FOURTEENTH AMENDMENT

RIGHTS GUARANTEED

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RIGHTS GUARANTEED

FOURTEENTH AMENDMENT

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

THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

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

CITIZENS OF THE UNITED STATES

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

1 “Since the 1950s most professional historians have come to agree with Lincoln’s assertion that slavery was, somehow, the cause of the war.” James M. McPherson, Southern Comfort, The New York Review of Books (Apr. 12, 2001), quoting Lincoln’s second inaugural address.

2 Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. Kutler, The Dred Scott Decision: Law or Poli-
this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) white persons born in the United States as descendants of “persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, [and who] became also citizens of this new political body,” the United States of America, and (2) those who, having been “born outside the dominions of the United States,” had migrated thereto and been naturalized therein. Freed slaves fell into neither of these categories.

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

Based on the first sentence of section 1, the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizen-
The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation, or children of members of Indian tribes subject to tribal laws. In addition, the citizenship of children born on vessels in United States territorial waters or on the high seas has generally been held by the lower courts to be determined by the citizenship of the parents. Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.

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

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10 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).
11 United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); In re Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).
12 Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899). This conclusion was in harmony with the earlier holding in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, § 2. See also Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).
13 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 290 (1915), the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958), in which the Court, by a five-to-four decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress's power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. See discussion of "Expatriation" under Article I, supra. In the years before Afroyim, a series of decisions had curbed congressional power.
14 Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). The Court went on to say, "It is true that the chief interest of the people in giving permanence and security to
ever, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of section 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship. Between these two decisions is a tension that should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

PRIVILEGES OR IMMUNITIES

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

According to the Court, however, such an interpretation would have “transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States,” and would “constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not

citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted.” Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court’s reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter’s previous reasoning in Perez. Id. at 268.


approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them," and that the "one pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

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

Although the Court in the *Slaughter-House Cases* expressed a reluctance to enumerate those privileges and immunities of United States citizens that are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those that it identified were the right of access to the seat of government and to the seaports, subtreasuries, land officers, and courts of justice in the several states, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of *habeas corpus*, the right to use the navigable waters of the United States, and rights secured by treaty. In *Twining v. New*
The Court recognized "among the rights and privileges" of national citizenship the right to pass freely from state to state, the right to petition Congress for a redress of grievances, the right to vote for national officers, the right to enter public lands, the right to be protected against violence while in the lawful custody of a United States marshal, and the right to inform the United States authorities of violation of its laws. Earlier, in a decision not mentioned in Twinning, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise." In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint that it imposes upon state action. In Hague v. CIO, two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States

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citizen, and, in Edwards v. California, thirty-four Justices were prepared to rely on the clause. In many other respects, however, claims based on this clause have been rejected.

32 E.g., Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the state); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the state); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another state and secured by mortgage of land in the debtor's state); Bartemeyer v. Iowa, 86 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozzi v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 182 (1870) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a state to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association—other than benevolent orders, and the like—with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a state to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the state are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a state in criminal proceedings); James v. Valtierra, 462 U.S. 137 (1979) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without
In *Oyama v. California*, the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law that resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him “of his privileges as an American citizen.” The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.

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

**DUE PROCESS OF LAW**

**Generally**

Due process under the Fourteenth Amendment can be broken down into two categories: procedural due process and substantive due process. Procedural due process, based on principles of “fundamental fairness,” addresses which legal procedures are required to be followed in state proceedings. Relevant issues, as discussed in

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33 332 U.S. 633, 640 (1948).
35 See The Right to Travel, infra.
37 526 U.S. at 525 (Thomas, J., dissenting).
38 The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”
detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, although also based on principles of “fundamental fairness,” is used to evaluate whether a law can be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due process has had greater political import, as significant portions of a state legislature’s substantive jurisdiction can be restricted by its application.

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

Definitions

“Person”.—The Due Process Clause provides that no states shall deprive any “person” of “life, liberty or property” without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word “person” to mean only natural persons, or whether the word was substituted for the word “citizen” with a view to protecting cor-

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

40 See Bill of Rights, Fourteenth Amendment, supra.
porations from oppressive state legislation.\textsuperscript{41} As early as the 1877 \textit{Granger Cases} \textsuperscript{42} the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due process of law.\textsuperscript{43} Although various decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural,\textsuperscript{44} not artificial, persons,\textsuperscript{45} nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.\textsuperscript{46}

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

\textsuperscript{41} See Graham, \textit{The "Conspiracy Theory" of the Fourteenth Amendment}, 47 YALE L. J. 371 (1938).

\textsuperscript{42} Munn \textit{v.} Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." \textit{Sinking Fund Cases}, 99 U.S. 700, 718–19 (1879).


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

\textsuperscript{45} Northwestern Life Ins. Co. \textit{v.} Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'nn \textit{v.} Greenberg, 204 U.S. 359, 363 (1907); Pierce \textit{v.} Society of Sisters, 268 U.S. 510, 525 (1925). Earlier, in Northern Securities Co. \textit{v.} United States, 193 U.S. 197, 382 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

\textsuperscript{46} Grosjean \textit{v.} American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In \textit{First Nat'l Bank of Boston v. Bellotti}, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. See id. at 778 n.14 (reserving question). \textit{But see} id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

\textsuperscript{47} Pennie \textit{v.} Reis, 132 U.S. 464 (1889); Taylor and Marshall \textit{v.} Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus \textit{v.} Foxworth, 231 U.S. 162 (1913); Columbus & Greenville Ry. \textit{v.} Miller, 283 U.S. 96 (1931).
opposition to the will of their creator,” the state. However, state officers are acknowledged to have an interest, despite their not having sustained any “private damage,” in resisting an “endeavor to prevent the enforcement of statutes in relation to which they have official duties,” and, accordingly, may apply to federal courts “to review decisions of state courts declaring state statutes, which [they] seek to enforce, to be repugnant to the [Fourteenth Amendment of] the Federal Constitution . . . .”

“Property” and Police Power.—States have an inherent “police power” to promote public safety, health, morals, public convenience, and general prosperity, but the extent of the power may vary based on the subject matter over which it is exercised. If a police power regulation goes too far, it will be recognized as a tak-
ing of property for which compensation must be paid.\textsuperscript{52} Thus, the means employed to effect its exercise may be neither arbitrary nor oppressive but must bear a real and substantial relation to an end that is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.\textsuperscript{53}

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be a private use.\textsuperscript{54} Mere “cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power.”\textsuperscript{55} Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated.\textsuperscript{56} Initial compliance with a regulation that is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.\textsuperscript{57}

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

\begin{thebibliography}{99}
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Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). \textit{See also} Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). \textit{See also} analysis of “Regulatory Takings” under the Fifth Amendment. Although the Fourteenth Amendment does not contain a “takings” provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb’s Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 159 (1980).
\bibitem{54} Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).
\bibitem{55} Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).
\bibitem{56} New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).
\bibitem{58} See the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 \& n.23 (1976), apparently to expand upon the concept of “\textit{liberty}” within the meaning of the Fifth Amendment’s Due Process Clause and necessarily therefore the Fourteenth’s.
\bibitem{59} See the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the “entitlement” doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous
The Rise and Fall of Economic Substantive Due Process: 
Overview

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

Thus, early invocations of “substantive” due process were unsuccessful. In the Slaughter-House Cases, discussed previously in the context of the Privileges or Immunities Clause, a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the...
prohibition against a deprivation of property without due process “has been in the Constitution since the adoption of the fifth amend-
ment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.”

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

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

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65 83 U.S. (16 Wall.) at 80–81.
66 94 U.S. 113, 134 (1877).
67 96 U.S. 97, 103–04 (1878).
without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

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

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68 110 U.S. 516, 528, 532, 536 (1884).
of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

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

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

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69 94 U.S. 113, 141–48 (1877).
70 “It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose.” 94 U.S. at 145–46.
71 123 U.S. 623, 661 (1887).
into constitutionally enforceable limitations upon government.\textsuperscript{73} The consequence was that the states in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property. As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.\textsuperscript{74}

Having narrowed the scope of the state’s police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of \textit{laissez faire} economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, “liberty” became synonymous with governmental non-interference in the field of private economic relations. For instance, in \textit{Budd v. New York},\textsuperscript{75} Justice Brewer declared in \textit{dictum}: “The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government.”

Next, the Court watered down the accepted maxim that a state statute must be presumed valid until clearly shown to be otherwise, by shifting focus to whether facts existed to justify a particular law.\textsuperscript{76} The original position could be seen in earlier cases such as \textit{Munn v. Illinois},\textsuperscript{77} in which the Court sustained the legislation before it by presuming that such facts existed: “For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.” Ten years later, however, in \textit{Mugler Loan Ass'n v. Topeka}, 87 U.S. (20 Wall.) 655 (1875). “There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . .”

\textsuperscript{73} Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655 (1875). “There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . .”

\textsuperscript{74} “Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.” \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).

\textsuperscript{75} 143 U.S. 517, 551 (1892).

\textsuperscript{76} See Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810).

\textsuperscript{77} 94 U.S. 113, 123, 182 (1877).
rather than presume the relevant facts, the Court sustained a statewide anti-liquor law based on the proposition that the deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them. This opened the door for future Court appraisals of the facts that had induced the legislature to enact the statute.

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

As a result of the Depression, however, the _laissez faire_ approach to economic regulation lost favor to the dictates of the New Deal. Thus, in 1934, the Court in _Nebbia v. New York_ discarded this approach to economic legislation. The modern approach is exemplified by the 1955 decision, _Williamson v. Lee Optical Co._, which upheld a statutory scheme regulating the sale of eyeglasses that favored ophthalmologists and optometrists in private professional

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78 123 U.S. 623 (1887).
79 123 U.S. at 662. “We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil.”
80 The following year the Court, confronted with an act restricting the sale of oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that “it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law.” Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).
81 291 U.S. 502 (1934).
practice and disadvantaged opticians and those employed by or using space in business establishments. “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’” The Court went on to assess the reasons that might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that some regulation might be found unreasonable. More recent decisions have limited this inquiry to whether the legislation is arbitrary or irrational, and have abandoned any requirement of “reasonableness.”

Regulation of Labor Conditions

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

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83 348 U.S. at 488.
84 348 U.S. at 487, 491.
85 The Court has pronounced a strict “hands-off” standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be “accorded the traditional presumption of constitutionality generally accorded economic regulations” and is to be “upheld absent proof of arbitrariness or irrationality on the part of Congress.” That the accommodation among interests which the legislative branch has struck “may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.” Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 578, 573 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).
86 83 U.S. (16 Wall.) 36 (1873). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in *Coppage v. Kansas*, 236 U.S. 1, 14 (1915). “Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.”
tioned in that [Fourteenth] amendment means not only the right of
the citizen to be free from the mere physical restraint of his per-
son, as by incarceration, but the term is deemed to embrace the
right of the citizen to be free in the enjoyment of all his faculties;
to be free to use them in all lawful ways; to live and work where
he will; to earn his livelihood by any lawful calling; to pursue any
livelihood or avocation, and for that purpose to enter into all con-
tracts which may be proper, necessary and essential to his carrying
out to a successful conclusion the purposes above mentioned.88

The Court, however, did sustain some labor regulations by ac-
knowledging that freedom of contract was “a qualified and not an
absolute right. . . . Liberty implies the absence of arbitrary re-
straint, not immunity from reasonable regulations and prohibitions
imposed in the interests of the community. . . . In dealing with the
relation of the employer and employed, the legislature has necessar-
ily a wide field of discretion in order that there may be suitable
protection of health and safety, and that peace and good order may
be promoted through regulations designed to insure wholesome
conditions of work and freedom from oppression.”89

Still, the Court was committed to the principle that freedom of
contract is the general rule and that legislative authority to abridge
it could be justified only by exceptional circumstances. To serve this
end, the Court intermittently employed the rule of judicial notice
in a manner best exemplified by a comparison of the early cases of
Holden v. Hardy90 and Lochner v. New York.91 In Holden v. Hardy,92
the Court, relying on the principle of presumed validity, allowed the
burden of proof to remain with those attacking a Utah act limiting
the period of labor in mines to eight hours per day. Recognizing the
fact that labor below the surface of the earth was attended by risk
to person and to health and for these reasons had long been the
subject of state intervention, the Court registered its willingness to
sustain a law that the state legislature had adjudged “necessary
for the preservation of health of employees,” and for which there
were “reasonable grounds for believing that . . . [it was] supported
by the facts.”

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

88 165 U.S. at 589.
Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).
90 169 U.S. 366 (1898).
91 198 U.S. 45 (1905).
92 169 U.S. 366, 398 (1898).
New York, the Court found that a law restricting employment in bakeries to ten hours per day and 60 hours per week was not a true health measure, but was merely a labor regulation, and thus was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the state was a "question that must be answered by the Court." Then, in disregard of the medical evidence proffered, the Justice stated: "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?"

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

A second dissenting opinion, written by Justice Holmes, has received the greater measure of attention as a forecast of the line of reasoning the Court was to follow some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making

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93 198 U.S. 45 (1905).
94 198 U.S. at 59.
95 198 U.S. at 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).
up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." 96

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

Holmes' dissent soon bore fruit in Muller v. Oregon98 and Bunting v. Oregon,99 which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of

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96 198 U.S. at 75–76.
97 Thus, Justice Holmes' criticism of his colleagues was unfair, as even a "rational and fair man" would be guided by some preferences or "economic predilections."
98 208 U.S. 412 (1908).
99 243 U.S. 426 (1917).
submitting voluminous factual briefs, known as “Brandeis Briefs,” 100 replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work, 101 it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing a minimum wage for women and children, 102 it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the laissez faire tenet of self-help was replaced by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain this remedial legislation, the Court had to extensively revise its previously formulated concepts of “liberty” under the Due Process Clause. Thus, the Court, in overturning prior holdings and sustaining minimum wage legislation, 103 took judicial notice of the demands for relief arising from the Depression. And, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court reconsidered the scope of an employer’s liberty of contract, and recognized a correlative liberty of employees that state legislatures could protect.

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

100 Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support the regulation of women's working hours in Muller v. Oregon, 208 U.S. 412 (1908).
101 E.g., Muller v. Oregon; Bunting v. Oregon.
102 See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923).
103 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937).
true of the restraints which government, in his behalf, imposes upon his neighbors.

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

The regulation of mines represented a further exception to the *Lochner* era's anti-discrimination tally. As such health and safety regulation was clearly within a state's police power, a state's laws providing for mining inspectors (paid for by mine owners),\(^ {111}\) licensing mine managers and mine examiners, and imposing liability upon

\(^{104}\) Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). See also Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

\(^{105}\) See, e.g., Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).

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

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

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


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

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

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

The Justice further noted that “many forms of regulation reduce the net return of the enterprise. . . . Most regulations of busi-

\textsuperscript{112} Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).
\textsuperscript{113} Barrett v. Indiana, 229 U.S. 26 (1913).
\textsuperscript{114} Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).
\textsuperscript{115} Booth v. Indiana, 237 U.S. 391 (1915).
\textsuperscript{117} West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children’s Hospital, 261 U.S. 525 (1923), a Fifth Amendment case); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).
\textsuperscript{118} Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (sustaining a Missouri statute giving employees the right to absent themselves for four hours while the polls were open on election day without deduction of wages for their absence). The Court in \textit{Day-Brite Lighting, Inc.} recognized that the legislation in question served as a form of wage control for men, which had previously found unconstitutional. Justice Douglas, however, wrote that “the protection of the right of suffrage under our scheme of things is basic and fundamental,” and hence within the states’ police power.
ness necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."

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

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

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

122 Nor does it violate due process to deprive an employee or his dependents of the higher damages that, in some cases, might be rendered under these doctrines.
tween restricted recovery under a compensation law or full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law. A variety of other statutory schemes have also been upheld.

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

**Collective Bargaining.**—During the *Lochner* era, liberty of contract, as translated into what one Justice labeled the *Allgeyer-Lochner-Adair-Coppage* doctrine, was used to strike down legislation cal-


124 Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911) (prohibiting contracts limiting liability for injuries and stipulating that acceptance of benefits under such contracts shall not constitute satisfaction of a claim); Alaska Packers Ass'n v. Industrial Accident Comm'n., 294 U.S. 532 (1935) (forbidding contracts exempting employers hired-in-state from liability for injuries outside the state); Thornton v. Duffy, 254 U.S. 361 (1920) (required contribution to a state insurance fund by an employer even though employer had obtained protection from an insurance company under previous statutory scheme); Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926) (finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance, right to come under a workmen's compensation statute is optional with employer); Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930) (wrongdoer is obliged to indemnify employer or the insurance carrier of the employer in the amount which the latter were required to contribute into special compensation funds); Sheehan Co. v. Shuler, 265 U.S. 379 (1924) (same holding as above case); New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919) (attorneys are not deprived of property or their liberty of contract by restriction imposed by the state on the fees they may charge in cases arising under the workmen's compensation law); Yeiser v. Dysart, 267 U.S. 540 (1925) (compensation need not be based exclusively on loss of earning power, and award authorized for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work).


culated to enhance the bargaining capacity of workers as against that already possessed by their employers.

127 The Court did, however, on occasion sustain measures affecting the employment relationship, such as a statute requiring every corporation to furnish a departing employee a letter setting forth the nature and duration of the employee's service and the true cause for leaving.128 In *Senn v. Tile Layers Union*, however, the Court began to show a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments.

The significance of *Senn* was, in part, that the case upheld a statute that was not appreciably different from a statute voided five

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

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

128 Prudential Ins. Co. v. *Cheek*, 259 U.S. 530 (1922). Added provisions that such letters should be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property. *Chicago, R.I. & P. Ry. v. Perry*, 259 U.S. 548 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others. On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee. *Dorchy v. Kansas*, 272 U.S. 304 (1928).

129 301 U.S. 486 (1937).
130 301 U.S. 468 (1937).
years earlier in *Truax v. Corrigan*.131 In *Truax*, the Court had found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute that the Court subsequently upheld in *Senn*, by contrast, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct.132 The difference between these statutes, according to the Court, was that the law in *Senn* applied to "peaceful" picketing only, whereas the law in *Truax* "was . . . applied to legalize conduct which was not simply peaceful picketing." Because the enhancement of job opportunities for members of the union was a legitimate objective, the state was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing *Senn* from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.

Years later, after regulations protective of labor allowed unions to amass enormous economic power, many state legislatures attempted to control the abuse of this power, and the Court’s newfound deference to state labor regulation was also applied to restrictions on unions. Thus, the Court upheld state prohibitions on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union’s right to choose its members, abridged its property rights, or violated its liberty of contract. Because the union “[held] itself out to represent the general business needs of employees” and functioned “under the protection of the State,” the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.133

Similarly, state laws outlawing closed shops were upheld in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*134 and *AFL v. American Sash & Door Co.*135 When labor unions

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131 257 U.S. 312 (1921).
132 The statute was applied to deny an injunction to a tiling contractor being picketed by a union because he refused to sign a closed shop agreement containing a provision requiring him to abstain from working in his own business as a tile layer or helper.
133 Railway Mail Ass’n v. Corsi, 326 U.S. 88, 94 (1945). Justice Frankfurter, concurring, declared that “the insistence by individuals of their private prejudices . . . , in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts.” Id. at 98.
134 335 U.S. 525 (1949).
135 335 U.S. 538 (1949).
attempted to invoke freedom of contract, the Court, speaking through Justice Black, announced its refusal “to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause,” it maintained, does not “forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers.”

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

\textbf{Regulation of Business Enterprises: Price Controls}

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

\textit{Types of Businesses That May be Regulated}.—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the Due Process Clause to impose no substantive restraint on the power of states to fix rates chargeable by any

\begin{itemize}
  \item \textit{UA W v. WERB}, 336 U.S. 245 (1949).
  \item \textit{Giboney v. Empire Storage & Ice Co.}, 336 U.S. 490 (1949) (upholding state law forbidding agreements in restraint of trade as applied to union ice peddlers picketing wholesale ice distributor to induce the latter not to sell to nonunion peddlers). Other cases regulating picketing are treated under the First Amendment topics, “Picketing and Boycotts by Labor Unions” and “Public Issue Picketing and Parading,” supra.
\end{itemize}
industry. Thus, in *Munn v. Illinois*, the first of the “Granger Cases,” maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose. The Court, in an opinion that was largely *dictum*, declared that the Due Process Clause did not operate as a safeguard against oppressive rates, and that, if regulation was permissible, the severity of it was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal from this position, and by 1890 it had fully converted the Due Process Clause into a restriction on the power of state agencies to impose rates that, in a judge’s estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was “affected with a public interest,” control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, the phrase, “business affected with a public interest,” never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes that invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft: “(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public

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139 94 U.S. 113 (1877). See also Davidson v. New Orleans, 96 U.S. 97 (1878); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877).
140 The Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the states’ police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision.
that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

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

In the 1934 case of \textit{Nebbia v. New York},\textsuperscript{151} however, the Court finally shelved the concept of "a business affected with a public interest,"\textsuperscript{152} upholding, by a vote of five-to-four, a depression-induced New York statute fixing fluid milk prices. "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted

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

\textsuperscript{144}Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

\textsuperscript{145}Townsend v. Yeomans, 301 U.S. 441 (1937).

\textsuperscript{146}German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928).


\textsuperscript{149}Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

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

\textsuperscript{151}291 U.S. 502 (1934).

\textsuperscript{152}In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928), had declared: "Price regulation is within the State’s power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business ‘affected with a public interest’ employing property ‘devoted to a public use,’ rests upon historical error. . . . In my opinion, the true principle is that the State’s power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."
interference with individual liberty.”  

Conceding that “the dairy industry is not, in the accepted sense of the phrase, a public utility,” that is, a business “affected with a public interest,” the Court in effect declared that price control is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions that due process imposes on arbitrary interference with liberty and property. “The due process clause makes no mention of sales or of prices . . . .”

Having thus concluded that it is no longer the nature of the business that determines the validity of a price regulation, the Court had little difficulty in upholding a state law prescribing the maximum commission that private employment agencies may charge. Rejecting contentions that the need for such protective legislation had not been shown, the Court, in Olsen v. Nebraska ex rel. Western Reference and Bond Ass’n held that differences of opinion as to the wisdom, need, or appropriateness of the legislation “suggest a choice which should be left to the States;” and that there was “no necessity for the State to demonstrate before us that evils persist despite the competition” between public, charitable, and private employment agencies.

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

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

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

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

156 The older case of Ribnik v. McBride, 277 U.S. 350 (1928), which had invalidated similar legislation upon the now obsolete concept of a “business affected with a public interest,” was expressly overruled. Adams v. Tanner, 244 U.S. 590 (1917), was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court’s hearing argument on it.
have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals primarily with governmentally imposed rates and charges for public utilities.

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

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine, it finally acceded to the wishes of the utilities in 1890 in Chicago, M. & St. P. Railway v. Minnesota. In this case, the Court ruled that "[t]he question of the reasonableness of a rate . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Although the Court made a last-ditch attempt to limit the ruling of Chicago, M. & St. P. Railway v. Minnesota to rates fixed by a commission as opposed to rates imposed by a legislature, the Court in Reagan v. Farmers' Loan & Trust Co. finally removed

157 116 U.S. 307, 331 (1886).
158 This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).
160 134 U.S. 418, 458 (1890).
161 Budd v. New York, 143 U.S. 517 (1892).
162 154 U.S. 362 (1894).
all lingering doubts over the scope of judicial intervention. In Reagan, the Court declared that, “if a carrier . . . attempted to charge a shipper an unreasonable sum,” the Court, in accordance with common law principles, would pass on the reasonableness of its rates, and has “jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.”

Reiterating virtually the same principle in Smyth v. Ames, the Court not only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court further determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

**Early Limitations on Review.**—Even while reviewing the reasonableness of rates, the Court recognized some limits on judicial review. As early as 1894, the Court asserted that “[t]he courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable, . . . and if found so to be, to
restrain its operation."

Further, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,

but he must present a case of "manifest constitutional invalidity." And, if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted. Moreover, even the Court was inclined to withhold judgment on the application of a rate until its practical effect could be surmised.

In the course of time this distinction solidified. Thus, the Court initially adopted the position that it would not disturb findings of fact insofar as such findings were supported by substantial evidence. For instance, in San Diego Land Company v. National City, the Court declared that "the courts cannot, after [a legislative body] has fairly and fully investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. . . . [J]udicial interference should never occur unless the case presents, clearly and beyond all doubt, such a fla-

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

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


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


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

171 174 U.S. 739, 750, 754 (1899). See also Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).
grant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.” And, later, in a similar case, the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations, writing, “we do not feel bound to reexamine and weigh all the evidence... or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.”

These standards of review were, however, abruptly rejected by the Court in Ohio Valley Water Co. v. Ben Avon Borough as being no longer sufficient to satisfy the requirements of due process, ushering in a long period during which courts substantively evaluated the reasonableness of rate settings. The U.S. Supreme Court in Ben Avon concluded that the Pennsylvania “Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment...”. Largely on the strength of this interpretation of the applicable state statute, the Court held that, when the order

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

174 253 U.S. 287 (1920).

175 253 U.S. at 289 (the “question of confiscation” was the question whether the rates set by the Public Service Commission were so low as to constitute confiscation). Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal. In injunctive proceedings, evidence is freshly introduced, whereas in the cases received on appeal from state courts, the evidence is found within the record.
of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 176

History of the Valuation Question. — For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property, including "fair value," 177 "reproduction cost," 178 "prudent investment," 179 "depreciation," 180 "going concern value and good will," 181 "salvage value," 182

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


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

179 Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges, i.e., interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return." As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930s. The sharp decline in prices that occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287 (1933) and Railroad Comm'n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938), the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base.

180 Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) (considering depreciation as part of cost). Notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, i.e., present value, or at original cost. In the FPC v. Hope Natural Gas Co. case, 320 U.S. 591, 606 (1944), the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.
and "past losses and gains," only to emerge from this maze in 1944 at a point not very far removed from Munn v. Illinois and its deference to rate-making authorities. By holding in FPC v. Natural Gas Pipeline Co. that "[t]he Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in FPC v. Hope Natural Gas Co. that "it is the result reached not the method employed which is controlling, . . . [that] [i]t is not the theory but the impact of the rate order which counts, [and that] [i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the Ben Avon case. Without surrendering the judicial power to declare rates unconstitutional on the basis of a substantive deprivation of due process, the Court announced that it would

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

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

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

184 94 U.S. 113 (1877).

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

186 320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.


188 In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in Driscoll v. Edison Co., 307 U.S. 104, 122 (1939), Justice Frankfurter temporarily adopted a similar position; he declared that "[t]he only relevant function of law [in rate contro-
not overturn a result it deemed to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission’s order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."\textsuperscript{189}

In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, "‘insure that the business shall produce net revenues.’ . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."\textsuperscript{190}

\textsuperscript{189} FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). See also Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963), in which the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labeled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

\textsuperscript{190} FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). See also Wisconsin v. FPC, 373 U.S. 294, 317, 326 (1963), in which the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labeled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

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

In General.—Because of the nature of the business they carry on and the public’s interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies.\(^\text{191}\) But because the property of these entities remains under the full protection of the Constitution, it follows that due process is violated when the state regulates in a manner that infringes the right of ownership in what the Court considers to be an “arbitrary” or “unreasonable” way.\(^\text{192}\) Thus, when a street railway company lost its franchise, the city could not simply take possession of its equipment,\(^\text{193}\) although it could subject the company to the alternative of accepting an inadequate price for its property or of ceasing operations and removing its property from the streets.\(^\text{194}\) Likewise, a city wanting to establish a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,\(^\text{195}\) although a city may compete with a company that has no exclusive charter.\(^\text{196}\) However, a municipal ordinance that demanded, as a condition for placing poles and conduits in city streets, that a telegraph company carry the city’s wires free of charge, and that required that conduits be moved at company expense, was constitutional.\(^\text{197}\)

And, the fact that a state, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation that has elected to enter a state that requires that it operate its local private pipe line as a common carrier. Such a foreign corporation is viewed as having waived its constitutional right to be secure against the imposition of conditions that amount to a taking of property without due process of law.\(^\text{198}\)


\(^{193}\) Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907).


\(^{195}\) Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919).


\(^{197}\) Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912).

\(^{198}\) Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125 (1922).
Compulsory Expenditures: Grade Crossings, and the Like.—
Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property in violation of due process.\textsuperscript{199} Thus, where a water company laid its lines on an ungraded street, and the applicable rule at the time of the granting of its charter compelled the company to furnish connections at its own expense to one residing on such a street, due process is not violated.\textsuperscript{200} Or, where a gas company laid its pipes under city streets, it may validly be obligated to assume the cost of moving them to accommodate a municipal drainage system.\textsuperscript{201} Or, railroads may be required to help fund the elimination of grade crossings, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

Although the power of the state in this respect is not unlimited, and an “arbitrary” and “unreasonable” imposition on these businesses may be set aside, the Court’s modern approach to substantive due process analysis makes this possibility far less likely than it once was. For instance, a 1935 case invalidated a requirement that railroads share 50% of the cost of grade separation, irrespective of the value of such improvements to the railroad, suggesting that railroads could not be required to subsidize competitive transportation modes.\textsuperscript{202} But in 1953 the Court distinguished this case, ruling that the costs of grade separation improvements need not be

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

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

\textsuperscript{201} New Orleans Gas Co. v. Drainage Comm'n, 197 U.S. 453 (1905).

\textsuperscript{202} Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). See also Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade
allocated solely on the basis of benefits that would accrue to railroad property.\footnote{Atchison, T. & S.F. Ry. v. Public Util. Comm’n, 346 U.S. 346 (1953).} Although the Court cautioned that “allocation of costs must be fair and reasonable,” it was deferential to local governmental decisions, stating that, in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community, “the cost of such improvements may be allocated all to the railroads.”\footnote{346 U.S. at 352.}

**Compellable Services.**—A state may require that common carriers such as railroads provide services in a manner suitable for the convenience of the communities they serve.\footnote{Atchison, T. & S. F. Ry. v. Public Utility Comm’n, 346 U.S. at 394–95 (1953). See Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904) (obligation to establish stations at places convenient for patrons); Gladson v. Minnesota, 166 U.S. 427 (1897) (obligation to stop all their intrastate trains at county seats); Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) (obligation to run a regular passenger train instead of a mixed passenger and freight train); Chesapeake & Ohio Ry. v. Public Serv. Comm’n, 242 U.S. 603 (1917) (obligation to furnish passenger service on a branch line previously devoted exclusively to carrying freight); Lake Erie & W.R.R. v. Public Util. Comm’n, 249 U.S. 422 (1919) (obligation to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, a sidetrack); Western & Atlantic R.R. v. Public Comm’n, 267 U.S. 493 (1925) (same); Alton R.R. v. Illinois Commerce Comm’n, 305 U.S. 548 (1939) (obligation for upkeep of a switch track leading from its main line to industrial plants.). But see Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) (requirement, without indemnification, to install switches on the application of owners of grain elevators erected on right-of-way held void). \footnote{United Gas Co. v. Railroad Comm’n, 278 U.S. 300, 308–09 (1929). See also New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm’n, 269 U.S. 244 (1925); New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).}} Similarly, a primary duty of a public utility is to serve all those who desire the service it renders, and so it follows that a company cannot pick and choose to serve only those portions of its territory that it finds most profitable. Therefore, compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the state does not constitute an unconstitutional deprivation.\footnote{Missouri Pacific Ry. v. Kansas, 216 U.S. 262 (1910); Chesapeake & Ohio Ry. v. Public Serv. Comm’n, 242 U.S. 603 (1917); Fort Smith Traction Co. v. Bourland, 267 U.S. 330 (1925).} Likewise, requiring a railway to continue the service of a branch or part of a line is acceptable, even if that portion of the operation is an economic drain.\footnote{Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) (requirement, without indemnification, to install switches on the application of owners of grain elevators erected on right-of-way held void).} A company, however, cannot be compelled to operate its franchise at a loss, but must be at liberty to surrender it and discontinue operations.\footnote{The United Gas Co. v. Railroad Comm’n, 278 U.S. 300, 308–09 (1929). See also New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm’n, 269 U.S. 244 (1925); New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).}
As the standard for regulation of a utility is whether a particular directive is reasonable, the question of whether a state order requiring the provision of services is reasonable could include a consideration of the likelihood of pecuniary loss, the nature, extent and productiveness of the carrier’s intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.\[^{209}\] An example of the kind of regulation where the issue of reasonableness would require an evaluation of numerous practical and economic factors is one that requires railroads to lay tracks and otherwise provide the required equipment to facilitate the connection of separate track lines.\[^{210}\]

Generally, regulation of a utility’s service to commercial customers attracts less scrutiny\[^{211}\] than do regulations intended to facilitate the operations of a competitor,\[^{212}\] and governmental power to

\[^{209}\]\(Chesapeake & Ohio Ry. v. Public Serv. Comm’n, 242 U.S. 603, 607 (1917).\)

\[^{210}\]\(“Since the decision in Wisconsin, M. & P.R. Co. v. Jacobson, 179 U.S. 287 (1900), there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may use the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though ‘the furnishing of such necessary facilities may occasion an incidental pecuniary loss.’ . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier.” Washington ex rel. Oregon R.R. & Navig. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). See also Michigan Cent. R.R. v. Michigan R.R. Comm’n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm’n, 240 U.S. 324, 327 (1916).\)

\[^{211}\]\(Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass’n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific R.R. v. McGrew Coal Co., 244 U.S. 191 (1917). Nor is it “unreasonable” or “arbitrary” to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment. Wadley Southern Ry. v. Georgia, 255 U.S. 651 (1915).\)

\[^{212}\]\(Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars
regulate in the interest of safety has long been conceded. Requirements for service having no substantial relation to a utility's regulated function, however, have been voided, such as requiring railroads to maintain scales to facilitate trading in cattle, or prohibiting letting down an unoccupied upper berth on a rail car while the lower berth was occupied.

**Imposition of Statutory Liabilities and Penalties Upon Common Carriers.**—Legislators have considerable latitude to impose legal burdens upon common carriers, as long as the carriers are not precluded from shifting such burdens. Thus, a statute may make an initial rail carrier, or the connecting or delivering carrier, liable to the shipper for the nondelivery of goods which results from the fault of another, as long as the carrier has a subrogated right to proceed against the carrier at fault. Similarly, a railroad may be held responsible for damages to the owner of property injured by fire caused by locomotive engines, as the statute also granted the railroad an insurable interest in such property along its route, allowing the railroad to procure insurance against such liability.

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Equally consistent with the requirements of due process are enactments imposing on all common carriers a penalty for failure to settle claims for freight lost or damaged in shipment within a reasonable specified period.\footnote{218}{Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (penalty imposed if claimant subsequently obtained by suit more than the amount tendered by the railroad). \textit{But see} Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) (levying double damages and an attorney's fee upon a railroad for failure to pay damage claims only where the plaintiff had not demanded more than he recovered in court); St. Louis, I. M. & S. Ry. v. Wynne, 224 U.S. 354 (1912) (same); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) (same).}

The Court has, however, established some limits on the imposition of penalties on common carriers. During the \textit{Lochner} era, the Court invalidated an award of $500 in liquidated damages plus reasonable attorney's fees imposed on a carrier that had collected transportation charges in excess of established maximum rates as disproportionate. The Court also noted that the penalty was exacted under conditions not affording the carrier an adequate opportunity to test the constitutionality of the rates before liability attached.\footnote{219}{Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913).} Where the carrier did have an opportunity to challenge the reasonableness of the rate, however, the Court indicated that the validity of the penalty imposed need not be determined by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."\footnote{220}{In accordance with this standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee was upheld. St. Louis, I. M. & S. Ry. v. Williams, 251 U.S. 63, 67 (1919). \textit{See also} Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) (statute requiring railroads to erect and maintain fences and cattle guards subject to award of double damages for failure to so maintain them upheld); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889) (same); Chicago, B. & Q.R.R. v. Cram, 228 U.S. 70 (1913) (required payment of $10 per car per hour to owner of livestock for failure to meet minimum rate of speed for delivery upheld). \textit{But see} Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) (fine of $3,690 imposed on a telephone company for suspending service of patron in arrears in accordance with established and uncontested regulations struck down as arbitrary and oppressive).}

\section*{Regulation of Businesses, Corporations, Professions, and Trades

\textit{Generally}.—States may impose significant regulations on businesses without violating due process. "The Constitution does not guar-
antee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State’s competency.”

Still, the fact that the state reserves the power to amend or repeal corporate charters does not support the taking of corporate property without due process of law, as termination of the corporate structure merely results in turning over corporate property to the stockholders after liquidation.

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

**Laws Prohibiting Trusts, Restraint of Trade or Fraud.**—Even during the period when the Court was invalidating statutes under liberty of contract principles, it recognized the right of states to proscribe activities involving restraint of trade, fraud, or illegal trusts.:


226 Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). Similarly a statute requiring a foreign hospital corporation to dispose of farm land not necessary to the conduct of their business was invalid even though the hospital, because of changed economic conditions, was unable to recoup its original investment from the sale. New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).
to prohibit combinations in restraint of trade.\textsuperscript{227} Thus, states could prohibit agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.\textsuperscript{228} Further, the Court held that the Fourteenth Amendment does not preclude a state from adopting a policy prohibiting competing corporations from combinations, even when such combinations were induced by good intentions and from which benefit and no injury have resulted.\textsuperscript{229} The Court also upheld a variety of statutes prohibiting activities taken by individual businesses intended to harm competitors\textsuperscript{230} or restrain the trade of others.\textsuperscript{231}

Laws and ordinances tending to prevent frauds by requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.\textsuperscript{232} Thus, a prohibition on the issuance or sale by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed is not unconstitutional.\textsuperscript{233} Similarly, the power of a state to prescribe standard

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

\textsuperscript{228} Smiley v. Kansas, 196 U.S. 447 (1905). See Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905), also upholding antitrust laws.

\textsuperscript{229} International Harvester Co. v. Missouri, 234 U.S. 199 (1914). See also American Machine Co. v. Kentucky, 236 U.S. 660 (1915).

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

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

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

\textsuperscript{233} Merchants Exchange v. Missouri, 248 U.S. 365 (1919).
containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question.234

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

The power to regulate also includes the power to forbid certain business practices. Thus, a state may forbid the giving of options to sell or buy any grain or other commodity at a future time.238 It may also forbid sales on margin for future delivery,239 and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.240 A prohibitive license fee upon the use of trading stamps is not unconstitutional,241 nor is imposing criminal penalties for any deductions by purchasers from the actual weight

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


of grain, hay, seed, or coal purchased, even when such deduction is made under a claim of custom or under a rule of a board of trade.\textsuperscript{242}

Banking, Wage Assignments, and Garnishment.—Regulation of banks and banking has always been considered well within the police power of states, and the Fourteenth Amendment did not eliminate this regulatory authority.\textsuperscript{243} A variety of regulations have been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors’ guaranty fund.\textsuperscript{244} Also, a law requiring savings banks to turn over deposits inactive for thirty years to the state (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the protective custody of the state deposits that, depending on the nature of the deposit, have been inactive ten or twenty-five years.\textsuperscript{245}

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

\textsuperscript{242} House v. Mayes, 219 U.S. 270 (1911).
\textsuperscript{243} Doty v. Love, 295 U.S. 64 (1935) (rights of creditors in an insolvent bank not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors); Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) (Federal Reserve bank not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker).
\textsuperscript{245} Provident Savings Inst. v. Malone, 221 U.S. 660 (1911); Anderson Nat’l Bank v. Luckett, 321 U.S. 233 (1944). When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders’ liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the pre-existing statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law. The depositor has no property right in any particular form of remedy. Gibbes v. Zimmerman, 290 U.S. 326 (1933).
\textsuperscript{246} Griffith v. Connecticut, 218 U.S. 563 (1910).
\textsuperscript{247} Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).
Insurance. — Those engaged in the insurance business as well as the business itself have been peculiarly subject to supervision and control.\(^{248}\) Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents,\(^{249}\) and over the years the Court has upheld a wide variety of regulation. For instance, a state may impose a fine on “any person ‘who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said State].’”\(^{251}\) Or, a state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.\(^{252}\) Further, foreign casualty and surety insurers were not deprived of due process by a Virginia law that prohibited the making of contracts of casualty or surety insurance except through registered agents, that required that such contracts applicable to persons or property in the state be countersigned by a registered local agent, and that prohibited such agents from sharing more than 50% of a commission with a nonresident broker.\(^{253}\) And just as all banks may be required to contribute to a depositors’ guaranty fund, so may automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.\(^{254}\)

However, the Court has discerned some limitations to such regulations. A statute that prohibited the insured from contracting directly with a marine insurance company outside the state for coverage of property within the state was held invalid as a deprivation of liberty without due process of law.\(^{255}\) For the same reason, the Court held, a state may not prevent a citizen from concluding a policy loan agreement with a foreign life insurance company at its home office whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied

\(^{249}\) German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).
\(^{251}\) Nutting v. Massachusetts, 183 U.S. 553, 556 (1902) (distinguishing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). See also Hoper v. California, 155 U.S. 648 (1895).
\(^{253}\) Osborn v. Ozlin, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services that the latter does not in fact render.
\(^{255}\) Allgeyer v. Louisiana, 165 U.S. 578 (1897).
to discharge the indebtedness. Authority to subject such an agree-
ment to the conflicting provisions of domestic law is not deducible
from the power of a state to license a foreign insurance company
as a condition of its doing business therein.\textsuperscript{256}

A stipulation that policies of hail insurance shall take effect and
become binding twenty-four hours after the hour in which an applica-
tion is taken and further requiring notice by telegram of rejec-
tion of an application was upheld.\textsuperscript{257} No unconstitutional restraint
was imposed upon the liberty of contract of surety companies by a
statute providing that, after enactment, any bond executed for the
faithful performance of a building contract shall inure to the ben-
efit of material men and laborers, notwithstanding any provision of
the bond to the contrary.\textsuperscript{258} Likewise constitutional was a law re-
quiring that a motor vehicle liability policy shall provide that bank-
ruptcy of the insured does not release the insurer from liability to
an injured person.\textsuperscript{259} There also is no denial of due process for a
state to require that casualty companies, in case of total loss, pay
the total amount for which the property was insured, less deprecia-
tion between the time of issuing the policy and the time of the loss,
rather than the actual cash value of the property at the time of
loss.\textsuperscript{260}

Moreover, even though it had its attorney-in-fact located in Illi-
nois, signed all its contracts there, and forwarded from there all
checks in payment of losses, a reciprocal insurance association cov-
ering real property located in New York could be compelled to com-
ply with New York regulations that required maintenance of an of-

\textsuperscript{256} New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

\textsuperscript{257} National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).

\textsuperscript{258} Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).

\textsuperscript{259} Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).

\textsuperscript{260} Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when
the contract at issue was signed).

\textsuperscript{261} Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

\textsuperscript{262} German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911). See also Carroll v.
amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.\textsuperscript{263} It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.\textsuperscript{264} A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.\textsuperscript{265} When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.\textsuperscript{266} Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and \textit{pro rata} distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenting policyholders have no constitutional right to a particular form of remedy.\textsuperscript{267}

\textbf{Miscellaneous Businesses and Professions.}—The practice of medicine, using this word in its most general sense, has long been the subject of regulation.\textsuperscript{268} A state may exclude osteopathic physicians from hospitals maintained by it or its municipalities\textsuperscript{269} and may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, or prohibiting certain advertising regardless of its truthfulness.\textsuperscript{270} The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were

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\item \textsuperscript{263} Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).
\item \textsuperscript{264} Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243 (1906).
\item \textsuperscript{265} Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907).
\item \textsuperscript{266} Polk v. Mutual Reserve Fund, 207 U.S. 310 (1907).
\item \textsuperscript{267} Nebbett v. Carpenter, 305 U.S. 297 (1938).
\item \textsuperscript{269} Collins v. Texas, 223 U.S. 286 (1912); Hayman v. Galveston, 273 U.S. 414 (1927).
\end{itemize}
actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.\textsuperscript{271}

Although statutes requiring pilots to be licensed\textsuperscript{272} and setting reasonable competency standards (e.g., that railroad engineers pass color blindness tests) have been sustained,\textsuperscript{273} an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years’ experience as a freight conductor or brakeman was invalidated as not rationally distinguishing between those competent and those not competent to serve as conductor.\textsuperscript{274} An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.\textsuperscript{275} Also, a state law prohibiting operation of a “debt pooling” or a “debt adjustment” business except as an incident to the legitimate practice of law is a valid exercise of legislative discretion.\textsuperscript{276}

The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement,\textsuperscript{277} grain elevators,\textsuperscript{278} detective agencies,\textsuperscript{279} the sale of cigarettes\textsuperscript{280} or cosmetics,\textsuperscript{281} and the resale of theater tickets.\textsuperscript{282} Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes\textsuperscript{283} or the use of a representation of the United States

\textsuperscript{271} North Dakota State Bd. of Pharmacy v. Snyder’s Drug Stores, 414 U.S. 156 (1973). In the course of the decision, the Court overruled Liggett Co. v. Baldridge, 278 U.S. 105 (1928), in which it had voided a law forbidding a corporation to own any drug store, unless all its stockholders were licensed pharmacists, as applied to a foreign corporation, all of whose stockholders were not pharmacists, which sought to extend its business in the state by acquiring and operating therein two additional stores.

\textsuperscript{272} Olsen v. Smith, 195 U.S. 332 (1904).


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


\textsuperscript{277} Western Surf Ass’n v. Greenberg, 204 U.S. 359 (1907).

\textsuperscript{278} W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).

\textsuperscript{279} Lehon v. Atlanta, 242 U.S. 53 (1916).

\textsuperscript{280} Gundling v. Chicago, 177 U.S. 183, 185 (1900).

\textsuperscript{281} Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937).


\textsuperscript{283} Packer Corp. v. Utah, 285 U.S. 105 (1932).
flag on an advertising medium.284 Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims,285 the keeping of private markets within six squares of a public market,286 the keeping of billiard halls except in hotels,287 or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller's right to sell.288

Protection of State Resources

Oil and Gas.—A state may prohibit conduct that leads to the waste of natural resources.289 Thus, for instance, where there is a limited market for natural gas acquired attendant to oil production or where the pumping of oil and gas from one location may limit the ability of others to recover oil from a large reserve, a state may require that production of oil be limited or prorated among producers.290 Generally, whether a system of proration is fair is a question for administrative and not judicial judgment.291 On the other

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287 Murphy v. California, 225 U.S. 621 (1891).
288 Rosenthal v. New York, 226 U.S. 260 (1912). The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or ophthalmologist licensed in the state is not invalid. A state may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to obtain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
289 Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950) (sustaining orders of the Oklahoma Corporation Commission fixing a minimum price for gas and requiring one producer to buy gas from another producer in the same field at a dictated price, based on a finding that low field prices for natural gas were resulting in economic and physical waste); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).
290 This can be done regardless of whether the benefit is to the owners of oil and gas in a common reservoir or because of the public interests involved. Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900)); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Thus, the Court upheld against due process challenge a statute that defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer’s share to a prorated portion of the total production that can be taken from the common source without waste. Champlin Rfg. Co. v. Corporation Comm’n, 286 U.S. 210 (1932).
291 Railroad Comm’n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (evaluating whether proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors). See also Railroad
hand, where the evidence showed that an order prorating allowed production among several wells was actually intended to compel pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as a taking of private property for private benefit.\textsuperscript{292}

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

\textbf{Protection of Property and Agricultural Crops.}—Special precautions may be required to avoid or compensate for harm caused by extraction of natural resources. Thus, a state may require the filing of a bond to secure payment for damages to any persons or property resulting from an oil and gas drilling or production operation.\textsuperscript{295} On the other hand, in \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{296} a Pennsylvania statute that forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine was viewed as too restrictive on the use of private property and hence a denial of due process and a “taking” without compensation.\textsuperscript{297} Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private economic interests, but instead promoted such “important public interests” as conserva-

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\item[294] \textit{Bandini Co. v. Superior Court}, 284 U.S. 8 (1931).
\item[295] \textit{Gant v. Oklahoma City}, 289 U.S. 98 (1933) (statute requiring bond of $200,000 per well-head, such bond to be executed, not by personal sureties, but by authorized bonding company).
\item[296] 260 U.S. 393 (1922).
\item[297] The “taking” jurisprudence that has stemmed from the Pennsylvania Coal Co. v. Mahon is discussed, \textit{supra}, at “Regulatory Takings,” under the Fifth Amendment.
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tion, protection of water supplies, and preservation of land values for taxation.\textsuperscript{298}

A statute requiring the destruction of cedar trees within two miles of apple orchards in order to prevent damage to the orchards caused by cedar rust was upheld as not unreasonable even in the absence of compensation. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout the state being small as compared with that of apple orchards, the state was constitutionally competent to require the destruction of one class of property in order to save another which, in the judgment of its legislature, was of greater value to the public.\textsuperscript{299} Similarly, Florida was held to possess constitutional authority to protect the reputation of one of its major industries by penalizing the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.\textsuperscript{300}

\textbf{Water, Fish, and Game.}—A statute making it unlawful for a riparian owner to divert water into another state was held not to deprive the property owner of due process. “The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs... What it has it may keep and give no one a reason for its will.”\textsuperscript{301} This holding has since been disapproved, but on interstate commerce rather than due process grounds.\textsuperscript{302} States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.\textsuperscript{303}

Similarly, a state has sufficient control over fish and wild game found within its boundaries\textsuperscript{304} so that it may regulate or prohibit

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\item \textsuperscript{298} Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 488 (1987). The Court in Pennsylvania Coal had viewed that case as relating to a “a single private house.” 260 U.S. at 413. Also distinguished from Pennsylvania Coal was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
\item \textsuperscript{299} Miller v. Schoene, 276 U.S. 272, 277, 279 (1928).
\item \textsuperscript{300} Sligh v. Kirkwood, 237 U.S. 52 (1915).
\item \textsuperscript{301} Hudson County Water Co. v. McCarter,, 209 U.S. 349, 356–57 (1908).
\item \textsuperscript{303} See, e.g., Perley v. North Carolina, 249 U.S. 510 (1919) (upholding law requiring the removal of timber refuse from the vicinity of a watershed to prevent the spread of fire and consequent damage to such watershed).
\item \textsuperscript{304} Bayside Fish Co. v. Gentry, 297 U.S. 422, 426 (1936).
\end{itemize}
fishing and hunting. For the effective enforcement of such restrictions, a state may also forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor. The Court has also upheld a state law restricting a commercial reduction plant from accepting more fish than it could process without spoilage in order to conserve fish found within its waters, even allowing the application of such restriction to fish imported into the state from adjacent international waters.

The Court’s early decisions rested on the legal fiction that the states owned the fish and wild game within their borders, and thus could reserve these possessions for use by their own citizens. The Court soon backed away from the ownership fiction, and in Hughes v. Oklahoma it formally overruled prior case law, indicating that state conservation measures discriminating against out-of-state persons were to be measured under the Commerce Clause. Although a state’s “concerns for conservation and protection of wild animals” were still a “legitimate” basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.

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

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309 See, e.g., Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (invalidating Louisiana statute prohibiting transportation outside the state of shrimp taken in state waters, unless the head and shell had first been removed); Toomer v. Witisell, 334 U.S. 385 (1948) (invalidating law discriminating against out-of-state commercial fishermen); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) (state could not discriminate in favor of its residents against out-of-state fishermen in federally licensed ships).
310 441 U.S. 322 (1979) (formally overruling Geer).
311 441 U.S. at 336, 338–39.
Ownership of Real Property: Rights and Limitations

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

With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living. Consequently, the Court has recognized the power of government, within the loose confines of the Due Process Clause, to zone in many ways and for many purposes. Governments may regulate the height of buildings, establish building setback requirements, preserve open spaces (through density controls and restrictions on the numbers of houses), and preserve historic structures. The Court will generally uphold a challenged land-use plan unless it determines that either the overall plan is arbitrary and unreasonable with no substantial relation to the public health, safety, or general welfare, or that the plan

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


as applied amounts to a taking of property without just compensation.\textsuperscript{322}

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

In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not been consistent. Thus, for instance, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street.\textsuperscript{327} Or, in another case, it struck down an ordinance that permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.\textsuperscript{328} In a decision falling chronologically between these two, however, the Court sustained an ordinance that permitted property owners to waive a municipal restriction prohibiting the construction of billboards.\textsuperscript{329}

\textsuperscript{322} See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and discussion of “Regulatory Taking” under the Fifth Amendment, supra.

\textsuperscript{323} Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).


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

\textsuperscript{326} Buchanan v. Warley, 245 U.S. 60 (1917).

\textsuperscript{327} Eubank v. City of Richmond, 226 U.S. 137 (1912).

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

\textsuperscript{329} Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). The Court thought the case different from \textit{Eubank}, because in that case the ordinance established no
In its most recent decision, the Court upheld a city charter provision permitting a petition process by which a citywide referendum could be held on zoning changes and variances. The provision required a 55% approval vote in the referendum to sustain the commission's decision, and the Court distinguished between delegating such authority to a small group of affected landowners and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.\footnote{330 City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967).}

**Estates, Succession, Abandoned Property.**—The Due Process Clause does not prohibit a state from varying the rights of those receiving benefits under intestate laws. Thus, the Court held that the rights of an estate were not impaired where a New York Decedent Estate Law granted a surviving spouse the right to take as in intestacy, despite the fact that the spouse had waived any right to her husband's estate before the enactment of the law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver, however formally executed.\footnote{331 Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942).}

Even after the creation of a testamentary trust, a state retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration. For instance, the Great Depression resulted in the default of numerous mortgages which were held by trusts, which had the affect of putting an unexpected accumulation of real property into those trusts. Under these circumstance, the Court upheld the retroactive application of a statute reallocating distribution within these trusts, even where the administration of the estate had already begun, and the new statute had the effect of taking away a remainderman's right to judicial review of the trustee's computation of income.\footnote{332 Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944). Under the peculiar facts of the case, however, the remainderman's right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.}
doned Property Law to New York residents’ life insurance policies, even when issued by foreign corporations, did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.333 Or, in Standard Oil Co. v. New Jersey,334 a divided Court held that due process is not violated by a state statute escheating shares of stock in a domestic corporation, including unpaid dividends, even though the last known owners were nonresidents and the stock was issued and the dividends held in another state. The state’s power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

A state’s wide discretion to define abandoned property and dispose of abandoned property can be seen in Texaco v. Short,335 which upheld an Indiana statute that terminated interests in coal, oil, gas, or other minerals that had not been used in twenty years, and that provided for reversion to the owner of the interest out of which the mining interests had been carved. The “use” of a mineral interest that could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Indeed, merely filing a claim with the local recorder would preserve the interest.336 The statute provided no notice to owners of interests, however, save for its own publication; nor did it require surface owners to notify owners of mineral interests that the interests were about to expire.337 By a narrow margin, the Court sustained the statute, holding that the state’s interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enact-

333 Connecticut Ins. Co. v. Moore, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York was attempting to escheat unclaimed funds not actually or constructively located in New York, and which were the property of beneficiaries who may never have been citizens or residents of New York.
335 454 U.S. 516 (1982).
336 With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder’s office.
337 The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder’s office.
ment, and finding that due process did not require any actual notice to holders of unused mineral interests.338 The state “may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests” and it may similarly “impose on him the lesser burden of keeping informed of the use or nonuse of his own property.”339

**Health, Safety, and Morals**

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

There are few constitutional restrictions on the extensive state regulations on the production and distribution of food and drugs.343 Statutes forbidding or regulating the manufacture of oleomargarine have been upheld,344 as have statutes ordering the destruction of unsafe food345 or confiscation of impure milk,346 notwithstanding that, in the latter cases, such articles had a value for purposes other than food. There also can be no question of the authority of the state, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors347 or the sale of spectacles by an establishment where a physician or optometrist is not in charge.348 Nor is it any longer possible to doubt the validity of state regula-

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

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

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


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

343 “The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pesti-


tions pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.\textsuperscript{349}

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

Even before the passage of the 21st Amendment, which granted states the specific authority to regulate alcoholic beverages, the Supreme Court had found that the states have significant authority in this regard.\textsuperscript{354} A state may declare that places where liquor is manufactured or kept are common nuisances,\textsuperscript{355} and may even subject an innocent owner to the forfeiture of his property if he allows others to use it for the illegal production or transportation of alcohol.\textsuperscript{356}

Safety.—Regulations designed to promote public safety are also well within a state's authority. For instance, various measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300

\textsuperscript{349} Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).
\textsuperscript{350} Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).
\textsuperscript{351} Hebe Co. v. Shaw, 248 U.S. 297 (1919).
\textsuperscript{352} Price v. Illinois, 238 U.S. 446 (1915).
\textsuperscript{353} Sage Stores Co. v. Kansas, 323 U.S. 32 (1944). Where health or fraud are not an issue, however, police power may be more limited. Thus, a statute forbidding the sale of bedding made with shoddy materials, even if sterilized and therefore harmless to health, was held to be arbitrary and therefore invalid. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).
\textsuperscript{354} "[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." Crane v. Campbell, 245 U.S. 304, 307 (1917), citing Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 296 (1917). See also Kidd v. Pearson, 128 U.S. 1 (1888); Barbour v. Georgia, 249 U.S. 454 (1919).
\textsuperscript{355} Mugler v. Kansas, 123 U.S. 623, 671 (1887).
\textsuperscript{356} Hawes v. Georgia, 258 U.S. 1 (1922); Van Oster v. Kansas, 272 U.S. 465 (1926).
feet of any dwelling, require that all gas storage tanks with a capacity of more than ten gallons be buried at least three feet under ground, or prohibit washing and ironing in public laundries and wash houses within defined territorial limits from 10 p.m. to 6 a.m. A city’s demolition and removal of wooden buildings erected in violation of regulations was also consistent with the Fourteenth Amendment. Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodging houses of non-fireproof construction, can be applied to a lodging house constructed in 1940, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.

States exercise extensive regulation over transportation safety. Although state highways are used primarily for private purposes, they are public property, and the use of a highway for financial gain may be prohibited by the legislature or conditioned as it sees fit. Consequently, a state may reasonably provide that intrastate carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that issuance to those whose service began later shall depend upon public convenience and necessity. A state may require private contract carriers for hire to obtain a certificate of convenience and necessity, and decline to grant one if the service of common carriers is impaired thereby. A state may also fix minimum rates applicable to such private carriers, which are not less than those prescribed for common carriers, as a valid as a means of conserving highways. In the absence of legislation by Congress, a state may, to protect public safety, deny an interstate motor carrier the use of an already congested highway.

357 Pierce Oil Corp. v. Hope, 248 U.S. 498 (1919).
358 Standard Oil Co. v. Marysville, 279 U.S. 582 (1929).
359 Barbier v. Connolly, 113 U.S. 27 (1885); Soon Hing v. Crowley, 113 U.S. 703 (1885).
360 Maguire v. Reardon, 225 U.S. 271 (1912).
In exercising its authority over its highways, a state is not limited to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load.\textsuperscript{366} No less constitutional is a municipal traffic regulation that forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks.\textsuperscript{367} A state may also provide that a driver who fails to pay a judgment for negligent operation shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or discharged.\textsuperscript{368} Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.\textsuperscript{369}

\textbf{Morality.}—Legislatures have wide discretion in regulating “im- moral” activities. Thus, legislation suppressing prostitution\textsuperscript{370} or gambling\textsuperscript{371} will be upheld by the Court as within the police power of a state. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.\textsuperscript{372} Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.\textsuperscript{373} For

\begin{itemize}
  \item \textsuperscript{366} Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable. Sproles v. Binford, 286 U.S. 374 (1932).
  \item \textsuperscript{367} Because it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion. Railway Express Agency v. New York, 338 U.S. 106 (1949).
  \item \textsuperscript{368} Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962). \textit{But see} Perez v. Campbell, 402 U.S. 637 (1971). Procedural due process must, of course be observed. Bell v. Burson, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another state, by the law of which he is immune from liability for the borrower’s negligence and who was not in the state at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner’s permission. Young v. Masci, 289 U.S. 253 (1933).
  \item \textsuperscript{369} Ex parte Poresky, 290 U.S. 30 (1933). \textit{See also} Packard v. Banton, 264 U.S. 140 (1924); Sprout v. City of South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
  \item \textsuperscript{370} L’Hote v. New Orleans, 177 U.S. 587 (1900).
  \item \textsuperscript{371} Ah Sin v. Wittman, 186 U.S. 500 (1905).
  \item \textsuperscript{372} Marvin v. Trout, 199 U.S. 212 (1905).
  \item \textsuperscript{373} Bennis v. Michigan, 516 U.S. 442 (1996).
\end{itemize}
the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.\footnote{Stone v. Mississippi, 101 U.S. 814 (1880); Douglas v. Kentucky, 168 U.S. 488 (1897).}  

\section*{Vested and Remedial Rights}  

As the Due Process Clause protects against arbitrary deprivation of "property," privileges or benefits that constitute property are entitled to protection.\footnote{See, e.g., Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of "property"). Cases under the equal protection clause now mandate a different result. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).} Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.\footnote{Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894).} Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law.\footnote{Coombes v. Getz, 285 U.S. 434, 442, 448 (1932).} A person, however, has no constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by an effective procedure.\footnote{Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). See Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).}  

Similarly, a statute creating an additional remedy for enforcing liability does not, as applied to stockholders then holding stock, violate due process.\footnote{Shriver v. Woodbine Bank, 285 U.S. 467 (1932).} Nor does a law that lifts a statute of limitations and makes possible a suit, previously barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retroactive operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is \textit{per se} an offense against the Fourteenth Amendment."\footnote{Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945).}
State Control over Local Units of Government

The Fourteenth Amendment does not deprive a state of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected. Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence. Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act that so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability, no unconstitutional deprivation is experienced.

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

Taxing Power

Generally.—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the states. When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers, and the Court will refrain from condemning a tax solely on the ground that it is excessive. Nor can the constitutionality of taxation be made to

381 Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The Equal Protection Clause has been used, however, to limit a state's discretion with regard to certain matters. See “Fundamental Interests: The Political Process,” infra.

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


387 Tonawanda v. Lyon, 181 U.S. 399 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).


depend upon the taxpayer’s enjoyment of any special benefits from use of the funds raised by taxation. 390

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes. 391 However, modern notions of public purpose have expanded to the point where the limitation has little practical import. 392 Whether a use is public or private, although ultimately a judicial question, “is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.” 393

The authority of states to tax income is “universally recognized.” 394 Years ago the Court explained that “[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its ben-


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

392 Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flour mill system, homebuilding projects, Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Louisiana Bd. of Educ., 261 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

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

fits." Also, a tax on income is not constitutionally suspect because retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld, and there are also situations in which courts have upheld retroactive application to the preceding year or two.

A state also has broad tax authority over wills and inheritance. A state may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent, although such tax must be consistent with other due process considerations. Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the state in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator’s death. Equally consistent with due process is a tax on an inter vivos transfer of property by deed intended to take effect upon the death of the grantor.

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the Due Process Clause merely because the city
has entered the power business in competition with such companies.\footnote{Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).} Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.\footnote{New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).}

States have significant discretion in how to value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.\footnote{Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).} Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.\footnote{Paddell v. City of New York, 211 U.S. 446 (1908).}

A state also has wide discretion in how to apportion real property tax burdens. Thus, a state may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.\footnote{Hagar v. Reclamation Dist., 111 U.S. 701 (1884).} Or, where a state statute authorizes municipal authorities to define the district to be benefitted by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefitted by the improvement was not included.\footnote{Butters v. City of Oakland, 263 U.S. 162 (1923).}

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon

\footnote{Id. But it is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 286 U.S. 187 (1924). See also Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefitted by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).}
such railroad violates due process, whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon. Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving. However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefitted directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.

Finally, a state may levy an assessment for special benefits resulting from an improvement already made and may validate an assessment previously held void for want of authority.

Jurisdiction to Tax

Generally.—The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state’s imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state’s taxing power; 2) application of wealth transfer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court’s opinions in these cases have often discussed due process and dormant commerce clause issues as if they were indistinguishable. A later decision, Quill Corp. v. North Dakota, however, used a two-tier analysis that found sufficient contact to satisfy due process but not dormant commerce clause requirements. In Quill, the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales represent-

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409 Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).
414 For discussion of the relationship between the taxation of interstate commerce and the dormant commerce clause, see Taxation, supra.
tatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business “purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State.”\footnote{417} Thus, Quill may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process issues need no longer be separately considered.\footnote{418} This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

**Real Property.**—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a state could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, “we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court.”\footnote{419} Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

**Tangible Personalty.**—A state may tax tangible property located within its borders (either directly through an \textit{ad valorem} tax or indirectly through death taxes) irrespective of the residence of the owner.\footnote{420} By the same token, if tangible personal property makes only occasional incursions into other states, its permanent situs re-


\footnote{418} A physical presence within the state is necessary, however, under the Commerce Clause analysis applicable to taxation of mail order sales. See Quill Corp. v. North Dakota, 504 U.S. at 309–19 (refusing to overrule the Commerce Clause ruling in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967)). See also Trinova Corp. v. Michigan Dep’t of Treasury, 498 U.S. 358 (1991) (neither the Commerce Clause nor the Due Process Clause is violated by application of a business tax, measured on a value added basis, to a company that manufactures goods in another state, but that operates a sales office and conducts sales within state).

\footnote{419} Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). See also Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

mains in the state of origin, and, subject to certain exceptions, is taxable only by the latter. The ancient maxim, *mobilia sequuntur personam*, which originated when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the “law of the place where the property is kept and used.” The tendency has been to treat tangible personal property as “having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner.”

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary state, the latter has no jurisdiction to tax it. Further, vessels that merely touch briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all. Thus, where airplanes are continually in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.

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423 Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–20 (1962), had his “doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without jurisdiction to tax property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines. . . . And in the first case [Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause . . . was even mentioned.” He also maintained that Justice Holmes shared this view in Union Transit Co. v. Kentucky, 199 U.S. at 211.
424 Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one state, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).
425 Noting that an entire fleet of airplanes of an interstate carrier were “never continuously without the [domiciliary] State during the whole tax year,” that such airplanes also had their “home port” in the domiciliary state, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary state to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other state was deemed able to accord the same protection and benefits as the taxing state in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other states, the Court declared that the “taxability of any part of this fleet by any other state, than Minnesota, in view of the taxability of the entire fleet by that state, is not now before us.” Justice Jackson, in a concurring opinion, would treat Minnesota’s right to tax as exclusively of any similar right elsewhere.
Conversely, a nondomiciliary state, although it may not tax property belonging to a foreign corporation that has never come within its borders, may levy a tax on movables that are regularly and habitually used and employed in that state. Thus, although the fact that cars are loaded and reloaded at a refinery in a state outside the owner’s domicile does not fix the situs of the entire fleet in that state, the state may nevertheless tax the number of cars that on the average are found to be present within its borders. But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.

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

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

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

428 Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).
commercial situs and of the issuing corporation’s domicile, or the state of the owner’s domicile and that of the commercial situs.\footnote{429}{Howard, State Jurisdiction to Tax Intangibles: A Twelve Year Cycle, 8 Mo. L. Rev. 155, 160–62 (1943); Rawlins, State Jurisdiction to Tax Intangibles: Some Modern Aspects, 18 Tex. L. Rev. 196, 314–15 (1940).}

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the state of the debtor’s residence;\footnote{430}{Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).} (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;\footnote{431}{Savings Society v. Multnomah County, 169 U.S. 421 (1898).} (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;\footnote{432}{Bristol v. Washington County, 177 U.S. 133, 141 (1900).} (4) deposits of a resident in a bank in another state, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business;\footnote{433}{Rogers v. Hennepin County, 240 U.S. 184 (1916).} (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;\footnote{434}{Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921).} (6) membership by a resident in a stock exchange located in another state;\footnote{435}{Hawley v. Malden, 232 U.S. 1, 12 (1914).} (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;\footnote{436}{First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937).} (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;\footnote{437}{Howard, State Jurisdiction to Tax Intangibles: Some Modern Aspects, 18 Tex. L. Rev. 196, 314–15 (1940).} (9) shares owned by nonresidents.
dent shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder; 438

(10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state; 439

(11) the transfer within the taxing state by one nonresident to another of stock certificates issued by a foreign corporation; 440 and

(12) promissory notes executed by a domestic corporation, although payable to banks in other states. 441

The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing state, but made and payable and secured by property in a second state and owned by a resident of a third state; 442

(2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale. 443

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom. 444 However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, notwithstanding that the trust was created by the will of a resident of another state in respect of intangible property located in the latter state, at least where it does not appear that the trustee is exposed to the danger of other ad valorem taxes in another state. 445 The first case, Brooke v. City of Norfolk, 277 U.S. 27 (1928).

439 The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).
440 New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907).
441 Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.
442 Buck v. Beach, 206 U.S. 392 (1907).
444 Brooke v. City of Norfolk, 277 U.S. 27 (1928).
v. Norfolk,\textsuperscript{446} is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is Safe Deposit & Trust Co. v. Virginia,\textsuperscript{447} where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a nondomiciliary state in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing state.\textsuperscript{448} On the other hand, when the foreign corporation transacts only interstate commerce within a state, any excise tax on such excess is void, irrespective of the amount of the tax.\textsuperscript{449}

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary state only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered," the presumption persists that intangible property is taxable by the state of origin.\textsuperscript{450}

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the

\textsuperscript{446} 277 U.S. 27 (1928).
\textsuperscript{447} 280 U.S. 83 (1929).
\textsuperscript{448} Adams Express Co. v. Ohio, 165 U.S. 194 (1897).
\textsuperscript{449} Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). See also Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).
\textsuperscript{450} Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in Curry v. McCanless, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.
taxing state but located in another state awaiting sale, deprives the corporation of its property without due process of law.\textsuperscript{451} Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.\textsuperscript{452}

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

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one state of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the *situs* (but nondomiciliary) state, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,\textsuperscript{455} the domiciliary state of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. It took cognizance of the fact that the state in which these intangibles had their situs had also taxed the trust.\textsuperscript{456}

\textsuperscript{452} Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).
\textsuperscript{453} Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).
\textsuperscript{455} 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was *Wachovia Bank & Trust Co. v. Doughton*, 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in *Graves v. Schmidlapp*, 315 U.S. 657 (1942).
\textsuperscript{456} Levy of an inheritance tax by a nondomiciliary State was also sustained on similar grounds in *Wheeler v. New York*, 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.
On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary state was held insufficient to support a tax by that state on the succession to shares of stock in that corporation owned by a nonresident decedent.457 Also against the trend was Blodgett v. Silberman,458 in which the Court defeated collection of a transfer tax by the domiciliary state by treating coins and bank notes deposited by a decedent in a safe deposit box in another state as tangible property.459

In the course of about two years following the Depression, the Court handed down a group of four decisions that placed the stamp of disapproval upon multiple transfer taxes and—by inference—other multiple taxation of intangibles.460 The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile." 461 Thus, the Court proceeded to deny the right of nondomiciliary states to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the Due Process Clause.

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

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458 277 U.S. 1 (1928).
459 The Court conceded, however, that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.
and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains . . . . [However], the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax . . . .” 463

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. “In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both.” 464

On the authority of Curry v. McCanless, the Court, in Pearson v. McGraw, 465 sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the state, but on the fact that the owner was a resident of Oregon. In Graves v. Elliott, 466 the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that “the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in

463 307 U.S. at 366, 367, 368.
464 307 U.S. at 372. These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions that he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many states as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary state would invariably qualify as a state competent to tax as would a nondomiciliary state, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.
465 308 U.S. 313 (1939).
the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation.\footnote{467}

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more states find that the decedent died domiciled within its borders. In such cases, contesting states may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in \textit{Texas v. Florida},\footnote{468} the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other states. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several states, so that the latter were confronted with a prospective inability to collect.

\footnote{467} 307 U.S. at 386. Consistent application of the principle enunciated in \textit{Curry v. McCanless} is also discernible in two later cases in which the Court sustained the right of a domiciliary state to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy." \textit{Graves v. Schmidlapp}, 315 U.S. 657, 661 (1942). In this case, an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted the statement in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 429 (1819), that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." 315 U.S. at 660. Again, in \textit{Central Hanover Bank Co. v. Kelly}, 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

\footnote{468} 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in \textit{Worcester County Co. v. Riley}, 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two states as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct state of domicile. In \textit{California v. Texas}, 437 U.S. 601 (1978), a case on all points with \textit{Texas v. Florida}, the Court denied leave to file an original action to adjudicate a dispute between the two states about the actual domicile of Howard Hughes, a number of Justices suggesting that \textit{Worcester County} no longer was good law. Subsequently, the Court reaffirmed \textit{Worcester County}, \textit{Cory v. White}, 457 U.S. 85 (1982), and then permitted an original action to proceed, \textit{California v. Texas}, 457 U.S. 164 (1982), several Justices taking the position that neither \textit{Worcester County} nor \textit{Texas v. Florida} was any longer viable.
Corporate Privilege Taxes.—A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the state, because the tax is levied not on property but on the privilege of doing business in corporate form. However, a state cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void, even though there is a maximum fee, unless the tax is apportioned based on property interests in the taxing state. On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.

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

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


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


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

Individual Income Taxes.—A state may tax annually the entire net income of resident individuals from whatever source received,476 as jurisdiction is founded upon the rights and privileges incident to domicile. A state may also tax the portion of a nonresident's net income that derives from property owned by him within its borders, and from any business, trade, or profession carried on by him within its borders.477 This state power is based upon the state's dominion over the property he owns, or over activity from which the income derives, and from the obligation to contribute to the support of a government that secures the collection of such income. Accordingly, a state may tax residents on income from rents of land located outside the state; from interest on bonds physically outside the state and secured by mortgage upon lands physically outside the state;475 and from a trust created and administered in another state and not directly taxable to the trustee.478 Further, the fact that another state has lawfully taxed identical income in the hands of trustees operating in that state does not necessarily destroy a domiciliary state's right to tax the receipt of income by a resident beneficiary.479

Corporate Income Taxes: Foreign Corporations.—A tax based on the income of a foreign corporation may be determined by allocating to the state a proportion of the total,481 unless the income attributed to the state is out of all appropriate proportion to the business transacted in the state.482 Thus, a franchise tax on a for-
eign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.\textsuperscript{483} Because the privilege granted by a state to a foreign corporation of carrying on business supports a tax by that state, it followed that a Wisconsin privilege dividend tax could be applied to a Delaware corporation despite its having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the “privilege of declaring and receiving dividends” out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.\textsuperscript{484}

\textit{Insurance Company Taxes.}—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the state does not deprive the company of property without due process,\textsuperscript{485} but such a tax is invalid if the company has withdrawn all its agents from the state and has ceased to do business there, merely continuing to receive the renewal premiums at its home office.\textsuperscript{486} Also violating due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, where the firm obtained the coverage of property within the state from an unlicenced out-of-state insurer that consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.\textsuperscript{487} However, a tax may be imposed upon the privilege of entering and engaging in business in a state, even if the tax is a percentage of the “annual premiums to be paid throughout the life of the policies issued.” Under

\textsuperscript{483} Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).
\textsuperscript{484} Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many states does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is “one wholly beyond the reach of Wisconsin’s sovereign power, one which it cannot effectively command, or prohibit or condition.” The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, “if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad.” See also Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).
\textsuperscript{485} Equitable Life Society v. Pennsylvania, 238 U.S. 143 (1915).
\textsuperscript{486} Provident Savings Ass’n v. Kentucky, 239 U.S. 103 (1915).
this kind of tax, a state may continue to collect even after the company's withdrawal from the state.\footnote{Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).}

A state may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third state to insure customers of the automobile sales corporation against loss of cars purchased through the automobile sales corporation, insofar as the cars go into the possession of a purchaser within the taxing state.\footnote{Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).} On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other states who are not authorized to do business in the taxing state, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.\footnote{St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).} Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums on such contracts in Connecticut, and was liable in Connecticut for payment of losses claimed under such contracts, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of California residents. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that state.\footnote{Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938).}

### Procedure in Taxation

**Generally.**—The Supreme Court has never decided exactly what due process is required in the assessment and collection of general taxes. Although the Court has held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws

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488 Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).
491 Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder’s loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S. 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.
for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary. Due process of law as applied to taxation does not mean judicial process; neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. Due process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the state for such purpose.

Notice and Hearing in Relation to Taxes.—“Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.”

495 Hodge v. Muscatine County, 196 U.S. 276 (1905).
496 Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).
Notice and Hearing in Relation to Assessments.—“But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.” 497

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed. 498 Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be reasonably asked. 499 Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the state for remittance becomes final. 500

However, when assessments based on the enjoyment of a special benefit are made by a political subdivision, a taxing board or court, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination. 501 The hearing need not amount to a judicial

497 111 U.S. at 710.
498 McMillen v. Anderson, 95 U.S. 37, 42 (1877).
499 State Railroad Tax Cases, 92 U.S. 575, 610 (1876).
500 Nickey v. Mississippi, 292 U.S. 393, 396 (1934). See also Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property. Pittsburgh C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 92, 45 (1898).
inquiry, although a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.

Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits. On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final. The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly included within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing. Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.

In contrast, when an attempt is made to cast upon particular property a certain proportion of the construc-

504 Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 289 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Board of Supervisors, 257 U.S. 118 (1921).
507 Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40 percent. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).
tion cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.509

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

States may also use various procedures to collect taxes from prior tax years. To reach property that has escaped taxation, a state may tax estates of decedents for a period prior to death and grant proportionate deductions for all prior taxes that the personal representative can prove to have been paid.513 In addition, the Court found no violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors’ trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier’s operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier’s operation is in no way altered by the vendor’s retention of title.514

As a state may provide in advance that taxes will bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent will bear interest from the time the delinquency commenced. Further, a state may adopt new remedies for the collection of taxes and apply these remedies

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511 Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).
512 The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).
to taxes already delinquent.\textsuperscript{515} After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.\textsuperscript{516} Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.\textsuperscript{517}

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.\textsuperscript{518} No less constitutional, as a means of facilitating collection, is an \textit{in rem} proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.\textsuperscript{519} On the other hand, although the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,\textsuperscript{520} a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.\textsuperscript{521} Apart from such restraints, however, a state is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.\textsuperscript{522}

\textit{Sufficiency and Manner of Giving Notice.}—Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,\textsuperscript{523} or by delivery to a statutorily designated agent.\textsuperscript{524} As regards land, “where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to

\textsuperscript{515} League v. Texas, 184 U.S. 156 (1902).

\textsuperscript{516} Palmer v. McMahon, 133 U.S. 660, 669 (1890).

\textsuperscript{517} Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

\textsuperscript{518} King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).

\textsuperscript{519} Leigh v. Green, 193 U.S. 79 (1904).

\textsuperscript{520} Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).

\textsuperscript{521} Dewey v. City of Des Moines, 173 U.S. 193 (1899).


\textsuperscript{524} A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).
appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . . ." In fact, compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an in rem case, even if there are technical defects in such notice.\textsuperscript{525}

Whether statutorily required notice is sufficient may vary with the circumstances. Thus, where a taxpayer was not legally competent, no guardian had been appointed and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.\textsuperscript{526} On the other hand, due process was not denied to appellants who were unable to avert foreclosure on certain trust lands (based on liens for unpaid water charges) because their own bookkeeper failed to inform them of the receipt of mailed notices.\textsuperscript{527}

\textbf{ Sufficiency of Remedy.}—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.\textsuperscript{528} Requirements of due process are similarly violated by a statute that limits a taxpayer’s right to challenge an assessment to cases of fraud or corruption,\textsuperscript{529} and by a state tribunal that prevents the recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law that allows suits to recover taxes alleged to have been assessed illegally only if the taxes had been paid at the time and in the manner provided by such law.\textsuperscript{530}

In the case of a tax held unconstitutional as a discrimination against

\textsuperscript{525} Leigh v. Green, 193 U.S. 79, 92–93 (1904). Thus, an assessment for taxes and a notice of sale when such taxes are delinquent will be sustained as long as there is a description of the land and the owner knows that the property so described is his, even if that description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are in rem, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property. Id.\textsuperscript{1930} See also Longyear v. Toolan, 209 U.S. 414 (1908).

\textsuperscript{526} Covey v. Town of Somers, 351 U.S. 141 (1956).

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

\textsuperscript{528} Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

\textsuperscript{529} Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

\textsuperscript{530} Carpenter v. Shaw, 280 U.S. 363 (1930). See also Ward v. Love County, 253 U.S. 17 (1920). In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply \textit{predeprivation}, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a \textit{postdeprivation}
interstate commerce and not invalidated in its entirety, the state has several alternatives for equalizing incidence of the tax: it may pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors; it may assess and collect back taxes from those competitors; or it may combine the two approaches.531

Laches.—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.532 Likewise a car company that failed to report its gross receipts, as required by statute, has no further right to contest the state comptroller’s estimate of those receipts and his adding to his estimate the 10 percent penalty permitted by law.533

Eminent Domain

The Due Process Clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment.534

Fundamental Rights (Noneconomic Substantive Due Process)

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has come to include disparate lines of cases, and various labels have been applied to the rights protected, including “fundamental rights,” “privacy rights,” “liberty interests” and “incorporated rights.” The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,535 serves as the basis for some of the most significant constitutional

remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). See also Reich v. Collins, 513 U.S. 106 (1994) (violating due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dept of Revenue, 522 U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy). 531 Carpenter v. Shaw, 280 U.S. 363 (1930).


534 See analysis under “National Eminent Domain Power,” Fifth Amendment, supra.

holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the “incorporation” of fundamental rights.\textsuperscript{536} Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion,\textsuperscript{537} remain controversial.

**Determining Noneconomic Substantive Due Process Rights.**—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of “privacy” relate to protecting physical spaces such as one’s home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the “privacy” of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? Although many of these issues have been resolved, others remain.

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

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice.

\textsuperscript{536} See Bill of Rights, “Fourteenth Amendment,” supra.
\textsuperscript{538} Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).
Brandeis regarding the Fourth Amendment.\textsuperscript{539} Then, in the 1920s, at the heyday of economic substantive due process, the Court ruled in two cases that, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In \textit{Meyer v. Nebraska},\textsuperscript{540} the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Two years later, in \textit{Pierce v. Society of Sisters},\textsuperscript{541} the Court declared it unconstitutional to require public school education of children aged eight to sixteen. The statute in \textit{Meyer} was found to interfere with the property interest of the plaintiff, a German teacher, in pursuing his occupation, while the private school plaintiffs in \textit{Pierce} were threatened with destruction of their businesses and the values of their properties.\textsuperscript{542} Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents and children in the assertion of other noneconomic forms of “liberty.”

“Without doubt,” Justice McReynolds said in \textit{Meyer}, liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”\textsuperscript{543} The right of the parents to have their children instructed in a foreign language was “within the liberty of the \textit{[Fourteenth] Amendment}.”\textsuperscript{544} \textit{Meyer} was then relied on in \textit{Pierce} to assert that the statute there “unreasonably interferes with the

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


\textsuperscript{541} 268 U.S. 510 (1925).

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

\textsuperscript{543} 262 U.S. at 399.

\textsuperscript{544} 262 U.S. at 400.
liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Although the Supreme Court continued to define noneconomic liberty broadly in *dicta*, this new concept was to have little impact for decades. Finally, in 1967, in *Loving v. Virginia*, the Court held that a statute prohibiting interracial marriage denied substantive due process. Marriage was termed "one of the 'basic civil rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and the classification of marriage rights on a racial basis was "unsupportable." Further development of this line of cases was slowed by the expanded application of the Bill of Rights to the states, which afforded the Court an alternative ground to void state policies.

Despite the Court’s increasing willingness to overturn state legislation, the basis and standard of review that the Court would use to review infringements on "fundamental freedoms" were not always clear. In *Poe v. Ullman*, for instance, the Court dismissed as non-justiciable a suit challenging a Connecticut statute banning the use of contraceptives, even by married couples. In dissent, however, Justice Harlan advocated the application of a due process standard of reasonableness—the same lenient standard he would have

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545 288 U.S. at 534–35.
546 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within "the private realm of family life which the state cannot enter").
547 E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (allowing compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Probate Court ex rel. Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).
548 388 U.S. 1, 12 (1967).
549 Indeed, in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note also that in *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968), and *Tinker v. Des Moines Indep. Community School Dist.*., 393 U.S. 503, 506–07 (1968), Justice Fortas for the Court approvingly noted the due process basis of *Meyer* and *Pierce* while deciding both cases on First Amendment grounds.
550 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.
applied to test economic legislation.\textsuperscript{551} Applying a lengthy analysis, Justice Harlan concluded that the statute in question infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court in \textit{Griswold v. Connecticut},\textsuperscript{552} a majority of the Justices rejected reliance on substantive due process\textsuperscript{553} and instead decided it on another basis—that the statute was an invasion of privacy, which was a non-textual “penumbral” right protected by a matrix of constitutional provisions. Not only was this right to be protected again governmental intrusion, but there was apparently little or no consideration to be given to what governmental interests might justify such an intrusion upon the marital bedroom.

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

\begin{itemize}
\item \textsuperscript{551} According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather “a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.” The liberty protected by the clause “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” 367 U.S. at 542, 543.
\item \textsuperscript{552} 381 U.S. 479 (1965).
\item \textsuperscript{553} “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” \textit{Griswold v. Connecticut}, 381 U.S. at 482 (opinion of Court by Justice Douglas).
\item \textsuperscript{554} The analysis, while reminiscent of the “right to privacy” first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority’s position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision on the Ninth Amendment. 381 U.S. at 486–97. See analysis under the Ninth Amendment, “Rights Retained By the People,” supra.
\item \textsuperscript{555} See Roe v. Wade, 410 U.S. 113 (1973).
\item \textsuperscript{556} When the Court began to extend “privacy” rights to unmarried person through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan’s dissent in Poe v. Ullman. \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972), is the principal case. See also \textit{Stanley v. Illinois}, 405 U.S. 845 (1972).
\item \textsuperscript{557} Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
\end{itemize}
A further problem confronting the Court is how such abstract rights, once established, are to be delineated. For instance, the constitutional protections afforded to marriage, family, and procreation in *Griswold* have been extended by the Court to apply to married and unmarried couples alike. However, in *Bowers v. Hardwick*, the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples. Then, in *Lawrence v. Texas*, the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

More broadly, in *Washington v. Glucksberg*, the Court, in an effort to guide and "restrain" a court's determination of the scope of substantive due process rights, held that the concept of "liberty" protected under the Due Process Clause should first be understood to protect only those rights that are "deeply rooted in this Nation's history and tradition." Moreover, the Court in *Glucksberg* required a "careful description" of fundamental rights that would be grounded in specific historical practices and traditions that serve as "crucial guideposts for responsible decisionmaking." However, the Court, in *Obergefell v. Hodges* largely departed from *Glucksberg*’s formulation for assessing fundamental rights in holding that the Due Process Clause required states to license and recognize marriages between two people of the same sex. Instead, the *Obergefell* Court recognized that fundamental rights do not “come from another place.”

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

*559 478 U.S. 186 (1986).*

*560 The Court upheld the statute only as applied to the plaintiffs, who were homosexuals, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192–93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199–203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).*


*563 See* id. at 721 (internal citations and quotations omitted).

*564 See* 576 U.S. ___, No. 14–556, slip op. at 18 (2015).*
cient sources alone” and instead must be viewed in light of evolving social norms and in a “comprehensive” manner.565 For the Obergefell Court, the two-part test relied on in Glucksberg—relying on history as a central guide for constitutional liberty protections and requiring a “careful description” of the right in question—was “inconsistent” with the approach taken in cases discussing certain fundamental rights, including the rights to marriage and intimacy, and would result in rights becoming stale, as “received practices could serve as their own continued justification and new groups could not invoke rights once denied.”566

Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in Michael H. v. Gerald D., involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.567 While recognizing the protection traditionally afforded a father, Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (i.e. the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection, arguing that courts should limit consideration to “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”568 Dissenting Justice Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should “ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of ‘liberty.’”569

Abortion.—In Roe v. Wade,570 the Court established a right of personal privacy protected by the Due Process Clause that includes the right of a woman to determine whether or not to bear a child. In doing so, the Court dramatically increased judicial oversight of

565 See id. at 18–19.
566 See id. at 18.
567 491 U.S. 110 (1989). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California’s procedures for establishing paternity did not unconstitutionally impinge on that interest.
568 491 U.S. at 128 n.6.
569 491 U.S. at 142.
570 410 U.S. 113, 164 (1973). A companion case was Doe v. Bolton, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id. at 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother’s life is in jeopardy to be a denial of due process, 410 U.S. at 173, while Justice White left the issue open. 410 U.S. at 223.
legislation under the privacy line of cases, striking down aspects of abortion-related laws in practically all the states, the District of Columbia, and the territories. To reach this result, the Court first undertook a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on abortion were of relatively recent vintage and thus lacked the historical foundation which might have preserved them from constitutional review.\[^{571}\] Then, the Court established that the word “person” as used in the Due Process Clause and in other provisions of the Constitution did not include the unborn, and therefore the unborn lacked federal constitutional protection.\[^{572}\] Finally, the Court summarily announced that the “Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” includes “a right of personal privacy, or a guarantee of certain areas or zones of privacy”\[^{573}\] and that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\[^{574}\]

It was also significant that the Court held this right of privacy to be “fundamental” and, drawing upon the strict standard of review found in equal protection litigation, held that the Due Process Clause required that any limits on this right be justified only by a “compelling state interest” and be narrowly drawn to express only the legitimate state interests at stake.\[^{575}\] Assessing the possible interests of the states, the Court rejected justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions as unsupported in the record and ill-served by the laws in question. Further, the state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue of when life begins. Two valid state interests were, however, recognized. “[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’”\[^{576}\]

Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no

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\[^{571}\] 410 U.S. at 129–47.
\[^{572}\] 410 U.S. at 156–59.
\[^{573}\] 410 U.S. at 152–53.
\[^{574}\] 410 U.S. at 147–52, 159–63. The “compelling state interest” test in equal protection cases is reviewed under “The New Standards: Active Review,” infra.
\[^{576}\] 410 U.S. at 147–52, 159–63.
capability of meaningful life outside the mother’s womb, the Court found that the state has no “compelling interest” in the first trimester and “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.” In the intermediate trimester, the danger to the woman increases and the state may therefore regulate the abortion procedure “to the extent that the regulation reasonably relates to the preservation and protection of maternal health,” but the fetus is still not able to survive outside the womb, and consequently the actual decision to have an abortion cannot be otherwise impeded. “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”

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

Further, in a companion case, the Court struck down three procedural provisions relating to a law that did allow some abortions. These regulations required that an abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician’s judgment be confirmed by the independent examination of the patient by two other licensed phy-

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577 410 U.S. at 163.
578 410 U.S. at 163.
579 410 U.S. at 163–64. A fetus becomes “viable” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” Id. at 160 (footnotes omitted).
sicians. These provisions were held not to be justified by the state's interest in maternal health because they were not reasonably related to that interest. 581 But a clause making the performance of an abortion a crime except when it is based upon the doctor’s “best clinical judgment that an abortion is necessary” was upheld against vagueness attack and was further held to benefit women seeking abortions on the grounds that the doctor could use his best clinical judgment in light of all the attendant circumstances. 582

After Roe, various states attempted to limit access to this newly found right, such as by requiring spousal or parental consent to obtain an abortion. 583 The Court, however, held that (1) requiring spousal consent was an attempt by the state to delegate a veto power over the decision of the woman and her doctor that the state itself could not exercise, 584 (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy, 585 and (3) that a criminal provision requiring the attending physician to exercise all care and

581 410 U.S. at 192–200. In addition, a residency provision was struck down as violating the privileges and immunities clause of Article IV, § 2. Id. at 200. See analysis under “State Citizenship: Privileges and Immunities,” supra.

582 410 U.S. at 191–92. “[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” Id. at 192. Presumably this discussion applies to the Court’s holding in Roe that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S. at 163–64, a holding that is unelaborated in the opinion. See also United States v. Vuitch, 402 U.S. 62 (1971).


584 Planned Parenthood v. Danforth, 428 U.S. 52, 67–72 (1976). The Court recognized the husband’s interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id. at 92.

585 428 U.S. at 72–75. Minors have rights protected by the Constitution, but the states have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman’s right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor found to be capable of making, and having
diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe*. The Court sustained provisions that required the woman’s written consent to an abortion with assurances that it is informed and freely given, and the Court also upheld mandatory reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. Another provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional because, in the absence of another comparably safe technique, it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.

In other rulings applying *Roe*, the Court struck down some requirements and upheld others. A requirement that all abortions performed after the first trimester be performed in a hospital was invalidated as imposing “a heavy, and unnecessary, burden on women’s access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure.” The Court held, however, that a state may require that abortions be performed in hospitals or licensed outpatient clinics, as long as licensing standards do not “depart from accepted medi-

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586 Planned Parenthood v. Danforth, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379 (1979).


588 City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438 (1983); *Accord*, Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983). The Court in *Akron* relied on evidence that “dilation and evacuation” (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had “increased dramatically” the safety of second trimester abortions in the 10 years since Roe v. Wade. 462 U.S. at 435–36.
Various “informed consent” requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision. The Court also invalidated a 24-hour waiting period following a woman’s written, informed consent.

On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, because the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery. The Court also upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus. Further, the Court refused to extend Roe to require states to pay for abortions for the indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.

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

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590 City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In City of Akron, the Court explained that while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not demand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the counseling. City of Akron, 462 U.S. 416, 448–49 (1983).
593 Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). See also Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, 448 U.S. at 306–11 (same). The state restriction in Maher, 432 U.S. at 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, Harris, 448 U.S. at 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).
the condition that was a barrier to getting an abortion—indigency—was not created or exacerbated by the government.

In reaching this finding the Court held that, while a state-created obstacle need not be absolute to be impermissible, it must at a minimum “unduly burden” the right to terminate a pregnancy. And, the Court held, to allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining and does not unduly burden the right.595 What is interesting about this holding is that the “undue burden” standard was to take on new significance when the Court began raising questions about the scope and even the legitimacy of Roe.

Although the Court expressly reaffirmed Roe v. Wade in 1983,596 its 1989 decision in Webster v. Reproductive Health Services597 signaled the beginning of a retrenchment. Webster upheld two aspects of a Missouri statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational age of 20 weeks, make an actual viability determination.598 This retrenchment was also apparent in

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


598 The Court declined to rule on several other aspects of Missouri’s law, including a preamble stating that life begins at conception, and a prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion.
two 1990 cases in which the Court upheld both one-parent and two-parent notification requirements. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly critical of Roe, but found no occasion to overrule it. Instead, the plurality's approach sought to water down Roe by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it “permissibly furthers the State’s interest in protecting potential human life.” Justice O’Connor, however, concurred in the result based on her view that the requirement did not impose “an undue burden” on a woman’s right to an abortion, while Justice Scalia’s concurrence urged that Roe be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did “not reasonably further any legitimate state interest.”

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

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599 Ohio’s requirement that one parent be notified of a minor’s intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990). And, while the Court ruled that Minnesota’s requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. Hodgson v. Minnesota, 497 U.S. 417 (1990).

600 492 U.S. at 519–20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this “permissibly furthers” standard “completely disregards the irreducible minimum of Roe . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy,” and instead balances “a lead weight” (the State’s interest in fetal life) against a “feather” (a woman’s liberty interest). Id. at 555, 556 n.11.


602 492 U.S. at 521. Concurring Justice O’Connor agreed that “no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible.” Id. at 528.

603 492 U.S. at 519.

604 492 U.S. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O’Connor had suggested that
Three years later, however, the Court invoked principles of *stare decisis* to reaffirm *Roe*’s “essential holding,” although it had by now abandoned the trimester approach and adopted Justice O’Connor’s “undue burden” test and *Roe*’s “essential holding.” According to the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the right to abortion has three parts. “First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”

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

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cise of the right to choose.” Thus, unless an undue burden is im-
possed, states may adopt measures “designed to persuade [a woman] to
choose childbirth over abortion.”

Casey did, however, overturn earlier decisions striking down in-
formed consent and 24-hour waiting periods. Given the state’s le-
gitimate interests in protecting the life of the unborn and the health
of the potential mother, and applying “undue burden” analysis, the
three-Justice plurality found these requirements permisssible. After
The Court also upheld application of an additional requirement that
women under age 18 obtain the consent of one parent or avail them-
selves of a judicial bypass alternative.

On the other hand, the Court distinguished Pennsylvania’s
spousal notification provision as constituting an undue burden on
a woman’s right to choose an abortion. “A State may not give to a
man the kind of dominion over his wife that parents exercise over
their children” (and that men exercised over their wives at com-
mon law). Although there was an exception for a woman who be-
lieved that notifying her husband would subject her to bodily in-
jury, this exception was not broad enough to cover other forms of
abusive retaliation, e.g., psychological intimidation, bodily harm to
children, or financial deprivation. To require a wife to notify her
husband in spite of her fear of such abuse would unduly burden
the wife’s liberty to decide whether to bear a child.

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

(invalidating “informed consent” and 24-hour waiting period); Thornburgh v. Ameri-
can College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating
informed consent requirement).

Requiring informed consent for medical procedures was found to be both com-
monplace and reasonable, and, in the absence of any evidence of burden, the state
could require that information relevant to informed consent be provided by a physi-
cian rather than an assistant. The 24-hour waiting period was approved both in theory
(it being reasonable to assume “that important decisions will be more informed and
deliberate if they follow some period of reflection”) and in practice (in spite of “trou-
brling” findings of increased burdens on poorer women who must travel significant
distances to obtain abortions, and on all women who must twice rather than once

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

505 U.S. at 898.
The passage of various state laws restricting so-called “partial birth abortions” gave observers an opportunity to see if the “undue burden” standard was in fact likely to lead to a major curtailment of the right to obtain an abortion. In *Stenberg v. Carhart*, the Court reviewed a Nebraska statute that forbade “partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery.” Although the state argued that the statute was directed only at an infrequently used procedure referred to as an “intact dilation and excavation,” the Court found that the statute could be interpreted to include the far more common procedure of “dilation and excavation.” The Court also noted that the prohibition appeared to apply to abortions performed by these procedures throughout a pregnancy, including before viability of the fetus, and that the sole exception in the statute was to allow an abortion that was necessary to preserve the life of the mother.

Thus, the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe* that provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman. The Court, however, reaffirmed the central tenets of its previous abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad, and the exception for threats to the life of the mother was too narrow.

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*, which, although not formally overruling *Stenberg*, appeared to signal a change in how the Court would analyze limitations on abortion procedures. Of perhaps greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5–4 vote, upheld a federal criminal statute that

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614 530 U.S. at 938–39.
615 The Nebraska law provided that such procedures could be performed where “necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” Neb. Rev. Stat. Ann. § 28–328(1).
617 As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, see Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).
619 Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsburg authored a dissenting opinion, which was
prohibited an overt act to “kill” a fetus where it had been intentionally “deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” The Court distinguished this federal statute from the Nebraska statute that it had struck down in *Stenberg*, holding that the federal statute applied only to the intentional performance of the less-common “intact dilation and excavation.” The Court found that the federal statute was not unconstitutionally vague because it provided “anatomical landmarks” that provided doctors with a reasonable opportunity to know what conduct it prohibited. Further, the scienter requirement (that delivery of the fetus to these landmarks before fetal demise be intentional) was found to alleviate vagueness concerns.

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

As in *Stenberg*, the prohibition considered in *Gonzales* extended to the performance of an abortion before the fetus was viable, thus directly raising the question of whether the statute imposed an “undue burden” on the right to obtain an abortion. Unlike

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joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe.*

620 18 U.S.C. § 1531(b)(1)(A). The penalty imposed on a physician for a violation of the statute was fines and/or imprisonment for not more than 2 years. In addition, the physician could be subject to a civil suit by the father (or maternal grandparents, where the mother is a minor) for money damages for all injuries, psychological and physical, occasioned by the violation of this section, and statutory damages equal to three times the cost of the partial-birth abortion.

621 550 U.S. at 150.

622 550 U.S. at 148–150.

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

624 550 U.S. at 162. Arguably, this holding overruled *Stenberg* insofar as *Stenberg* had allowed a facial challenge to the failure of Nebraska to provide a health exception to its prohibition on intact dilation and excavation abortions. 530 U.S. at 929–38.

625 550 U.S. at 168.
the statute in Stenberg, however, the ban in Gonzales was limited to the far less common “intact dilation and excavation” procedure, and consequently did not impose the same burden as the Nebraska statute. The Court also found that there was a “rational basis” for the limitation, including governmental interests in the expression of “respect for the dignity of human life,” “protecting the integrity and ethics of the medical profession,” and the creation of a “dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”\footnote{626}

The Court revisited the question of whether particular restrictions place a “substantial obstacle” in the path of women seeking a pre-viability abortion and constitute an “undue burden” on abortion access in its 2016 decision in Whole Woman’s Health v. Helлерstedt.\footnote{627} At issue in Whole Woman’s Health was a Texas law that required (1) physicians performing or inducing abortions to have active admitting privileges at a hospital located not more than thirty miles from the facility; and (2) the facility itself to meet the minimum standards for ambulatory surgical centers under Texas law.\footnote{628} Texas asserted that these requirements served various purposes related to women’s health and the safety of abortion procedures, including ensuring that women have easy access to a hospital should complications arise during an abortion procedure and that abortion facilities meet heightened health and safety standards.\footnote{629}

In reviewing Texas’s law, the Whole Woman’s Health Court began by clarifying the underlying “undue burden” standard established in Casey. First, the Court noted that the relevant standard from Casey requires that courts engage in a balancing test to determine whether a law amounts to an unconstitutional restriction on abortion access by considering the “burdens a law imposes on abortion access together with the benefits those laws confer.”\footnote{630} As a consequence, the Whole Woman’s Health articulation of the undue burden standard necessarily requires that courts “consider the existence or nonexistence of medical benefits” when considering whether a regulation constitutes an undue burden.\footnote{631} In such a consideration, a reviewing court, when evaluating an abortion regulation purporting to protect woman’s health, may need to closely scrutinize (1) the relative value of the protections afforded under the new

\footnote{626} 550 U.S. at 160.  
\footnote{627} 579 U.S. ___, No. 15–274, slip op. (2016).  
\footnote{628} Id. at 1–2.  
\footnote{629} Id. at 22.  
\footnote{630} Id. at 19.  
\footnote{631} Id.
law when compared to those prior to enactment. Second, the Whole Woman's Health decision rejected the argument that judicial scrutiny of abortion regulations was akin to rational basis review, concluding that courts should not defer to legislatures when resolving questions of medical uncertainty that arise with respect to abortion regulations. Instead, the Court found that reviewing courts are permitted to place “considerable weight upon evidence and argument presented in judicial proceedings” when evaluating legislation under the undue burden standard, notwithstanding contrary conclusions by the legislature.

Applying these standards, the Whole Woman's Health Court viewed the alleged benefits of the Texas requirements as inadequate to justify the challenged provisions under the precedent of Casey, given both the burdens they imposed upon women's access to abortion and the benefits provided. Specifically as to the admitting privileges requirement, the Court determined that nothing in the underlying record showed that this requirement “advanced Texas's legitimate interest in protecting women's health” in any significant way as compared to Texas’s previous requirement that abortion clinics have a “working arrangement” with a doctor with admitting privileges. In particular, the Court rejected the argument that the admitting privileges requirements were justified to provide an “extra layer” of protection against abusive and unsafe abortion facilities, as the Court concluded that “[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.” On the contrary, in the Court's view, the evidentiary record suggested that the admitting-privileges requirement placed a substantial obstacle in the path of women's access to abortion because (1) of the temporal proximity between the imposition of the requirement and the closing of

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632 Id. at 22, 28–30 (reviewing the state of the law prior to the enactment of the abortion regulation to determine whether there was a “significant health-related problem that the new law helped to cure.”).
633 Id. at 30 (comparing the health risks associated with abortion relative to other medical procedures).
634 Id. at 20.
635 See id. (noting that in Gonzales v. Carhart, 550 U.S. 124, 165 (2007), the Court maintained that courts have an “independent constitutional duty” to review factual findings when reviewing legislation as inconsistent with abortion rights).
636 Id. at 19 (quoting and citing Planned Parenthood v. Casey, 505 U.S. 833, 877–78 (1992) (plurality opinion)).
637 Id. at 23. The Court further noted that Texas had admitted it did not know of a “single instance” where the requirement would have helped “even one woman” obtain “better treatment.” Id.
638 Id. at 27.
a number of clinics once the requirement was enforced;\textsuperscript{639} and (2) the necessary consequence of the requirement of foreclosing abortion providers from obtaining such privileges for reasons having "nothing to do with ability to perform medical procedures."\textsuperscript{640} In the view of the Court, the resulting facility closures that the Court attributed to the first challenged requirement meant fewer doctors, longer wait times, and increased crowding for women at the remaining facilities, and the closures also increased driving distances to an abortion clinic for some women, amounting to an undue burden.\textsuperscript{641}

Similarly as to the surgical-center requirement, the \textit{Whole Woman's Health} Court viewed the record as evidencing that the requirement "provides no benefits" in the context of abortions produced through medication and was "inappropriate" as to surgical abortions.\textsuperscript{642} In so doing, the Court also noted disparities between the treatment of abortion facilities and facilities providing other medical procedures, such as colonoscopies, which the evidence suggested had greater risks than abortions.\textsuperscript{643} The Court viewed the underlying record as demonstrating that the surgical-center requirement would also have further reduced the number of abortion facilities in Texas to seven or eight and, in so doing, would have burdened women's access to abortion in the same way as the admitting-privileges requirement (e.g., creating crowding, increasing driving distances).\textsuperscript{644} Ultimately, the Court struck down the two provisions in the Texas law, concluding that the regulations in question imposed an undue burden on a "large fraction" of women for whom the provisions are an "actual" restriction.\textsuperscript{645}

\textsuperscript{639} Id. at 24.
\textsuperscript{640} Specifically, the Court noted that hospitals typically condition admitting privileges based on the number admissions a doctor has to a hospital—policies that, because of the safety of abortion procedures, meant that providers likely would be unable to obtain and maintain such privileges. Id. at 25.
\textsuperscript{641} Id. at 26. The Court noted that increased driving distances are not necessarily an undue burden, but in this case viewed them as "one additional burden" which, when taken together with the other burdens—and the "virtual absence of any health benefit"—lead to the conclusion that the admitting-privileges requirement constitutes an undue burden. Id.
\textsuperscript{642} Id. at 30.
\textsuperscript{643} Id. at 30–31.
\textsuperscript{644} Id. at 32, 35–36.
\textsuperscript{645} Id. at 39. In so concluding, the \textit{Whole Woman's Health} Court appears to have clarified that the burden for a plaintiff to establish that an abortion restriction is unconstitutional on its face (as opposed to unconstitutional as applied in a particular circumstance) is to show that the law would be unconstitutional with respect to a "large fraction" of women for whom the provisions are relevant. Id. (rejecting Texas's argument that the regulations in question would not affect most women of reproductive age in Texas); cf. United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount
Privacy after Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?—The use of strict scrutiny to review intrusions on personal liberties in Roe v. Wade seemed to portend the Court's striking down many other governmental restraints upon personal activities. These developments have not occurred, however, as the Court has been relatively cautious in extending the right to privacy. Part of the reason that the Court may have been slow to extend the rationale of Roe to other contexts was that "privacy" or the right "to be let alone" appears to encompass a number of different concepts arising from different parts of the Constitution, and the same combination of privacy rights and competing governmental interests are not necessarily implicated in other types of "private" conduct.

For instance, the term “privacy” itself seems to encompass at least two different but related issues. First, it relates to protecting against disclosure of personal information to the outside world, i.e., the right of individuals to determine how much and what information about themselves is to be revealed to others.646 Second, it relates inward toward notions of personal autonomy, i.e., the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.647 These dual concepts, here referred to as “informational privacy” and “personal autonomy,” can easily arise in the same case, as government regulation of personal behavior can limit personal autonomy, while investigating and prosecuting such behavior can expose it to public scrutiny. Unfortunately, some of the Court's cases identified violations of a right of privacy without necessarily making this distinction clear. While the main thrust of the Court's fundamental-rights analysis appears to emphasize the personal autonomy aspect of privacy, now often phrased as "liberty" interests, a clear analytical framework for parsing of these two concepts in different contexts has not yet been established.

Another reason that “privacy” is difficult to define is that the right appears to arise from multiple sources. For instance, the Court first identified issues regarding informational privacy as specifically tied to various provisions of Bill of Rights, including the First and Fourth Amendments. In Griswold v. Connecticut,648 however, Justice Douglas found an independent right of privacy in the “pen-
umbras” of these and other constitutional provisions. Although the parameters and limits of the right to privacy were not well delineated by that decision, which struck down a statute banning married couples from using contraceptives, the right appeared to be based on the notion that the government should not be allowed to gather information about private, personal activities. However, years later, when the closely related abortion cases were decided, the right to privacy being discussed was now characterized as a “liberty interest” protected under the Due Process Clause of the Fourteenth Amendment, and the basis for the right identified was more consistent with a concern for personal autonomy.

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

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


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

654 See *Buckley v. Valeo*, 424 U.S. 1, 60–82 (1976); *Whalen v. Roe*, 429 U.S. 589, 601 n.27, 604 n.32 (1977); *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976). The Court continues to reserve the question of the “special problems of privacy which
Similarly, in *Fisher v. United States*, the Court held that the Fifth Amendment’s Self-incrimination Clause did not prevent the IRS from obtaining income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. The Court noted that it “has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence that, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.” Furthermore, it wrote, “[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment.”

So what remains of informational privacy? A cryptic opinion in *Whalen v. Roe* may indicate the Court’s continuing willingness to recognize privacy interests as independent constitutional rights. At issue was a state’s pervasive regulation of prescription drugs with abuse potential, and a centralized computer record-keeping system through which prescriptions, including patient identification, could be stored. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to “pose a sufficiently grievous threat to either interest to establish a constitutional violation.”

Lower court cases have raised substantial questions as to whether
this case established a “fundamental right” to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.\textsuperscript{660}

More than two decades after \textit{Whalen}, the Court remains ambivalent about whether such a privacy right exists. In its 2011 decision in \textit{NASA v. Nelson}, the Supreme Court unanimously ruled against 28 NASA workers who argued that the extensive background checks required to work at NASA facilities violated their constitutional privacy rights.\textsuperscript{661} In so doing, the Court assumed without deciding that a right to informational privacy could be protected by the Constitution and instead held that the right does not prevent the government from asking reasonable questions in light of the government’s interest as an employer and in light of the statutory protections that provide meaningful checks against unwarranted disclosures.\textsuperscript{662} As a result, the questions about the scope of the right to informational privacy suggested by \textit{Whalen} remain.

The Court has also briefly considered yet another aspect of privacy—the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In \textit{Stanley v. Georgia},\textsuperscript{663} the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual for possessing pornography in the privacy of the home would raise obvious First Amendment free speech and the Fourth Amendment search and seizure issues. In this case, however, the material was obscenity, unprotected by the First Amendment, and the police had a valid search warrant, obviating Fourth Amendment concerns.\textsuperscript{664} Nonetheless, the Court based its decision upon a person’s protected right to receive what information and ideas he wishes, which derives from the “right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,”\textsuperscript{665} and from the failure of the state to either justify protecting

\begin{itemize}
\item \textsuperscript{660} See, e.g., Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (“. . . we believe that the balancing test, more common to due process claims, is appropriate here.”).
\item \textsuperscript{661} See 562 U.S. 134 (2011).
\item \textsuperscript{662} Id. at 148–56.
\item \textsuperscript{663} 394 U.S. 557 (1969).
\item \textsuperscript{664} In fact, the Court passed over a subsidiary Fourth Amendment issue that was available for decision in favor of a broader resolution. 394 U.S. at 569–72. (Stewart, J., concurring).
\item \textsuperscript{665} 394 U.S. at 564–65.
\end{itemize}
an individual from himself or to show empirical proof of such activity harming society.\textsuperscript{666}

The potential significance of \textit{Stanley} was enormous, as any number of illegal personal activities, such as drug use or illegal sex acts, could arguably be practiced in the privacy of one's home with little apparent effect on others. \textit{Stanley}, however, was quickly restricted to the particular facts of the case, namely possession of obscenity in the home.\textsuperscript{667} In \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{668} which upheld the government's power to prevent the showing of obscene material in an adult theater, the Court recognized that governmental interests in regulating private conduct could include the promotion of individual character and public morality, and improvement of the quality of life and "tone" of society. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."\textsuperscript{669}

\textsuperscript{666} The rights noted by the Court were held superior to the interests Georgia asserted to override them. That is, first, the state was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the state's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.


\textsuperscript{668} 413 U.S. 49 (1973).

\textsuperscript{669} 413 U.S. at 64. Similar themes can be found in \textit{Roe v. Wade}, 410 U.S. 113, 148 (1972), decided the year before. Because the Court had determined that the right to obtain an abortion constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Departing from a \textit{laissez faire}, "free will" approach to individual autonomy, the Court recognized protecting the health of the mother as a valid interest. The Court also mentioned but did not rule upon a state interest in protecting morality. The Court was referring not to the morality of abortion, but instead to the promotion of sexual morality through making abortion unavailable. \textit{Roe v. Wade}, 410 U.S. 113, 148 (1972).
Furthermore, continued the Court in *Paris Adult Theatre I*, “[o]ur Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful.’ The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States’ right . . . to maintain a decent society.” 670

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. The limited impact of *Stanley* was reemphasized in *Bowers v. Hardwick*. 671 The Court in *Bowers*, finding that there is no protected right to engage in homosexual sodomy in the privacy of the home, held that *Stanley* did not implicitly create protection for “voluntary sexual conduct [in the home] between consenting adults.” 672 Instead, the Court found *Stanley* “firmly grounded in the First Amendment,” 673 and noted that extending the reasoning of that case to homosexual conduct would result in protecting all voluntary sexual conduct between consenting adults, including adultery, incest, and other sexual crimes. Although *Bowers* has since been overruled by *Lawrence v. Texas* 674 based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

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


672 478 U.S. at 195–96. Dissenting, Justice Blackmun challenged the Court’s characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that “the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution’s protection of privacy.” Id. at 207–08.


So, what of the expansion of the right to privacy under the rubric of personal autonomy? The Court speaking in Roe in 1973 made it clear that, despite the importance of its decision, the protection of personal autonomy was limited to a relatively narrow range of behavior. “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.”

Despite the limiting language of Roe, the concept of privacy still retained sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of Carey v. Population Services Int’l, recognition of the “constitutional protection of individual autonomy in matters of childbearing” led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16. The Court sig-
significantly extended the Griswold-Baird line of cases so as to make the “decision whether or not to beget or bear a child” a “constitutionally protected right of privacy” interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of Bowers v. Hardwick,\textsuperscript{678} where the Court by a 5–4 vote roundly rejected the suggestion that the privacy cases protecting “family, marriage, or procreation” extend protection to private consensual homosexual sodomy,\textsuperscript{679} and also rejected the more comprehensive claim that the privacy cases “stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription.”\textsuperscript{680} Heavy reliance was placed on the fact that prohibitions on sodomy have “ancient roots,” and on the fact that half of the states still prohibited the practice.\textsuperscript{681} The privacy of the home does not protect all behavior from state regulation, and the Court was “unwilling to start down [the] road” of immunizing “voluntary sexual conduct between consenting adults.”\textsuperscript{682} Interestingly, Justice Blackmun, in dissent, was portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.\textsuperscript{678} 478 U.S. 186 (1986). The Court’s opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.\textsuperscript{679} “[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.” 478 U.S. at 191–92.\textsuperscript{680} Justice White's opinion for the Court in Hardwick sounded the same opposition to “announcing rights not readily identifiable in the Constitution’s text” that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no “fundamental right [of] homosexuals to engage in acts of consensual sodomy,” as homosexual sodomy is neither a fundamental liberty “implicit in the concept of ordered liberty” nor is it “deeply rooted in this Nation’s history and tradition.” 478 U.S. at 191–92.\textsuperscript{681} 478 U.S. at 191–92. Chief Justice Burger’s brief concurring opinion amplified this theme, concluding that constitutional protection for “the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching.” Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.\textsuperscript{682} The Court voiced concern that “it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.” 478 U.S. at 195–96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.
most critical of the Court’s framing of the issue as one of homose-
sexual sodomy, as the sodomy statute at issue was not so lim-
ited.683

Yet, Lawrence v. Texas,684 by overruling Bowers, brought the outer
limits of noneconomic substantive due process into question by once
again using the language of “privacy” rights. Citing the line of per-
sonal autonomy cases starting with Griswold, the Court found that
sodomy laws directed at homosexuals “seek to control a personal
relationship that, whether or not entitled to formal recognition in
the law, is within the liberty of persons to choose without being pun-
ished as criminals. . . . When sexuality finds overt expression in
intimate conduct with another person, the conduct can be but one
element in a personal bond that is more enduring. The liberty pro-
tected by the Constitution allows homosexual persons the right to
make this choice.” 685

Although it quarreled with the Court’s finding in Bowers v.
Hardwick that the proscription against homosexual behavior had
“ancient roots,” Lawrence did not attempt to establish that such be-
behavior was in fact historically condoned. This raises the question
as to what limiting principles are available in evaluating future ar-
guments based on personal autonomy. Although the Court seems to
recognize that a state may have an interest in regulating personal
relationships where there is a threat of “injury to a person or abuse
of an institution the law protects,” 686 it also seems to reject reli-
ance on historical notions of morality as guides to what personal
relationships are to be protected. 687 Thus, the parameters for regu-
lation of sexual conduct remain unclear.

683 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes,
prohibits the practices regardless of the sex or marital status of the participants.
See id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the
earlier privacy cases clearly bar a state from prohibiting sodomy by married couples,
and that Georgia had not justified selective application to homosexuals. Id. at 219.
Justice Blackmun would instead have addressed the issue more broadly as to whether
the law violated an individual’s privacy right “to be let alone.” The privacy cases are
not limited to protection of the family and the right to procreation, he asserted, but
instead stand for the broader principle of individual autonomy and choice in mat-
ters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the major-
ity, however, which held that the thrust of the fundamental right of privacy in this
area is one functionally related to “family, marriage, or procreation.” 478 U.S. at
685 539 U.S. at 567.
686 539 U.S. at 567.
687 The Court noted with approval Justice Stevens’ dissenting opinion in Bow-
ers v. Hardwick, stating “that a governing majority in a State has traditionally viewed
a particular practice as immoral is not a sufficient reason for upholding a law pro-
hibiting the practice; neither history nor tradition could save a law prohibiting mis-
cegenation from constitutional attack.” 539 U.S. at 577–78, citing Bowers v. Hardwick,
478 U.S. at 216.
For instance, the extent to which the government may regulate the sexual activities of minors has not been established. Analysis of this question is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court’s observation in Roe v. Wade “that only personal rights that can be deemed ‘fundamental’ are included in this guarantee of personal privacy,” occasioning justification by a “compelling” interest, provides little elucidation.

Despite the Court’s decision in Lawrence, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of “privacy” or under the more limited “liberty” set out in Roe. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now settled to be a “liberty” protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

**Family Relationships.**—Starting with Meyer and Pierce, the Court has held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” For instance, the right to

688 The Court reserved this question in Carey, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.
690 In the same Term the Court significantly restricted its equal protection doctrine of “fundamental” interests—“compelling” interest justification by holding that the “key” to discovering whether an interest or a relationship is a “fundamental” one is not its social significance but is whether it is “explicitly or implicitly guaranteed by the Constitution.” San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. Compare Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), with id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).
marry is a fundamental right protected by the Due Process Clause, and only “reasonable regulations” of marriage may be imposed. Thus, the Court has held that a state may not deny the right to marry to someone who has failed to meet a child support obligation, as the state already has numerous other means for exacting compliance with support obligations. In fact, any regulation that affects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.

In 2015, in Obergefell v. Hodges, the Supreme Court clarified that the “right to marry” applies with “equal force” to same-sex couples, as it does to opposite-sex couples, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. In so holding, the Court recognized marriage as being an institution of “both continuity and change,” and, as a consequence, recent shifts in public attitudes respecting gay individuals and more specifically same-sex marriage necessarily informed the Court’s conceptualization of the right to marry. More broadly, the Obergefell Court recognized that the right to marry is grounded in four “principles and traditions.” These involve the concepts that (1) marriage (and choosing whom to marry) is inherent to individual autonomy protected by the Constitution; (2) marriage is fundamental to supporting a union of committed individuals; (3) marriage safeguards children and families; and (4) marriage is essential to the nation’s social order, because it is at the heart of many legal benefits. With this conceptualization of the right to marry in mind, the Court found no difference between same- and opposite-sex couples.


696 In Pavan v. Smith, the Court reviewed an Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child’s birth certificate, including when he is not the child’s genetic parent. 582 U.S. ___, No. 16–992, slip op. at 1 (2017). The lower court had interpreted the law to not require the state to extend the rule to similarly situated same-sex couples. Id. Relying on Obergefell, the Court struck down the law, noting that the “differential treatment” of the Arkansas rules “infringes Obergefell’s commitment to provide same-sex couples the constellation of benefits that the States have linked to marriage.” Id. (quoting Obergefell, slip op. at 17.)


698 See id. at 6–10.
opposite-sex couples with respect to any of the right's four central principles, concluding that a denial of marital recognition to same-sex couples ultimately “demean[ed]” and “stigma[tized]” those couples and any children resulting from such partnerships.\textsuperscript{700} Given this conclusion, the Court held that, while limiting marriage to opposite-sex couples may have once seemed “natural,” such a limitation was inconsistent with the right to marriage inherent in the “liberty” of the person as protected by the Fourteenth Amendment.\textsuperscript{701} The open question that remains respecting the substantive due process right to marriage post-\textit{Obergefell} is whether the right of marriage, as broadly envisioned by the Court in the 2015 case, can extend to protect and require state recognition of other committed, autonomous relationships, such as polyamorous relationships.\textsuperscript{702}

There is also a constitutional right to live together as a family,\textsuperscript{703} and this right is not limited to the nuclear family. Thus, a neighborhood that is zoned for single-family occupancy, and that defines “family” so as to prevent a grandmother from caring for two grandchildren of different children, was found to violate the Due Process Clause.\textsuperscript{704} And the concept of “family” may extend beyond the biological relationship to the situation of foster families, although the Court has acknowledged that such a claim raises complex and novel questions, and that the liberty interests may be lim-

\textsuperscript{700} See id. at 17.

\textsuperscript{701} See id. at 17–18. The Court also grounded its \textit{Obergefell} decision in the Equal Protection Clause of the Fourteenth Amendment. Id. at 19 (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.”). For a discussion of \textit{Obergefell}'s equal protection holding, see infra Fourteenth Amendment: Equal Protection of the Laws: The New Equal Protection: Sexual Orientation.

\textsuperscript{702} See, e.g., \textit{Obergefell}, slip op. at 20 (Roberts, C.J., dissenting) (“It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”); but see Joanna L. Grossman & Lawrence M. Friedman, \textit{Is Three Still a Crowd? Polygamy and the Law After Obergefell v. Hodges}, \textit{V

\textsuperscript{703} “If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little doubt that the State would have intruded impermissibly on ‘the private realm of family life which the state cannot enter.” Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Justice Stewart concurring), cited with approval in Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

\textsuperscript{704} Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id. at 513.
On the other hand, the Court has held that the presumption of legitimacy accorded to a child born to a married woman living with her husband is valid even to defeat the right of the child's biological father to establish paternity and visitation rights. The Court has merely touched upon but not dealt definitively with the complex and novel questions raised by possible conflicts between parental rights and children's rights. The Court has, however, imposed limits on the ability of a court to require that children be made available for visitation with grandparents and other third parties. In Troxel v. Granville, the Court evaluated a Washington State law that allowed “any person” to petition a court “at any time” to obtain visitation rights whenever visitation “may serve the best interests” of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the “fundamental rights of parents to make decisions concerning the care, custody and control of their children,” reversed this decision, noting the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

Liberty Interests of People with Mental Disabilities: Civil Commitment and Treatment.—The recognition of liberty rights for people with mental disabilities who are involuntarily committed or who voluntarily seek commitment to public institutions is

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705 Smith v. Organization of Foster Families, 431 U.S. 816 (1977). As the Court noted, the rights of a natural family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of state-ordered arrangement. As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the natural parents. Although Smith does not define the nature of the interest of foster parents, it would appear to be quite limited and attenuated. Id. at 842–47. In a conflict between natural and foster families, a court is likely to defer to a typical state process which makes such decisions based on the best interests of the child. See Quilloin v. Walcott, 434 U.S. 246 (1978).

706 Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court. A majority of Justices (Brennan, Marshall, Blackmun, Stevens, White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Scalia, Rehnquist, O'Connor, Kennedy) because he believed that the statute at issue adequately protected that interest.


709 530 U.S. at 66.
potentially a major development in substantive due process. The states, pursuant to their parens patriae power, have a substantial interest in institutionalizing persons in need of care, both for the protection of such people themselves and for the protection of others.\footnote{These principles have no application to persons not held in custody by the state. DeShaney v. Winnebago County Social Servs. Dept., 489 U.S. 189 (1989) (no due process violation for failure of state to protect an abused child from his parent, even when the social service agency had been notified of possible abuse, and possibility had been substantiated through visits by social worker).} A state, however, “cannot constitutionally confine without more a nondoner- ous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”\footnote{O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). See Jackson v. Indiana, 406 U.S. 715 (1972); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).} Moreover, a person who is constitutionally confined “enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.”\footnote{Youngberg v. Romeo, 457 U.S. 307, 324 (1982). Thus, personal security constitutes a “historic liberty interest” protected substantively by the due process clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Justice Powell concurring) (“Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions”).} Influential lower court decisions have also found a significant right to treatment\footnote{In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court had said that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” Reasoning that if commitment is for treatment and betterment of individuals, it must be accom- panied by adequate treatment, several lower courts recognized a due process right. E.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala), enforced, 334 F. Supp. 1341 (1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), aff'd in part, reserved in part, and remanded sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975).} or “habilitation,”\footnote{“The word ‘habilitation,’ . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills.” Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting amicus brief for American Psychiatric Association; ellipses and brackets supplied by the Court).} although the Supreme Court’s approach in this area has been tentative.

For instance, in Youngberg v. Romeo, the Court recognized a liberty right to “minimally adequate or reasonable training to ensure safety and freedom from undue restraint.”\footnote{Youngberg v. Romeo, 457 U.S. 307, 319 (1982).} Although the lower court had agreed that residents at a state mental hospital are entitled to “such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as...
effectively as their capacities permit.” 716 the Supreme Court found that the plaintiff had reduced his claim to “training related to safety and freedom from restraints.” 717 But the Court’s concern for federalism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts must defer to professional decision-making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed “only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” 718 Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures. 719

The Court’s resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In Kansas v. Hendricks, 720 the Court upheld a Kansas law that allowed civil commitment without a showing of “mental illness,” so that a defendant diagnosed as a pedophile could be committed based on his having a “mental abnormality” that made him “likely to engage in acts of sexual violence.” Although the Court minimized the use of this

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716 457 U.S. at 318 n.23.
717 457 U.S. at 317–18. Concurring, Justices Blackmun, Brennan, and O’Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with. Id. at 325. Chief Justice Burger rejected any protected interest in training. Id. at 329. The Court had also avoided a decision on a right to treatment in O’Connor v. Donaldson, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thereby depriving the decision of precedential value. Chief Justice Burger expressly rejected the right there also. Id. at 578. But just four days later the Court denied certiorari to another panel decision from the same circuit that had relied on the circuit’s Donaldson decision to establish such a right, leaving the principle alive in that circuit. Burnham v. Department of Public Health, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057 (1975). See also Allen v. Illinois, 478 U.S. 364, 373 (1986) (dictum that person civilly committed as “sexually dangerous person” might be entitled to protection under the self-incrimination clause if he could show that his confinement “is essentially identical to that imposed upon felons with no need for psychiatric care”).
718 457 U.S. at 323.
719 E.g., Ohlinger v. Watson, 652 F. 2d 775, 779 (9th Cir. 1980); Welsh v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. Cf. New York State Ass’n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). The Supreme Court has limited the injunctive powers of the federal courts in similar situations.
expanded nomenclature,\textsuperscript{721} the concept of “mental abnormality” appears both more encompassing and less defined than the concept of “mental illness.” It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders. A subsequent opinion does seem to narrow the \textit{Hendricks} holding so as to require an additional finding that the defendant would have difficulty controlling his or her behavior.\textsuperscript{722}

Still other issues await exploration.\textsuperscript{723} Additionally, federal legislation is becoming extensive,\textsuperscript{724} and state legislative and judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests that the Due Process Clause protects.\textsuperscript{725}

\textit{“Right to Die”}.—Although the popular term “right to die” has been used to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, “right to die” could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). Recently, a new category has been suggested—physician-assisted suicide—that appears to be an uncertain blend of assisted suicide or active euthanasia undertaken by a licensed physician.

There has been little litigation of constitutional issues surrounding suicide generally, although Supreme Court \textit{dicta} seems to favor the notion that the state has a constitutionally defensible interest

\textsuperscript{721} 521 U.S. at 359. \textit{But see} Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).


\textsuperscript{723} See Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974). In Mills v. Rogers, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the state’s highest court had measurably strengthened the patients’ rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision. \textit{See also} Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).


in preserving the lives of healthy citizens.\footnote{Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990) ("We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death").} On the other hand, the right of a seriously ill person to terminate life-sustaining medical treatment has been addressed, but not squarely faced. In \textit{Cruzan v. Director, Missouri Department of Health},\footnote{497 U.S. 261 (1990).} the Court, rather than directly addressing the issue, “assume[d]” that “a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition.”\footnote{497 U.S. at 279.} More importantly, however, a majority of the Justices separately declared that such a liberty interest exists.\footnote{\textit{See} 497 U.S. at 287 (O'Connor, concurring); id. at 304–05 (Brennan, joined by Marshall and Blackmun, dissenting); id. at 331 (Stevens, dissenting).} Yet, it is not clear how actively the Court would seek to protect this right from state regulation.

In \textit{Cruzan}, which involved a patient in a persistent vegetative state, the Court upheld a state requirement that there must be “clear and convincing evidence” of a patient’s previously manifested wishes before nutrition and hydration could be withdrawn. Despite the existence of a presumed due process right, the Court held that a state is not required to follow the judgment of the family, the guardian, or “anyone but the patient herself” in making this decision.\footnote{497 U.S. at 286.} Thus, in the absence of clear and convincing evidence that the patient had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration.\footnote{"A State is entitled to guard against potential abuses" that can occur if family members do not protect a patient’s best interests, and “may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and [instead] simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.” 497 U.S. at 281–82.} Despite the Court’s acceptance of such state requirements, the implications of the case are significant. First, the Court appears, without extensive analysis, to have adopted the position that refusing nutrition and hydration is the same as refusing other forms of medical treatment. Also, the Court seems ready to extend such right not only to terminally ill patients, but also to severely incapacitated patients whose condition has stabilized.\footnote{There was testimony that the patient in \textit{Cruzan} could be kept “alive” for about 30 years if nutrition and hydration were continued.} However, the Court
made clear in a subsequent case, Washington v. Glucksberg,733 that it intends to draw a line between withdrawal of medical treatment and more active forms of intervention.

In Glucksberg, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with “utmost care” before breaking new ground in the area of liberty interests.734 The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of Cruzan and other liberty interest cases,735 noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.736

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.737 Exactly what procedures are needed to satisfy due process, however, will vary depend-

733 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

734 521 U.S. at 720.


736 A passing reference by Justice O'Connor in a concurring opinion in Glucksberg and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or “palliative” care. Glucksberg and Vacco, 521 U.S. at 736–37 (Justice O'Connor, concurring).

737 Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).
ing on the circumstances and subject matter involved. A basic thresh-
old issue respecting whether due process is satisfied is whether the gov-
ernment conduct being examined is a part of a criminal or civil pro-
cceeding. The appropriate framework for assessing procedural
rules in the field of criminal law is determining whether the proce-
dure is offensive to the concept of fundamental fairness. In civil
contexts, however, a balancing test is used that evaluates the gov-
ernment’s chosen procedure with respect to the private interest af-
fected, the risk of erroneous deprivation of that interest under the
chosen procedure, and the government interest at stake.

Relevance of Historical Use.—The requirements of due pro-
cess are determined in part by an examination of the settled us-
ages and modes of proceedings of the common and statutory law of
England during pre-colonial times and in the early years of this coun-
try. In other words, the antiquity of a legal procedure is a factor
weighing in its favor. However, it does not follow that a procedure
settled in English law and adopted in this country is, or remains,
an essential element of due process of law. If that were so, the pro-
cedure of the first half of the seventeenth century would be “fas-
tened upon American jurisprudence like a strait jacket, only to be
unloosed by constitutional amendment.” Fortunately, the states
are not tied down by any provision of the Constitution to the prac-
tice and procedure that existed at the common law, but may avail
themselves of the wisdom gathered by the experience of the coun-
try to make changes deemed to be necessary.

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738 Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). “Due process of law is
[process which], following the forms of law, is appropriate to the case and just to
the parties affected. It must be pursued in the ordinary mode prescribed by law; it
must be adapted to the end to be attained; and whenever necessary to the protec-
tion of the parties, it must give them an opportunity to be heard respecting the jus-
tice of the judgment sought. Any legal proceeding enforced by public authority, whether
sanctioned by age or custom or newly devised in the discretion of the legislative
power, which regards and preserves these principles of liberty and justice, must be
held to be due process of law.” Id. at 708; Accord, Hurtado v. California, 110 U.S.
516, 537 (1884).


740 Id.

the Supreme Court held that the Mathews test controls when evaluating state pro-
cedures governing the continuing deprivation of property after a criminal conviction
has been reversed or vacated, with no prospect of re prosecution. See 581 U.S. ___,
No. 15–1256, slip op. at 6 (2017).

742 Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175
U.S. 172, 175 (1899). “A process of law, which is not otherwise forbidden, must be
taken to be due process of law, if it can show the sanction of settled usage both in
England and this country.” Hurtado v. California, 110 U.S. at 529.

743 Twining, 211 U.S. at 101.

744 Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175
U.S. 172, 175 (1899); Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 244 (1944).
Non-Judicial Proceedings.—A court proceeding is not a requisite of due process.\textsuperscript{745} Administrative and executive proceedings are not judicial, yet they may satisfy the Due Process Clause.\textsuperscript{746} Moreover, the Due Process Clause does not require \textit{de novo} judicial review of the factual conclusions of state regulatory agencies,\textsuperscript{747} and may not require judicial review at all.\textsuperscript{748} Nor does the Fourteenth Amendment prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.\textsuperscript{749} Further, it is up to a state to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.\textsuperscript{750}

The Requirements of Due Process.—Although due process tolerates variances in procedure "appropriate to the nature of the case,"\textsuperscript{751} it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."\textsuperscript{752} Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.\textsuperscript{753} The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an op-
portunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” 754 This may include an obligation, upon learning that an attempt at notice has failed, to take “reasonable followup measures” that may be available. 755 In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. 756 Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. 757 Such notice, however, need not describe the legal procedures necessary to protect one’s interest if such procedures are otherwise set out in published, generally available public sources. 758

(2) Hearing. “[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest.” 759 This right is a “basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . .” 760 Thus, the notice of hearing and the opportuni...
nity to be heard “must be granted at a meaningful time and in a meaningful manner.”

(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases, an impartial decisionmaker is an essential right in civil proceedings as well. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board’s effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.

There is, however, a “presumption of honesty and integrity in those serving as adjudicators,” so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician’s suspension, may raise substantial concerns, but does not by itself establish a violation of due process. The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who

765 Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others’ investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
767 Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248-50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But “traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.” Id. at 249.
had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.\textsuperscript{768} Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In \textit{Caperton v. A. T. Massey Coal Co., Inc.}, the Court noted that “most matters relating to judicial disqualification [do] not rise to a constitutional level,” and that “matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.”\textsuperscript{769} The Court added, however, that “[t]he early and leading case on the subject” had “concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has ‘a direct, personal, substantial, pecuniary interest’ in a case.”\textsuperscript{770} In addition, although “[p]ersonal bias or prejudice ‘alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,’” there “are circumstances ‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”\textsuperscript{771} These circumstances include “where a judge had a financial interest in the outcome of a case” or “a conflict arising from his participation in an earlier proceeding.”\textsuperscript{772} In such cases, “[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”\textsuperscript{773} In \textit{Caperton}, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when “[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice.”\textsuperscript{774} This $3 million was more than the total amount spent by all other supporters of the justice and three times the amount spent by the justice’s own committee. The justice was elected, declined to recuse himself, and joined a 3-to-2 decision overturning the jury verdict. The Supreme Court, in a 5-to-4 opinion written by Justice Kennedy, “conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportion-


\textsuperscript{769} 556 U.S. ___, No. 08–22, slip op. at 6 (2009) (citations omitted).

\textsuperscript{770} 556 U.S. ___, No. 08–22, slip op. at 6, quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927).

\textsuperscript{771} 556 U.S. ___, No. 08–22, slip op. at 6 (citations omitted).

\textsuperscript{772} 556 U.S. ___, No. 08–22, slip op. at 7. 9.

\textsuperscript{773} 556 U.S. ___, No. 08–22, slip op. at 11 (citations omitted).

\textsuperscript{774} 556 U.S. ___, No. 08–22, slip op. at 15.
ate influence in placing the judge on the case by raising funds or
directing the judge’s election campaign when the case was pending
or imminent.”  

Subsequently, in Williams v. Pennsylvania, the Court found that
the right of due process was violated when a judge on the Pennsyl-
vania Supreme Court—who participated in case denying post-
conviction relief to a prisoner convicted of first-degree murder and
sentenced to death—had, in his former role as a district attorney,
given approval to seek the death penalty in the prisoner’s case.
Relying on Caperton, which the Court viewed as having set forth an
“objective standard” that requires recusal when the likelihood
of bias on the part of the judge is “too high to be constitutionally
tolerable,” the Williams Court specifically held that there is an
impermissible risk of actual bias when a judge had previously had
a “significant, personal involvement as a prosecutor in a critical de-
cision regarding the defendant’s case.” The Court based its hold-
ing, in part, on earlier cases which had found impermissible bias
occurs when the same person serves as both “accuser” and “adjudi-
cator” in a case, which the Court viewed as having happened in
Williams. It also reasoned that authorizing another person to seek
the death penalty represents “significant personal involvement” in
a case, and took the view that the involvement of multiple ac-
tors in a case over many years “only heightens”—rather than miti-
gates—the “need for objective rules preventing the operation of bias
that otherwise might be obscured.” As a remedy, the case was
remanded for reevaluation by the reconstituted Pennsylvania Su-
preme Court, notwithstanding the fact that the judge in question

775 556 U.S. ___, No. 08–22, slip op. at 14. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, asserting that “a ‘probability of bias’ cannot be defined in any limited way,” “provides no guidance to judges and litigants about when recusal will be constitutionally required,” and “will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.” Slip. op. at 1 (Roberts, C.J., dissenting). The majority countered that “[t]he facts now before us are extreme in any measure.” Slip op. at 17.  

776 579 U.S. ___, No. 15–5040, slip op. at 1 (2016).  

777 Id. (internal quotations omitted).  

778 Id. at 5–6.  

779 Id. at 6 (citing In re Murchison, 349 U.S. 133, 136–37 (1955)). The Court also noted that “[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision.” Id. at 7.  

780 Id. at 9. See also id. at 10 (noting that the judge in this case had highlighted the number of capital cases in which he participated when campaigning for judicial office).  

781 Id. at 8.
sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error. 782

(4) Confrontation and Cross-Examination. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” 783 Where the “evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy,” the individual’s right to show that it is untrue depends on the rights of confrontation and cross-examination. “This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.” 784

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in dictum that “where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.” 785 Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so. 786 There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization. 787

(6) Decision on the Record. Although this issue arises principally in the administrative law area, 788 it applies generally. “[T]he

782 Id. at 12–13. Likewise, the Court rejected the argument that remanding the case would not cure the underlying due process violation because the disqualified judge’s views might still influence his former colleagues, as an “inability to guarantee complete relief for a constitutional violation . . . does not justify withholding a remedy altogether.” Id. at 14.


787 FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

788 The exclusiveness of the record is fundamental in administrative law. See § 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d). However, one must show not only that the agency used ex parte evidence but that he was prejudiced thereby. Market Street R.R. v. Railroad Comm’n, 324 U.S. 548 (1945) (agency deci-
decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”

(7) Counsel. In Goldberg v. Kelly, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel. In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established a presumption that an indigent does not have the right to appointed counsel unless his “physical liberty” is threatened. Moreover, that an indigent may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court focuses on the circumstances in individual cases, and may hold that provision of counsel is not required if the state provides appropriate alternative safeguards.

Though the calculus may vary, cases not involving detention also are determined on a case-by-case basis using a balancing standard.

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791 Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no per se right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first Eldridge factor is diminished. The Court noted, however, that the Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. C.f. 424 U.S. at 344 (1976).
792 Turner v. Rogers, 564 U.S. ___, No. 10–10, slip op. (2011). The Turner Court denied an indigent defendant appointed counsel in a civil contempt proceeding to enforce a child support order, even though the defendant faced incarceration unless he showed an inability to pay the arrearages. The party opposing the defendant in the case was not the state, but rather the unrepresented custodial parent, nor was the case unusually complex. A five-Justice majority, though denying a right to counsel, nevertheless reversed the contempt order because it found that the procedures followed remained inadequate.
793 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32
For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent’s interest as “an extremely important one.” The Court, however, also noted the state’s strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no “specially troublesome” substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.\textsuperscript{794} In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.\textsuperscript{795} Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure That Is Due Process

\textit{The Interests Protected: “Life, Liberty and Property”}.— The language of the Fourteenth Amendment requires the provision of due process when an interest in one’s “life, liberty or property” is threatened.\textsuperscript{796} Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.\textsuperscript{797} In the 1960s, however, the Court began a rapid expansion of the “liberty” and “property” aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The “life” inter-

\textsuperscript{794} 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.


\textsuperscript{796} Morrissey v. Brewer, 408 U.S. 471, 481 (1982). “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.” Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment’s Due Process Clause have been interchangeable. Cf. Arnett v. Kennedy, 416 U.S. 134 (1974).

\textsuperscript{797} For instance, at common law, one’s right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One’s liberty, generally expressed as one’s freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One’s ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.
est, on the other hand, although often important in criminal cases, has found little application in the civil context.

The Property Interest.—The expansion of the concept of “property rights” beyond its common law roots reflected a recognition by the Court that certain interests that fall short of traditional property rights are nonetheless important parts of people’s economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession could occur.\(^798\) In addition, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail.\(^799\) Furthermore, the continued possession of a driver’s license, which may be essential to one’s livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.\(^800\)

A more fundamental shift in the concept of property occurred with recognition of society’s growing economic reliance on government benefits, employment, and contracts,\(^801\) and with the decline of the “right-privilege” principle. This principle, discussed previously in the First Amendment context,\(^802\) was pithily summarized by Justice Holmes in dismissing a suit by a policeman protesting being fired from his job: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”\(^803\) Under this theory, a finding that a litigant had no “vested property interest” in government employment,\(^804\) or that some form of public assistance was “only” a privilege,\(^805\) meant that no proce-
dural due process was required before depriving a person of that interest. The reasoning was that, if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or procedures it found appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the “unconstitutional conditions” doctrine, held that, “even though a person has no ‘right’ to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when the right-privilege distinction started to be largely disregarded.

Concurrently with the virtual demise of the “right-privilege” distinction, there arose the “entitlement” doctrine, under which the Court erected a barrier of procedural—but not substantive—protections against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and “natural rights.” Now, under a new “positivist” approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental practice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in Goldberg v. Kelly, in which the Court held that, because termination of welfare assistance may deprive an eligible recipient of

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the means of livelihood, the government must provide a pre-
termination evidentiary hearing at which an initial determination
of the validity of the dispensing agency’s grounds for termination
may be made. In order to reach this conclusion, the Court found
that such benefits “are a matter of statutory entitlement for per-
sons qualified to receive them.”
Thus, where the loss or reduc-
tion of a benefit or privilege was conditioned upon specified grounds,
it was found that the recipient had a property interest entitling him
to proper procedure before termination or revocation.

At first, the Court’s emphasis on the importance of the statu-
tory rights to the claimant led some lower courts to apply the Due
Process Clause by assessing the weights of the interests involved
and the harm done to one who lost what he was claiming. This ap-
proach, the Court held, was inappropriate. “[W]e must look not to
the ‘weight’ but to the nature of the interest at stake. . . . We must
look to see if the interest is within the Fourteenth Amendment’s
protection of liberty and property.”

To have a property interest
in the constitutional sense, the Court held, it was not enough that
one has an abstract need or desire for a benefit or a unilateral ex-
pectation. He must rather “have a legitimate claim of entitlement”
to the benefit. “Property interests, of course, are not created by the
Constitution. Rather, they are created and their dimensions are de-
fined by existing rules or understandings that stem from an inde-
pendent source such as state law—rules or understandings that se-
cure certain benefits and that support claims of entitlement to those
benefits.”

Consequently, in Board of Regents v. Roth, the Court held that
the refusal to renew a teacher’s contract upon expiration of his one-
year term implicated no due process values because there was noth-
ing in the public university’s contract, regulations, or policies that
“created any legitimate claim” to reemployment. By contrast, in

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813 408 U.S. at 577. Although property interests often arise by statute, the Court
has also recognized interests established by state case law. Thus, where state court
holdings required that private utilities terminate service only for cause (such as non-
payment of charges), then a utility is required to follow procedures to resolve dis-
putes about payment or the accuracy of charges prior to terminating service. Mem-
814 436 U.S. at 576–78. The Court also held that no liberty interest was impli-
cated, because in declining to rehire Roth the state had not made any charges against
him or taken any actions that would damage his reputation or stigmatize him. 436
at 572–75. For an instance of protection accorded a claimant on the basis of such an
action, see Codd v. Veggel. See also Bishop v. Wood, 426 U.S. 341, 347–50 (1976);
78, 82–84 (1978).
Perry v. Sindermann,\(^{815}\) a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.\(^{816}\) The “existing rules or understandings” were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.\(^{817}\)

The Court has also found “legitimate entitlements” in a variety of other situations besides employment. In Goss v. Lopez,\(^{818}\) an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the state was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. “Having chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.”\(^{819}\) The Court is highly deferential, however, to school dismissal decisions based on academic grounds.\(^{820}\)


\(^{816}\) 408 U.S. at 601–03 (1972). In contrast, a statutory assurance was found in Arnett v. Kennedy, 416 U.S. 134 (1974), where the civil service laws and regulations allowed suspension or termination “only for such cause as would promote the efficiency of the service.” 416 U.S. at 140. On the other hand, a policeman who was a “permanent employee” under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the Due Process Clause because the federal district court interpreted the ordinance as providing only employment at the will and pleasure of the city, an interpretation that the Supreme Court chose not to disturb. Bishop v. Wood, 426 U.S. 341 (1976). “On its face,” the Court noted, “the ordinance on which [claimant relied] may fairly be read as conferring” both “a property interest in employment . . . [and] an enforceable expectation of continued public employment.” 426 U.S. at 344–45 (1976). The district court’s decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. 426 U.S. at 345 (1976).

\(^{817}\) 408 U.S. at 601.


\(^{820}\) Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court “assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment” in a state university, this limited constitutional right is violated only by a showing that dismissal resulted from “such a sub-
The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*, the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes. Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.

In *Arnett v. Kennedy*, an incipient counter-revolution to the expansion of due process was rebuffed, at least with respect to entitlements. Three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law that provided that employees could not be discharged except for cause, and the Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, observed that the same law specifically withheld the procedural protections now being sought by the employees. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest," the employee would have to "take the bitter with the sweet." Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required.

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821 545 U.S. 748 (2005).
822 545 U.S. at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminacy is not the "hallmark of a duty that is mandatory." Id. at 763.
823 545 U.S. at 764-65.
825 416 U.S. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).
826 416 U.S. at 154.
But the other six Justices, although disagreeing among themselves in other respects, rejected this attempt to formulate the issue. “This view misconceives the origin of the right to procedural due process,” Justice Powell wrote. “That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”

Yet, in Bishop v. Wood, the Court accepted a district court’s finding that a policeman held his position “at will” despite language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice Arnett position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in Arnett. And, in Goss v. Lopez, Justice Powell, writing in dissent but using language quite similar to that of Justice Rehnquist in Arnett, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principal to impose a ten-day suspension.

Subsequently, however, the Court held squarely that, because “minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action.” Indeed, any other conclusion would allow the state to destroy virtually any state-created property interest at will. A striking application of this analysis is found in Logan v. Zimmerman Brush Co., in which a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint.

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828 426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in Arnett. See id. at 350, 353 n.4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. But see id. at 345, 347.
830 419 U.S. at 584, 586–87 (Justice Powell dissenting).
832 455 U.S. 422 (1982).
Court noted that various older cases had clearly established that causes of action were property, and, in any event, Logan’s claim was an entitlement grounded in state law and thus could only be removed “for cause.” This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.\footnote{455 U.S. at 428–33 A different majority of the Court also found an equal protection denial. 455 U.S. at 438.}

**The Liberty Interest.**—With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not.\footnote{These procedural liberty interests should not, however, be confused with substantive liberty interests, which, if not outweighed by a sufficient governmental interest, may not be intruded upon regardless of the process followed. See “Fundamental Rights (Noneconomic Due Process),” supra.} Thus, in *Ingraham v. Wright*,\footnote{430 U.S. 651 (1977).} the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. “The liberty preserved from deprivation without due process included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’ . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”\footnote{430 U.S. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. See Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). See also Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).}

The Court also appeared to have expanded the notion of “liberty” to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process.\footnote{Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975).} Thus, in *Wisconsin v. Constantineau*,\footnote{400 U.S. 433 (1971).} the Court invalidated a statutory scheme in which persons could be labeled “excessive drinkers,” without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted
that the governmental action impugned the individual’s reputation, honor, and integrity.\textsuperscript{839}

But, in \textit{Paul v. Davis},\textsuperscript{840} the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one’s reputation also resulted in loss of a statutory entitlement. In \textit{Davis}, the police had included plaintiff’s photograph and name on a list of “active shoplifters” circulated to merchants without an opportunity for notice or hearing. But the Court held that “Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners’ actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions.”\textsuperscript{841} Thus, unless the government’s official defamation has a specific negative effect on an entitlement, such as the denial to “excessive drinkers” of the right to obtain alcohol that occurred in \textit{Constantineau}, there is no protected liberty interest that would require due process.

A number of liberty interest cases that involve statutorily created entitlements involve prisoner rights, and are dealt with more extensively in the section on criminal due process. However, they are worth noting here. In \textit{Meachum v. Fano},\textsuperscript{842} the Court held that a state prisoner was not entitled to a fact-finding hearing when he was transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the Due Process Clause liberty interest by itself was satisfied by the initial valid conviction, which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner

\textsuperscript{839} But see Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) (posting of accurate information regarding sex offenders on state Internet website does not violate due process as the site does not purport to label the offenders as presently dangerous).

\textsuperscript{840} 424 U.S. 693 (1976).

\textsuperscript{841} Here the Court, 424 U.S. at 701–10, distinguished \textit{Constantineau} as being a “reputation-plus” case. That is, it involved not only the stigmatizing of one posted but it also “deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry.” 424 U.S. at 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. See discussion below. See also Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a later case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craff, 436 U.S. 1, 9–12 (1978).

could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

In *Vitek v. Jones*, by contrast, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner “suffers from a mental disease or defect” and “cannot be given treatment in that facility.” Because the transfer was conditioned upon a “cause,” the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the *Vitek* Court also held that the prisoner had a “residuum of liberty” in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the Due Process Clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation, a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But, with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures. Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain “substantive predicates” limiting the exercise of discretion, and there must be explicit “mandatory language” requiring a particular outcome if substantive predicates are found. In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the state creates an “atypical and significant hardship.”

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846 Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain “substantive predicates” but lack mandatory language).
Proceedings in Which Procedural Due Process Need Not Be Observed.—Although due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries, there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation. On the other hand, if a regulation, sometimes denominated an “order,” is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action, becomes a matter of greater urgency and must be determined by evaluating the various factors discussed below.

One such factor is whether agency action is subject to later judicial scrutiny. In one of the initial decisions construing the Due

851 410 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). See Londoner v. City of Denver, 210 U.S. 373 (1908).
852 “It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding: Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process.” Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).
Process Clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector’s property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable. 853

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable. 854

It is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered. 855 With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be remitted to other actions initiated by him 856 or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursu-

854 Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).
ing the wrong procedure in the state courts.\textsuperscript{857} On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.\textsuperscript{858}

**What Process Is Due.**—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.\textsuperscript{859} The currently prevailing standard is that formulated in *Mathews v. Eldridge*,\textsuperscript{860} which concerned termination of Social Security benefits. “Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”

The termination of welfare benefits in *Goldberg v. Kelly*,\textsuperscript{861} which could have resulted in a “devastating” loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in *Mathews* would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-


\textsuperscript{858} Saunders v. Shaw, 244 U.S. 317 (1917).

\textsuperscript{859} The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’ . . . and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.” Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894–95 (1961).

\textsuperscript{860} 424 U.S. 319, 335 (1976).

\textsuperscript{861} 397 U.S. 254, 264 (1970).
termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.862

Application of the Mathews standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. “The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.”863

Thus, Sniadach v. Family Finance Corp.,864 which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.865 Fuentes v. Shevin,866 which struck down a replevin statute that authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an ex parte application and the posting of bond, has been limited,867 so that an appropriately structured ex parte judicial determination before seizure is sufficient to satisfy due process.868 Thus,

867 Fuentes was an extension of the Sniadach principle to all “significant property interests” and thus mandated pre-deprivation hearings. Fuentes was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court, hence neither participated in the decision. See Di-Chem, 419 U.S. at 616–19 (Justice Blackmun dissenting); Mitchell, 416 U.S. at 635–36 (1974) (Justice Stewart dissenting).
laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor’s interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.869

Similarly, applying the Mathews v. Eldridge standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.870 Where the adverse action is less

Mathews v. Eldridge formula in holding that Connecticut’s prejudgment attachment statute, which “failed to provide a preattatchment hearing without at least requiring a showing of some exigent circumstance,” operated to deny equal protection. Connecticut v. Doehr, 901 U.S. 1, 18 (1991). “[T]he relevant inquiry requires, as in Mathews, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.” 501 U.S. at 11.


870 Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and 416 U.S. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. See also FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking
than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.\textsuperscript{871} In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.\textsuperscript{872} In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.\textsuperscript{873}

In \textit{Brock v. Roadway Express, Inc.},\textsuperscript{874} a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a “whistle-blower” employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee’s charges, and to have an opportunity for informal rebuttal. The principal difference with the \textit{Mathews v. Eldridge} test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer “in controlling the makeup of its workforce” and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.\textsuperscript{875}

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In \textit{City of Los Angeles v. David},\textsuperscript{876} a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as

\textsuperscript{871}Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

\textsuperscript{872}\textit{E.g.}, Dixon v. Love, 451 U.S. 105 (1977) (when suspension of driver’s license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).


\textsuperscript{874}451 U.S. 252 (1987). Justice Marshall’s plurality opinion was joined by Justices Blackmun, Powell, and O’Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White’s opinion taking a somewhat narrower view of due process requirements but supporting the plurality’s general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.


\textsuperscript{876}538 U.S. 715 (2003).
the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

In another context, the Supreme Court applied the Mathews test to strike down a provision in Colorado’s Exoneration Act. That statute required individuals whose criminal convictions had been invalidated to prove their innocence by clear and convincing evidence in order to recoup any fines, penalties, court costs, or restitution paid to the state as a result of the conviction. The Court, noting that “[a]bsent conviction of crime, one is presumed innocent,” concluded that all three considerations under Mathews “weigh[ed] decisively against Colorado’s scheme.” Specifically, the Court reasoned that (1) those affected by the Colorado statute have an “obvious interest” in regaining their funds; (2) the burden of proving one’s innocence by “clear and convincing” evidence unacceptably risked erroneous deprivation of those funds; and (3) the state had “no countervailing interests” in withholding money to which it had “zero claim of right.” As a result, the Court held that the state could not impose “anything more than minimal procedures”
for the return of funds that occurred as a result of a conviction that was subsequently invalidated.\textsuperscript{884}

In another respect, the balancing standard of \textit{Mathews} has resulted in states' having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.\textsuperscript{885} Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively.\textsuperscript{886} The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.\textsuperscript{887}

The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and unauthorized acts of state employees,\textsuperscript{888} and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is "the state system itself that destroys a complainant's property interest." \textsuperscript{889} Although the Court briefly entertained the theory that a negligent (i.e., non-willful) action by a state official was sufficient to invoke due process, and that a post-
deprivation hearing regarding such loss was required.\textsuperscript{890} The Court subsequently overruled this holding, stating that “the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.”\textsuperscript{891}

In “rare and extraordinary situations,” where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing.\textsuperscript{892} Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer,\textsuperscript{893} collection of governmental revenues,\textsuperscript{894} and the seizure of enemy property in wartime.\textsuperscript{895} Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.\textsuperscript{896} On the one hand, the Court was ambivalent about a right-privilege distinction;\textsuperscript{897} on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire’s other

\textsuperscript{890} More expressly adopting the tort remedy theory, the Court in Parratt v. Taylor, 451 U.S. 527 (1981), held that the loss of a prisoner’s mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the state’s post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the state can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the Due Process Clause is satisfied by the provision of a judicial remedy which the claimant must initiate. 451 U.S. at 541, 543–44. It should be noted that Parratt was a property loss case, and thus may be distinguished from liberty cases, where a tort remedy, by itself, may not be adequate process. See Ingraham v. Wright, 430 U.S. at 680–82.

\textsuperscript{891} Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials). Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor § 1983 provides a federal remedy.


\textsuperscript{893} Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

\textsuperscript{894} Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1919).


premises—with the government’s interest in conducting a high-security program.898

Jurisdiction

Generally.—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process Clause limits the abilities of states to exercise this power.899 In the famous case of Pennoyer v. Neff,900 the Court enunciated two principles of jurisdiction respecting the states in a federal system901: first, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and second, “no State can exercise direct jurisdiction and authority over persons or property without its territory.”902 Over a long period of

899 Scott v. McNeal, 154 U.S. 34, 64 (1894).
900 95 U.S. 714 (1878).
901 Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 252–62, the constitutional basis for them was deemed to be in the Due Process Clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The Due Process Clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled use of this constitutional foundation. Pennoyer denied full faith and credit to the judgment because the state lacked jurisdiction.
902 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in Pennoyer and modified over the years is two-fold: a concern for “fair play and substantial justice” involved in requiring defendants to litigate cases against them far from their “home” or place of business. International Shoe Co. v. Washington, 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, “also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. “[T]he Due Process Clause ‘does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.’ . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
time, however, the mobility of American society and the increasing complexity of commerce led to attenuation of the second principle of Pennoyer, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a state.903 This “minimum contacts” test, consequently, permits state courts to obtain power over out-of-state defendants.

In Personam Proceedings Against Individuals.—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered in personam, and jurisdiction must be established over the defendant’s person in order to render an effective decree.904 Generally, presence within the state is sufficient to create personal jurisdiction over an individual, if process is served.905 In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the state.906 However, if the defendant, although technically domiciled there, has left the state with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, because it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.907

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in

903 International Shoe Co. v. Washington, 326 U.S. 310 (1945)). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), “[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called “transient” rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court’s dicta appeared to assume it is not.


907 McDonald v. Mabee, 243 U.S. 90 (1917).
which he neither appeared nor was served or effectively made a party. 908 The early cases held that the process of a court of one state could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment. 909 This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power, 910 and even a special appearance to deny jurisdiction might be treated as consensual submission to the court. 911 The concept of "constructive consent" was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued. 912

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the state's power to regulate acts done in the state that were danger-

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911 State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the court proceedings and he loses, it is within the power of a state to require that he submit to the jurisdiction of the court to determine the merits. Yorke v. Texas, 137 U.S. 15 (1890); Kauffman v. Wooters, 138 U.S. 285 (1891); Western Life Indemnity Co. v. Rupp, 255 U.S. 261 (1914).

ous to life or property. Because the state did not really have the ability to prevent nonresidents from doing business in their state, this extension was necessary in order to permit states to assume jurisdiction over individuals “doing business” within the state. Thus, the Court soon recognized that “doing business” within a state was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the state on an agent appointed to carry out the business.

The culmination of this trend, established in *International Shoe Co. v. Washington*, was the requirement that there be “minimum contacts” with the state in question in order to establish jurisdiction. The outer limit of this test is illustrated by *Kulko v. Superior Court*, in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the state was to send his daughter to live with her mother in California. The argument was made that the father had “caused an effect” in the state by availing himself of the benefits and protections of California’s laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, “[i]ke any standard that requires a determination of ‘reasonableness,’ the ‘minimum contacts’ test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present.” Although the Court noted that the “effects” test had been accepted as a test of contacts when wrongful activity outside a state causes injury within the state or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California. As with many such cases, the decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

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916 326 U.S. 310, 316 (1945).
917 436 U.S. 84 (1978).
918 Kulko had visited the state twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.
919 436 U.S. at 92.
920 436 U.S. at 96–98.
Walden v. Fiore further articulated what “minimum contacts” are necessary to create jurisdiction as a result of the relationship between the defendant, the forum, and the litigation. In Walden, the plaintiffs, who were residents of Nevada, sued a law enforcement officer in federal court in Nevada as a result of an incident that occurred in an airport in Atlanta as the plaintiffs were attempting to board a connecting flight from Puerto Rico to Las Vegas. The Court held that the court in Nevada lacked jurisdiction because of insufficient contacts between the officer and the state relative to the alleged harm, as no part of the officer’s conduct occurred in Nevada. In so holding, the Court emphasized that the minimum contacts inquiry should not focus on the resulting injury to the plaintiffs; instead, the proper question is whether the defendant’s conduct connects him to the forum in a meaningful way.

Suing Out-of-State (Foreign) Corporations.—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the state chartering it. Thus, the basis for state court jurisdiction over an out-of-state (“foreign”) corporation has been even more uncertain than that with respect to individuals. Before International Shoe Co. v. Washington, it was asserted that, because a corporation could not carry on business in a state without the state’s permission, the state could condition its permission upon the corporation’s consent to submit to the jurisdiction of the state’s courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the state. Further, by doing business in a state, the corporation was deemed to be present there and thus subject to service of process and suit. This theoretical corporate presence conflicted with the idea of corporations having no existence outside their state of incorporation, but it was nonetheless accepted that a corporation “doing business”

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921 571 U.S. ___, No. 12–574, slip op. (2014). This type of “jurisdiction” is often referred to as “specific jurisdiction.”
922 Id. at 6–8.
924 326 U.S. 310 (1945).
926 Presence was first independently used to sustain jurisdiction in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), although the possibility was suggested as early as St. Clair v. Cox, 106 U.S. 350 (1882). See also Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).
in a state to a sufficient degree was “present” for service of process upon its agents in the state who carried out that business.927

Presence alone, however, does not expose a corporation to all manner of suits through the exercise of general jurisdiction. Only corporations, whose “continuous and systematic” affiliations with a forum make them “essentially at home” there, are broadly amenable to suit.928 While the paradigmatic examples of where a corporate defendant is “at home” are the corporation’s place of incorporation and principal place of business,929 the Court has recognized that in “exceptional cases” general jurisdiction can be exercised by a court located where the corporate defendant’s operations are “so substantial” as to “render the corporation at home in that state.”930 Nonetheless, insubstantial in-state business, in and of itself, does not suffice to permit an assertion of jurisdiction over claims that are unrelated to any activity occurring in a state.931 Without the protection of such a rule, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any state in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.932 And if the corporation stopped doing business in the forum state before suit against it was

929 Id. at 18–19.
930 Id. at 20 n. 19. For example, the Court held that an Ohio court could exercise general jurisdiction over a defendant corporation that was forced to relocate temporarily from the Philippines to Ohio, making Ohio the “center” of the corporation’s activities. See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952).
931 See BNSF R.R. Co. v. Tyrrell, 581 U.S. ___, No. 16–405, slip op. at 11–12 (2017) (holding that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not “so substantial” as to render the corporation “at home” in the state).
commenced, it might well escape jurisdiction altogether.\textsuperscript{933} In early cases, the issue of the degree of activity and, in particular, the degree of solicitation that was necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.\textsuperscript{934} In the absence of enough activity to constitute doing business, the mere presence of an agent, officer, or stockholder, who could be served, within a state’s territorial limits was not sufficient to enable the state to exercise jurisdiction over the foreign corporation.\textsuperscript{935}

The touchstone in jurisdiction cases was recast by \textit{International Shoe Co. v. Washington} and its “minimum contacts” analysis.\textsuperscript{936} \textit{International Shoe}, an out-of-state corporation, had not been issued a license to do business in the State of Washington, but it systematically and continuously employed a sales force of Washington residents to solicit therein and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. The Court deemed a notice of assessment served personally upon one of the local sales solicitors, and a copy of the assessment sent by registered mail to the corporation’s principal office in Missouri, sufficient to apprise the corporation of the proceeding.

To reach this conclusion, the Court not only overturned prior holdings that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a state’s jurisdiction,\textsuperscript{937} but also rejected the “presence” test as begging the question to be decided. “The terms ‘present’ or ‘presence,’” according to Chief Justice Stone, “are used merely to symbolize those activities of the corporation’s agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those


\textsuperscript{934} Solicitation of business alone was inadequate to constitute “doing business,” \textit{Green}, 205 U.S. at 534, but when connected with other activities could suffice to confer jurisdiction. \textit{Int’l Harvester Co. v. Kentucky}, 234 U.S. 579 (1914). \textit{Hutchinson v. Chase & Gilbert}, 45 F.2d 139, 141–42 (2d Cir. 1930) (Hand, J., providing survey of cases).


\textsuperscript{936} 326 U.S. 310 (1945).

\textsuperscript{937} This departure was recognized by Justice Rutledge subsequently in \textit{Nippert v. City of Richmond}, 327 U.S. 416, 422 (1946). Because \textit{International Shoe}, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have used \textit{International Harvester Co. v. Kentucky}, 234 U.S. 579 (1914), to find it was “present” in the state.
demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’. . . . An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”

As to the scope of application to be accorded this “fair play and substantial justice” doctrine, the Court concluded that “so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the state could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever. The Due Process Clause was declared not to “forbid a State to protect its citizens from such injustice” of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.

Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had

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939 326 U.S. at 319.
940 Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950). The decision was 5-to-4 with one of the majority Justices also contributing a concurring opinion. Id. at 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id. at 647–48, that a state's legislative jurisdiction and its judicial jurisdiction are coextensive. Id. at 652–53 (distinguishing between the use of the state's judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). See id. at 659 (dissent).
941 339 U.S. at 647–49. The holding in Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum state and that the circumstances under which its contracts with forum state citizens, executed and to be performed in its state of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum state, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, Benn could not have survived McGee v. International Life Ins. Co., 355 U.S. 220 (1957), below.
authorized the petitioner to serve a Texas insurer by registered mail only. The contract between the company and the insured specified that Austin, Texas, was the place of “making” and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the state and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. “The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.”

In making this decision, the Court noted that “[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.” However, in *Hanson v. Denckla*, decided during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International Shoe Co. v. Washington*, pronouncing firm due process limitations. In *Hanson*, the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of dis-

943 355 U.S. at 223. The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer. See also Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of *International Shoe* that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum state, as well as to state, in *dictum*, that the mere presence of a corporate official within the state on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the state. 342 U.S. at 444–45. The Court held that the state could, but was not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum state, including directors’ meetings, business correspondence, banking, and the like, although it owned no mining properties in the state.

944 McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). An exception exists with respect to *in personam* jurisdiction in domestic relations cases, at least in some instances. E.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (holding that sufficient contacts afforded Nevada *in personam* jurisdiction over a New York resident wife for purposes of dissolving the marriage but Nevada did not have jurisdiction to terminate the wife’s claims for support).

945 357 U.S. 235 (1958). The decision was 5-to-4. See 357 U.S. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).
puted property through use of ordinary mail and publication. The will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the states to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by states, saying that “it would be a mistake to assume that th[e] trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”

The Court recognized in Hanson that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the Due Process Clause. The Court noted that due process restrictions do more than guarantee immunity from inconvenient or distant litigation, in that “[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him.” The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor’s execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.”

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946 357 U.S. at 251. In dissent, Justice Black observed that “of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here.” 357 U.S. at 260.

The Court continued to apply *International Shoe* principles in diverse situations. Thus, circulation of a magazine in a state was an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have “minimum contacts” with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation.948 Or, damage done to the plaintiff’s reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state.949 Further, though there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party’s forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation’s home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor’s home state.950

The Court has continued to wrestle over when a state may adjudicate a products liability claim for an injury occurring within it, at times finding the defendant’s contacts with the place of injury to be too attenuated to support its having to mount a defense there. In *World-Wide Volkswagen Corp. v. Woodson*,951 the Court applied its “minimum contacts” test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum state. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, the plaintiffs were New York residents at time of purchase, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defen-

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The Court found that the defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the state’s laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the state, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. Although it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”

The Court in *World-Wide Volkswagen Corp.* contrasted the facts of the case with the instance of a corporation “deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”

In *Asahi Metal Industry Co. v. Superior Court*, the Court addressed more closely how jurisdiction flows with products downstream. The Court identified two standards for limiting jurisdiction even as products proceed to foreseeable destinations. The more general standard harked back to the fair play and substantial justice doctrine of *International Shoe* and requires balancing the respective interests of the parties, the prospective forum state, and alternative fora. All the Justices agreed with the legitimacy of this test in assessing due process limits on jurisdiction. However, four Justices would also apply a more exacting test: A defendant who placed a product in the stream of commerce knowing that the product might eventually be sold in a state will be subject to jurisdiction there only if the defendant also had purposefully acted to avail itself of the state’s market. According to Justice O’Connor, who wrote the opinion espousing this test, a defendant subjected itself to jurisdiction in *Asahi*, even though Asahi Metal could have foreseen that some of its valve assemblies would end up incorporated into tire tubes sold in the United States. Three of the *Asahi* Justices had been dissenters in *World-Wide Volkswagen Corp. v. Woodson*. Of the three dissenters, Justice Brennan had argued that the “minimum contacts” test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum state and plaintiffs against the actual burden imposed on defendant, 444 U.S. at 299, while Justices Marshall and Blackmun had applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant state and because the defendants had entered into an interstate economic network. 444 U.S. at 313.
tion by targeting or serving customers in a state through, for example, direct advertising, marketing through a local sales agent, or establishing channels for providing regular advice to local customers. Action, not expectation, is key.\footnote{956} In Asahi, the state was found to lack jurisdiction under both tests cited.

Doctrinal differences on the due process touchstones in stream-of-commerce cases became more critical to the outcome in \emph{J. McIntyre Machinery, Ltd. v. Nicastro},\footnote{957} Justice Kennedy, writing for a four-Justice plurality, asserted that it is a defendant’s purposeful availment of the forum state that makes jurisdiction consistent with traditional notions of fair play and substantial justice. The question is not so much the fairness of a state reaching out to bring a foreign defendant before its courts as it is a matter of a foreign defendant having acted within a state so as to bring itself within the state’s limited authority. Thus, a British machinery manufacturer who targeted the U.S. market generally through engaging a nationwide distributor and attending trade shows, among other means, could not be sued in New Jersey for an industrial accident that occurred in the state. Even though at least one of its machines (and perhaps as many as four) were sold to New Jersey concerns, the defendant had not purposefully targeted the New Jersey market through, for example, establishing an office, advertising, or sending employees.\footnote{958} Concurring with the plurality, Justice Breyer emphasized the outcome lay in stream-of-commerce precedents that held isolated or infrequent sales could not support jurisdiction. At the same time, Justice Breyer cautioned against adoption of the plurality’s strict active availment of the forum rule, especially because the Court had yet to consider due process requirements in the context of evolving business models, modern e-commerce in particular.\footnote{959}

Nonetheless, in order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant’s contacts with the forum,\footnote{960} and when there is “no such connection, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”\footnote{961} As a result, the Court, in \emph{Bristol-Myers Squibb Co. v. Superior Court}, concluded that the California Supreme Court erred in employing a “relaxed” approach to personal jurisdiction by holding that a state court could exercise

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\item\footnote{956} 480 U.S. at 109–113 (1987). Agreeing with Justice O’Connor on this test were Chief Justice Rehnquist and Justices Powell and Scalia.
\item\footnote{957} 564 U.S. ___, No. 09–1343, slip op. (2011).
\item\footnote{958} 564 U.S. ___, No. 09–1343, slip op. (2011) (Kennedy, Roberts, Scalia and Thomas).
\item\footnote{959} 564 U.S. ___, No. 09–1343, slip op. (2011) (Breyer and Alito concurring).
\item\footnote{960} Daimler AG v. Bauman, 571 U.S. ___, No. 11–965, slip op. at 8 (2014).
\item\footnote{961} Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., 582 U.S. ___, No. 16–466, slip op. at 7 (2017).
\end{itemize}}
specific jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had “extensive forum contacts” unrelated to the claims in question. Concluding that California’s approach was a “loose and spurious form of general jurisdiction,” the Court held that without a “connection between the forum and the specific claims at issue,” California courts lacked jurisdiction over the corporate defendant.

**Actions In Rem: Proceeding Against Property.**—In an *in rem* action, which is an action brought directly against a property interest, a state can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was never established. Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question. Proceedings brought to register title to land, to condemn or confiscate real or personal property, or to administer a decedent’s estate are typical in rem actions. Due process is satisfied by seizure of the property (the “res”) and notice to all who have or may have interests therein. Under prior case law, a court could acquire *in rem* jurisdiction over nonresidents by mere...
constructive service of process, under the theory that property was always in possession of its owners and that seizure would afford them notice, because they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.

Although the Court has now held “that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in International Shoe Co. v. Washington,” it does not appear that this will appreciably change the result for in rem jurisdiction over property. “[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant’s claim to property located in the State would normally indicate that he expected to benefit from the State’s protection of his interest. The State’s strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.”

Thus, for “true” in rem actions, the old results are likely to still prevail.

Quasi in Rem: Attachment Proceedings.—If a defendant is neither domiciled nor present in a state, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a state to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of in

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975 433 U.S. at 207–08 (footnotes omitted). The Court also suggested that the state would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.
rem proceeding sometimes called “quasi in rem,” and under Pennoyer v. Neff976 an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication.977 The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.978

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum state, such as where the property was related to the matter sued over.979 In others, the question was more disputed, as in the famous New York Court of Appeals case of Seider v. Roth,980 in which the property subject to attachment was the contractual obligation of the defendant’s insurance company to defend and pay the judgment. But, in Harris v. Balk,981 the facts of the case and the establishment of jurisdiction through quasi in rem proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense,976 95 U.S. 714 (1878). Cf. Pennington v. Fourth Nat’l Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank v. Commissioner, 280 U.S. 218, 222 (1930); Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

977 The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See “Actions in Rem: Proceedings Against Property”, supra.

978 Other, quasi in rem actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat’l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the Full Faith and Credit Clause, Art. I, § 1.

979 Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P. 2d 960 (1957), appeal dismissed, 357 U.S. 569 (1958) (debt seized in California was owed to a New Yorker, but it had arisen out of transactions in California involving the New Yorker and the California plaintiff).


981 198 U.S. 215 (1905).
ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid. 982

Subsequently, *Harris v. Balk* was overruled by *Shaffer v. Heitner*, 983 in which the Court rejected the Delaware state court's jurisdiction, holding that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase 'judicial jurisdiction' over a thing,' is customary elliptical way of referring to jurisdiction over the interests of persons in a thing." 984 Thus, "[t]he recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' " 985

A further tightening of jurisdictional standards occurred in *Rush v. Savchuk*. 986 The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the fo-

982 Compare New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (action purportedly against property within state, proceeds of an insurance policy, was really an *in personam* action against claimant and, claimant not having been served, the judgment is void). But see Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).
984 433 U.S. at 207 (internal quotation from *Restatement (Second) of Conflict of Laws* 56, Introductory Note (1971)).
985 433 U.S. at 207. The characterization of actions *in rem* as being not actions against a res but against persons with interests merely reflects Justice Holmes' insight in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76-77, 55 N.E., 812, 814, appeal dismissed, 179 U.S. 405 (1900).
rum.\textsuperscript{987} Rush thus resulted in the demise of the controversial Seider v. Roth doctrine, which lower courts had struggled to save after Shaffer v. Heitner.\textsuperscript{988}

**Actions in Rem: Estates, Trusts, Corporations.**—Generally, probate will occur where the decedent was domiciled, and, as a probate judgment is considered in rem, a determination as to assets in that state will be determinative as to all interested persons.\textsuperscript{989} Insofar as the probate affects real or personal property beyond the state's boundaries, however, the judgment is in personam and can bind only parties thereto or their privies.\textsuperscript{990} Thus, the Full Faith and Credit Clause would not prevent an out-of-state court in the state where the property is located from reconsidering the first court's finding of domicile, which could affect the ultimate disposition of the property.\textsuperscript{991}

The difficulty of characterizing the existence of the res in a particular jurisdiction is illustrated by the in rem aspects of Hanson v. Denckla.\textsuperscript{992} As discussed earlier,\textsuperscript{993} the decedent created a trust with a Delaware corporation as trustee,\textsuperscript{994} and the Florida courts had attempted to assert both in personam and in rem jurisdiction over the Delaware corporation. Asserting the old theory that a court's in rem jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"\textsuperscript{995} i.e., whether the court has jurisdiction over the thing, the Court thought it clear that the trust

\textsuperscript{987} 444 U.S. at 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee." Id. at 330–31. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.


\textsuperscript{989} Goodrich v. Ferris, 214 U.S. 71, 80 (1909); McCaughey v. Lyall, 224 U.S. 558 (1912).


\textsuperscript{991} 315 U.S. at 353.

\textsuperscript{992} 357 U.S. 235 (1957).

\textsuperscript{993} The in personam aspect of this decision is considered supra.

\textsuperscript{994} She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by inter vivos instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will.

\textsuperscript{995} 357 U.S. at 246.
assets that were the subject of the suit were located in Delaware and thus the Florida courts had no in rem jurisdiction. The Court did not expressly consider whether the International Shoe test should apply to such in rem jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida’s interests arising from its authority to probate and construe the domiciliary’s will, under which the foreign assets might pass, were a sufficient basis of in rem jurisdiction and decided they were not. The effect of International Shoe in this area is still to be discerned.

The reasoning of the Pennoyer rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident were given constructive notice by publication, judgments in these proceedings were held binding on all. But, in Mullane v. Central Hanover Bank & Trust Co., the Court, while declining to characterize the proceeding as in rem or in personam, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. Although such notice by publication was sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held that it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.

Notice: Service of Process.—Before a state may legitimately exercise control over persons and property, the state’s jurisdiction must be perfected by an appropriate service of process that is effec-

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996 357 U.S. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that state, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. 357 U.S. at 256, 262.

997 See discussion of Pennoyer, supra.


1000 A related question is which state has the authority to escheat a corporate debt. See Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961); Texas v. New Jersey, 379 U.S. 674 (1965). Where a state seeks to escheat intangible corporate property such as uncollected debt, the Court found that the multiplicity of states with a possible interest made a “contacts” test unworkable. Citng ease of administration rather than logic or jurisdiction, the Court held that the authority to take the uncollected claims against a corporation by escheat would be based on whether the last known address on the company’s books for the each creditor was in a particular state.
tive to notify all parties of proceedings that may affect their rights.\textsuperscript{1001} Personal service guarantees actual notice of the pendency of a legal action, and has traditionally been deemed necessary in actions styled \textit{in personam}.\textsuperscript{1002} But “certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance,” the Court in some situations has allowed the use of procedures that “do not carry with them the same certainty of actual notice that inheres in personal service.”\textsuperscript{1003} But, whether the action be \textit{in rem} or \textit{in personam}, there is a constitutional minimum; due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”\textsuperscript{1004}

The use of mail to convey notice, for instance, has become quite established,\textsuperscript{1005} especially for assertion of \textit{in personam} jurisdiction extraterritorially upon individuals and corporations having “minimum contacts” with a forum state, where various “long-arm” stat-

\textsuperscript{1001} "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). “There . . . must be a basis for the defendant’s amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.” Omni Capital Int’l v. Rudolph Wolff & Co., 484 U.S. 97 (1987).

\textsuperscript{1002} McDonald v. Mabee, 243 U.S. 90, 92 (1917).

\textsuperscript{1003} Greene v. Lindsey, 456 U.S. 444, 449 (1982). See Dusenbery v. United States, 534 U.S. 161 (2001) (upholding a notice of forfeiture that was delivered by certified mail to the mailroom of a prison where the individual to be served was incarcerated, even though the individual himself did not sign for the letter).

\textsuperscript{1004} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Thus, in Jones v. Flowers, 547 U.S. 220 (2006), the Court held that, after a state’s certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked “unclaimed,” the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so. And, in Greene v. Lindsey, 456 U.S. 444 (1982), the Court held that, in light of substantial evidence that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not satisfy due process. Without requiring service by mail, the Court observed that the mails “provide an ‘efficient and inexpensive means of communication’ upon which prudent men will ordinarily rely in the conduct of important affairs.” Id. at 455 (citations omitted). See also Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale, Tulsa Professional Collection Servs. v. Pope, 485 U.S. 475 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).

utes authorize notice by mail.\textsuperscript{1006} Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such members the opportunity to “opt out” but with no requirement that inclusion in the class be contingent upon affirmative response.\textsuperscript{1007} Other service devices and substitutions have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.\textsuperscript{1008}

**Power of the States to Regulate Procedure**

*Generally.*—As long as a party has been given sufficient notice and an opportunity to defend his interest, the Due Process Clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.\textsuperscript{1009} The states may regulate the manner in which rights may be enforced and wrongs remedied,\textsuperscript{1010} and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.\textsuperscript{1011} Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues that ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is

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\item See, e.g., G.D. Searle & Co. v. Cohn, 455 U.S. 404, 409–12 (1982) (discussing New Jersey’s “long-arm” rule, under which a plaintiff must make every effort to serve process upon someone within the state and then, only if “after diligent inquiry and effort personal service cannot be made” within the state, “service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.”). Cf. Velmohos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980), vacated and remanded, 455 U.S. 985 (1982).
\item Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A state “is free to regulate procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912).
\item The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the Contract, Full Faith and Credit, and Privileges and Immunities Clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).
\item Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).
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\end{footnotesize}
negative rather than affirmative and in no way obligates the states to adopt specific measures of reform.

Commencement of Actions.—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered. But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a state has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and its dissolution, the state may not deny access to those persons unable to pay its fees.

Older cases, which have not been questioned by more recent ones, held that a state, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of reasonable security for the costs and fees incurred by the corporation.

Some recent decisions, however, have imposed some restrictions on state procedures that require substantial reorientation of process. While this is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Review has, however, been restrained with regard to details. See, e.g., Lindsey v. Normet, 405 U.S. at 64–69.

Ownbey v. Morgan, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the states to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to amend pleadings. Note that the Supreme Court did once grant review to determine whether due process required the states to provide some form of post-conviction remedy to assert federal constitutional violations, a review that was mooted when the state enacted such a process. Case v. Nebraska, 381 U.S. 336 (1965). When a state, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that state. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Nor did the retroactive application of this statutory requirement to actions pending at the time of its adoption violate due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

cord. For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, was not deemed arbitrary or unreasonable.

Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.

Defenses.—Just as a state may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment. A state may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises. A state may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses. Similarly, a nonresident defendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.

Costs, Damages, and Penalties.—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due

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1018 Sawyer v. Piper, 189 U.S. 154 (1903).
process of law.\textsuperscript{1023} Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.\textsuperscript{1024} Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.\textsuperscript{1025}

Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.\textsuperscript{1026} Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a state may permit harassed litigants to recover penalties in the form of attorney's fees or damages.\textsuperscript{1027}

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.\textsuperscript{1028} On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a pen-

\textsuperscript{1023} Ballard v. Hunter, 204 U.S. 241, 259 (1907).
\textsuperscript{1024} Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).
\textsuperscript{1026} Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).
\textsuperscript{1028} Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).
alty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the state’s judicial process.\textsuperscript{1029}

To deter careless destruction of human life, a state may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,\textsuperscript{1030} and may also allow punitive damages for fraud perpetrated by employees.\textsuperscript{1031} Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.\textsuperscript{1032} The Court has indicated, however, that, although the Excessive Fines Clause of the Eighth Amendment “does not apply to awards of punitive damages in cases between private parties,”\textsuperscript{1033} a “grossly excessive” award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is “reasonably necessary to vindicate the State’s legitimate interests in punishment and deterrence.”\textsuperscript{1034} These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff’s actual or potential harm, and the legislative sanctions provided for comparable misconduct.\textsuperscript{1035} In addition, the “Due Process Clause forbids a State to use a punitive damages

\textsuperscript{1029} National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).

\textsuperscript{1030} Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).


\textsuperscript{1034} BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a “new” car had been repainted was grossly excessive in relation to the state’s interest, as only a few of the 983 similarly repainted cars had been sold in that same state); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a $145 million judgment for refusing to settle an insurance claim was excessive as it included consideration of conduct occurring in other states). But see TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

\textsuperscript{1035} BMW v. Gore, 517 U.S. at 574–75 (1996). The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 424 (2003).
award to punish a defendant for injury that it inflicts upon nonparties . . . .” 1036

Statutes of Limitation.—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a state may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.1037

Thus, where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.1038 When a state, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.1039 No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.1040 Similarly, an amendment to a workmen’s compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.1041

1036 Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant’s conduct on smokers who were not parties to the lawsuit).
1040 Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of property without due process.
1041 Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).
Moreover, a state may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. “A right to defeat a just debt by the statute of limitation . . . [is not] a vested right,” such as is protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,1042 or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,1043 or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.1044

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.1045 Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. “When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired” unconstitutionally imposes a burden in excess of that contracted.1046

Burden of Proof and Presumptions.—It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation.1047 Nonetheless, the Due Process Clause does prevent the deprivation of liberty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, “[t]he function of a standard of proof, as that concept is embodied in the Due

Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’”

Applying the formula it has worked out for determining what process is due in a particular situation, the Court has held that a standard at least as stringent as clear and convincing evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period. Similarly, because the interest of parents in retaining custody of their children is fundamental, the state may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove that the parents are unfit by clear and convincing evidence. Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one’s defense is void. On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that

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the proof of one fact or group of facts shall constitute *prima facie* evidence of a main or ultimate fact will be sustained.\textsuperscript{1054}

For a brief period, the Court used what it called the “irrebuttable presumption doctrine” to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.\textsuperscript{1055} Thus, in *Stanley v. Illinois*,\textsuperscript{1056} the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.\textsuperscript{1057}

Major controversy developed over the application of “irrebuttable presumption doctrine” in benefits cases. Thus, although a state may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The Due Process Clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.\textsuperscript{1058}

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be

\textsuperscript{1054} Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). *See also* Morrison v. California, 291 U.S. 82 (1934).

\textsuperscript{1055} The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate’s right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm’n, 284 U.S. 206 (1931).

\textsuperscript{1056} 405 U.S. 645 (1972).

\textsuperscript{1057} Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

\textsuperscript{1058} Vlandis v. Kline, 412 U.S. 441 (1973).
shown to be false if evidence could be presented.\textsuperscript{1059} The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the Equal Protection Clause or to the Due Process Clause in judging the validity of certain classifications,\textsuperscript{1060} and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Use of the doctrine was curbed if not halted, however, in \textit{Weinberger v. Salfi},\textsuperscript{1061} in which the Court upheld the validity of a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. Purporting to approve but to distinguish the prior cases in the line,\textsuperscript{1062} the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.\textsuperscript{1063} Extensions of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, “turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.”\textsuperscript{1064} Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications (in the equal protection sense of those expressions)\textsuperscript{1065} or whether it will simply per-

\textsuperscript{1059} Department of Agriculture v. Murry, 413 U.S. 508 (1973).
\textsuperscript{1060} Thus, on the same day Murry was decided, a similar food stamp qualification was struck down on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
\textsuperscript{1061} 422 U.S. 749 (1975).
\textsuperscript{1062} \textit{Stanley} and \textit{LaFleur} were distinguished as involving fundamental rights of family and childbearing, 422 U.S. at 771, and Murry was distinguished as involving an irrational classification. Id. at 772. \textit{Vlandis}, said Justice Rehnquist for the Court, meant no more than that when a state fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. \textit{But see} id. at 802–03 (Justice Brennan dissenting).
\textsuperscript{1063} 422 U.S. at 768–70, 775–77, 785 (using Dandridge v. Williams, 397 U.S. 471 (1970); Richardson v. Belcher, 404 U.S. 78 (1971); and similar cases).
\textsuperscript{1065} \textit{Vlandis}, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like \textit{Salfi} and \textit{Murry} in its benefit context and order of presumption. The Court has avoided decid-
mit the doctrine to pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court’s docket.1066

**Trials and Appeals.**—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the states in retaining or abolishing civil juries.1067 Thus, abolition of juries in proceedings to enforce liens,1068 mandamus1069 and quo warranto1070 actions, and in eminent domain1071 and equity1072 proceedings has been approved. states are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,1073 and petit juries containing eight rather than the conventional number of twelve members may be established.1074

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.1075 But if an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.1076

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1066 In Turner v. Department of Employment Security, 423 U.S. 44 (1975), decided after Salfi, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. But see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977) (provision granting benefits to miners “irrebuttable presumed” to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption); Califano v. Boles, 443 U.S. 282, 284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).


1069 In re Delgado, 140 U.S. 586, 588 (1891).


1074 See Maxwell v. Dow, 176 U.S. 581, 602 (1900).


1076 405 U.S. at 74–79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). Cf. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).
PROCEDURAL DUE PROCESS—CRIMINAL

Generally: The Principle of Fundamental Fairness

The Court has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment.\(^{1077}\) In addition, the Court has held that the Due Process Clause protects against practices and policies that violate precepts of fundamental fairness,\(^{1078}\) even if they do not violate specific guarantees of the Bill of Rights.\(^{1079}\) The standard query in such cases is whether the challenged practice or policy violates “a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government.”\(^{1080}\)

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\(^{1077}\) See analysis under the Bill of Rights, “Fourteenth Amendment,” supra.

\(^{1078}\) For instance, *In re Winship*, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, see, e.g., United States v. Bryant, 579 U.S. ___, No. 15–420, slip op. at 15–16 (2016) (holding that principles of due process did not prevent a defendant’s prior uncounseled convictions in tribal court from being used as the basis for a sentence enhancement, as those convictions complied with the Indian Civil Rights Act, which itself contained requirements that “ensure the reliability of tribal-court convictions”). See also *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant’s sentence cannot be sustained, even if sentence falls within range of unenhanced sentences); *Sandstrom v. Montana*, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); *Taylor v. Kentucky*, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); *Patterson v. New York*, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); *Henderson v. Kibbe*, 431 U.S. 145 (1977) (sufficiency of jury instructions); *Estelle v. Williams*, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); *Wardius v. Oregon*, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged).

\(^{1079}\) Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. See, e.g., *In re Winship*, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan’s response, see id. at 372 n.5 (concurring).

\(^{1080}\) *Twining v. New Jersey*, 211 U.S. 78, 106 (1908). The question is phrased as whether a claimed right is “implicit in the concept of ordered liberty,” whether it partakes “of the very essence of a scheme of ordered liberty.” *Palko v. Connecticut*,
This inquiry contains a historical component, as “recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore, the limitations imposed by the Court on the states are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the context of the criminal processes maintained by the American States.”

The Elements of Due Process

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a state may proceed instead by information. Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried, even aside from the notice requirements of the Sixth Amendment. Where, of course, a grand jury is used, it must be fairly constituted and free from prejudicial influences.

302 U.S. 319, 325 (1937), or whether it “offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses,” Rochin v. California, 342 U.S. 165, 169 (1952).

1082 Hurtado v. California, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

1083 Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of “burglary with explosives” carrying a much lengthier sentence voided). See also Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); In re Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

1084 See Sixth Amendment, Notice of Accusation, supra.

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.—Criminal statutes that lack sufficient definiteness or specificity are commonly held “void for vagueness.” Such legislation “may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.” “Men of common intelligence cannot be required to guess at the meaning of [an] enactment.” In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. In this vein, the Court has invalidated two kinds of laws as “void for vagueness”: (1) laws that define criminal offenses; and (2) laws that fix the permissible sentences for criminal offenses. With respect to laws that define criminal offenses, the Court has required that a penal statute provide the definition of the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”

For instance, the Court voided for vagueness a criminal statute providing that a person was a “gangster” and subject to fine or im-

1087 Musser v. Utah, 333 U.S. 95, 97 (1948). “The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt.” Id. at 97. “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.” Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), quoted in Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).
1088 Winters v. New York, 333 U.S. 507, 515–16 (1948). “The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt.” Id. Cf. Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the “current rate of per diem wages in the locality where the work is performed” was held to be “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” Connally v. General Const. Co., 269 U.S. 385 (1926). Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge’s instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of “some misconduct” though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).
prisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was “known to be a member of a gang of two or more persons.” The Court observed that neither common law nor the statute gave the words “gang” or “gangster” definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase “known to be a member” was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.1091

A statute may be so vague or so threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, “unconstitutional on its face.”1092 Thus, for instance, a unanimous Court in Papachristou v. City of Jacksonville1093 struck down as invalid on its face a vagrancy ordinance that punished “dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . .”1094 The ordinance was found to be facially invalid, according to Justice Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities that by modern standards are normally innocent.1095

1095 Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). See Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under stat-
In *FCC v. Fox*, 567 U.S. ___, No. 10–1293, slip op. (2012) the Court held that the Federal Communications Commission (FCC) had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broadcasting isolated instances of expletives or brief nudity could lead to punishment. 18 U.S.C. § 1464 bans the broadcast of “any obscene, indecent, or profane language”, but the FCC had a long-standing policy that it would not consider “fleeting” instances of indecency to be actionable, and had confirmed such a policy by issuance of an industry guidance. The policy was not announced until after the instances at issue in this case (two concerned isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable as indecent.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court. For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied. Thus, in *Palmer v. City of Euclid*, an ordinance punishing “suspicious persons” defined as “[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself” was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, was engaging in conduct which
could not reasonably be anticipated as fitting within the “without any visible or lawful business” portion of the ordinance’s definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.\footnote{1099} Thus, a Chicago ordinance that required police to disperse all persons in the company of “criminal street gang members” while in a public place with “no apparent purpose,” failed to meet the “requirement that a legislature establish minimal guidelines to govern law enforcement.”\footnote{1100} The Court noted that “no apparent purpose” is inherently subjective because its application depends on whether some purpose is “apparent” to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.\footnote{1101} On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.\footnote{1102}

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity.\footnote{1103} Thus, the civil commitment of persons of “such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons” was upheld by the Court, based on a state court’s construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.\footnote{1104}

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ig-

\footnote{1101} 527 U.S. at 62.
\footnote{1103} See, e.g., McDonnell v. United States, 579 U.S. ___, No. 15–474, slip op. at 23 (2016) (narrowly interpreting the term “official act” to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would allow public officials to be subject to prosecution without fair notice “for the most prosaic interactions” between officials and their constituents).

\footnote{1104} Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).
norance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to alert one that there are laws which must be observed.\textsuperscript{1105} On occasion the Court has even approved otherwise vague statutes because the statute forbade only “willful” violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.\textsuperscript{1106} Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.\textsuperscript{1107}

The question of notice has also arisen in the context of “judge-made” law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a “year and a day” in order for homicide charges to be brought in \textit{Rogers v. Tennessee},\textsuperscript{1108} the question arose whether such rule could be applied to acts occurring before the court’s decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court’s decision was an outright reversal of existing law. Under this reasoning, the new “law” could not be applied retrospectively. The majority held, however, that only those holdings which were “unexpected and indefensible by reference to the law which had been express prior to the conduct in issue”\textsuperscript{1109} could not be applied retroactively. The relatively archaic nature of “year and a day rule”, its abandonment by most jurisdictions, and its inapplicability to modern times were all

\begin{itemize}
\item \textsuperscript{1105} \textit{E.g.}, United States v. Freed, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other “fundamentally similar” case precedent, so long as the court can find that, under the circumstance, “unlawfulness . . . is apparent” to the defendant. United States v. Lanier, 520 U.S. 259, 271–72 (1997).
\item \textsuperscript{1106} \textit{E.g.}, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). \textit{Cf.} Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explicitly include such a \textit{mens rea} requirement. \textit{E.g.}, Morissette v. United States, 342 U.S. 246 (1952).
\item \textsuperscript{1107} \textit{See, e.g.}, Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In \textit{Lambert}, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite “unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.” “Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” \textit{Id.} at 228, 229–30.
\item \textsuperscript{1108} 532 U.S. 451 (2001).
\item \textsuperscript{1109} \textit{Bouie} v. City of Columbia, 378 U.S. 347, 354 (1964).
\end{itemize}
cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

With regard to statutes that fix criminal sentences,\textsuperscript{1110} the Court has explained that the law must specify the range of available sentences with “sufficient clarity.”\textsuperscript{1111} For example, in Johnson v. United States, after years of litigation on the meaning and scope of the “residual clause” of the Armed Career Criminal Act of 1984 (ACCA),\textsuperscript{1112} the Court concluded that the clause in question was void for vagueness.\textsuperscript{1113} In relevant part, the ACCA imposes an increased prison term upon a felon who is in possession of a firearm, if that felon has previously been convicted for a “violent felony,” a term defined by the statute to include “burglary, arson, or extortion, [a crime that] involves use of explosives, or” crimes that fall within the residual clause—that is, crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”\textsuperscript{1114} In Johnson, prosecutors sought an enhanced sentence for a felon found in possession of a firearm, arguing that one of the defendant’s previous crimes—unlawful possession of a short-barreled shotgun—qualified as a violent felony because the crime amounted to one that “involve[d] conduct that presents a serious potential risk of physical injury to another.”\textsuperscript{1115} To determine whether a crime falls within the residual clause, the Court had previously endorsed a “categorical approach”—that is, instead of looking to whether the facts of a specific offense presented a serious risk of physical injury to another, the Supreme Court had interpreted the ACCA to require courts

\textsuperscript{1110} In United States v. Beckles, the Supreme Court concluded that the federal sentencing guidelines “do not fix the permissible range of sentences” and, therefore, are not subject to a vagueness challenge under the Due Process Clause. See 580 U.S. ___, No. 15–8544, slip op. at 5 (2017). Rather, the sentencing guidelines “merely guide the district courts’ discretion.” Id. at 8. In so concluding, the Court noted that the sentencing system that predated the use of the guidelines gave nearly unfettered discretion to judges in sentencing, and that discretion was never viewed as raising similar concerns. Id. Thus, the Court reasoned that it was “difficult to see how the present system of guided discretion” could raise vagueness concerns. Id. Moreover, the Beckles Court explained that “the advisory Guidelines . . . do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement.” Id. According to the Court, the only notice that is required regarding criminal sentences is provided to the defendant by the applicable statutory range and the guidelines. Further, the guidelines, which serve to advise courts how to exercise their discretion within the bounds set by Congress, simply do not regulate any conduct that can be arbitrarily enforced against a criminal defendant. Id. at 9.


\textsuperscript{1115} Johnson, slip op. at 2–3.
to look to whether the underlying crime falls within a category such that the “ordinary case” of the crime would present a serious risk of physical injury.\textsuperscript{1116} The Court in \textit{Johnson} concluded that the residual clause was unconstitutionally vague because the clause’s requirement that courts determine what an “ordinary case” of a crime entails led to “grave uncertainty” about (1) how to estimate the risk posed by the crime and (2) how much risk was sufficient to qualify as a violent felony.\textsuperscript{1117} For example, in determining whether attempted burglary ordinarily posed serious risks of physical injury, the Court suggested that reasonable minds could differ as to whether an attempted burglary would typically end in a violent encounter, resulting in the conclusion that the residual clause provided “no reliable way” to determine what crimes fell within its scope.\textsuperscript{1118} In so holding, the Court relied heavily on the difficulties that federal courts (including the Supreme Court) have had in establishing consistent standards to adjudge the scope of the residual clause, noting that the failure of “persistent efforts” to establish a standard can provide evidence of vagueness.\textsuperscript{1119}

\textbf{Entrapment.}—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems.\textsuperscript{1120} Thus, in order to deter such criminal behavior, police agents may “encourage” persons to engage in criminal behavior, such as selling narcotics or contraband,\textsuperscript{1121} or they may seek to test the integrity of public employees, officers or public officials by offering them bribes.\textsuperscript{1122} In such cases, an “entrapment” defense is often made, though it is unclear whether the basis for the defense is the Due Process Clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws

\textsuperscript{1116} See James, 550 U.S. at 208.
\textsuperscript{1117} \textit{Johnson}, slip op. at 5–6.
\textsuperscript{1118} Id.
\textsuperscript{1119} See id. at 6–10 (“Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.”).
\textsuperscript{1120} Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be used, which also has constitutional implications.
\textsuperscript{1122} For instance, this strategy was seen in the “Abscam” congressional bribery controversy. The defense of entrapment was rejected as to all the “Abscam” defendants. E.g., United States v. Kelly, 707 F.2d 1480 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982), cert. denied, 457 U.S. 1106 (1982).
to find that the legislature would not have intended to punish conduct induced by police agents.1123

The Court has employed the so-called “subjective approach” in evaluating the defense of entrapment.1124 This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, “the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”1125 If the defendant can be shown to have been ready and willing to commit the crime whenever the opportu-

1123 For a thorough evaluation of the basis for and the nature of the entrapment defense, see Seidman, The Supreme Court, Entrapment, and Our Criminal Justice Dilemma, 1981 SUW. CR. REV. 111. The Court’s first discussion of the issue was based on statutory grounds, see Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. In United States v. Russell, 411 U.S. 423, 490 (1973), however, the Court rejected the use of that power, as did a plurality in Hampton, 425 U.S. at 490. The Hampton plurality thought the Due Process Clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The Russell and Hampton dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); Russell, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an “inconsistent” entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S. 540 (1992) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

1124 An “objective approach,” although rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. See American Law Institute, MODEL PENAL CODE § 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Final Draft, 1971). The objective approach disregards the defendant’s predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be available. Sorrells v. United States, 287 U.S. 435, 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484, 496–97 (1976) (Justice Brennan dissenting).

1125 Jacobson v. United States, 503 U.S. 540, 548–49 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover “sting” operation. For several years government agents had sent the defendant mailings soliciting his views on pornogra-
nity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement. On the other hand, “[w]hen the Government’s quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene.”

Criminal Identification Process.—In criminal trials, the reliability and weight to be accorded an eyewitness identification ordinarily are for the jury to decide, guided by instructions by the trial judge and subject to judicial prerogatives under the rules of evidence to exclude otherwise relevant evidence whose probative value is substantially outweighed by its prejudicial impact or potential to mislead. At times, however, a defendant alleges an out-of-court identification in the presence of police is so flawed that it is inadmissible as a matter of fundamental justice under due process. These cases most commonly challenge such police-arranged procedures as lineups, showups, photographic displays, and the like. But not all cases have alleged careful police orchestration.

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process. Two elements are required for due process suppression. First, law enforcement officers must have participated in an identifi-
lication process that was both suggestive and unnecessary.1132 Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by examining the “totality of the circumstances” of a case.1133 The Court has not recognized any per se rule for excluding an eyewitness identification on due process grounds.1134 Defendants have had difficulty meeting the Court’s standards: Only one challenge has been successful.1135

**Fair Trial.**—As noted, the provisions of the Bill of Rights now applicable to the states contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. “Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What

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1132 “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Neil v. Biggers, 409 U.S. 188, 196 (1972). An identification process can be found to be suggestive regardless of police intent. Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 2 & n.1 (2012) (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. E.g., Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought handcuffed to sole witness’s hospital room where it was uncertain whether witness would survive her wounds).

1133 Neil v. Biggers, 409 U.S. 188, 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. See also Stovall v. Denno, 388 U.S. 293 (1967).

1134 The Court eschewed a per se exclusionary rule in due process cases at least as early as Stovall. 388 U.S. 293, 302 (1967). In Manson v. Brathwaite, the Court evaluated application of a per se rule versus the more flexible, ad hoc “totality of the circumstances” rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. 98, 111–14 (1977). The rule in due process cases differs from the per se exclusionary rule adopted in the Wade–Gilbert line of cases on denial of the right to counsel under the Sixth Amendment in post-indictment lineups. Cases refining the Wade–Gilbert holdings include Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and United States v. Ash, 413 U.S. 300 (1973) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant’s presence; record insufficient to assess possible due process claim).

1135 Foster v. California, 394 U.S. 440 (1969) (5–4) (“[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable.”). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. See discussion of Assistance of Counsel under Amend. VI, “Lineups and Other Identification Situations.”
is fair in one set of circumstances may be an act of tyranny in others.” Conversely, “as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.”

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio* it was held to violate due process for a judge to receive compensation out of the fines imposed on convicted defendants, and no compensation beyond his salary) “if he does not convict those who are brought before him.”

Or, in other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors. Due process is also violated by the participation of a biased or oth-

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1138 273 U.S. 510, 520 (1927). See also Ward v. Village of Monroeville, 409 U.S. 57 (1972). But see Dugan v. Ohio, 277 U.S. 61 (1928). Similarly, in *Rippo v. Baker*, the Supreme Court vacated the Nevada Supreme Court's denial of a convicted petitioner's application for post-conviction relief based on the trial judge's failure to recuse himself. 580 U.S. ___, No. 16–6316, slip op. (2017). During Rippo's trial, the trial judge was the target of a federal bribery probe by the same district attorney's office that was prosecuting Rippo. Rippo moved for the judge's disqualification under the Fourteenth Amendment's Due Process Clause, arguing the "judge could not impartially adjudicate a case in which one of the parties was criminally investigating him."

Id. at 1. After the judge was indicted on federal charges, a different judge subsequently assigned to the case denied Rippo's motion for a new trial. In vacating the Nevada Supreme Court's decision, the Supreme Court noted that "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge "ha[s] no actual bias." Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Id. at 2 (quoting *Aetna Life Ins. Co. v. LaV oie*, 475 U.S. 813, 825 (1986)); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Bias or prejudice of an appellate judge can also deprive a litigant of due process. *Aetna Life Ins. Co. v. LaV oie*, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

1139 Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); *Taylor v. Hayes*, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see Ungar v. Sarafite*, 376 U.S. 575 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority"). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).
erwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced.1140

Public hostility toward a defendant that intimidates a jury is, or course, a classic due process violation.1141 More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.1142 For instance, the impact of televising trials on a jury has been a source of some concern.1143

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions must be based on the totality of the circumstances surrounding such procedures.1144

1140 Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). See also Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on voir dire asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, see discussion under Sixth Amendment, supra.


1143 Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that Estes had established a per se constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74.

1144 For instance, the presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the
For instance, a court may not restrict the basic due process right to testify in one’s own defense by automatically excluding all hypnotically refreshed testimony.\textsuperscript{1145} Or, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the state give the defendant pretrial notice of its rebuttal evidence on the alibi issue.\textsuperscript{1146} Due process is also violated when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.\textsuperscript{1147}

The use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, has been held to raise due process concerns. In \textit{Deck v. Missouri},\textsuperscript{1148} the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in \textit{Taylor} included skeletal instructions on burden of proof combined with the prosecutor’s remarks in his opening and closing statements inviting the jury to consider the defendant’s prior record and his indictment in the present case as indicating guilt. See also \textit{Sandstrom} v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with “purposely or knowingly” causing victim’s death that “law presumes that a person intends the ordinary consequences of his voluntary acts” denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). See also \textit{Cupp} v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1973). For other cases applying \textit{Sandstrom}, see Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state’s burden of persuasion on intent does not erase \textit{Sandstrom} error in earlier part of charge); \textit{Rose} v. Clark, 478 U.S. 570 (1986) (\textit{Sandstrom} error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)); \textit{Middleton} v. McNeil, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute “plain error,” and a reviewing court may consider in the context of the entire record of the trial the trial court’s failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

\textsuperscript{1147} Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied habeas relief; however, because of failure to object at trial, \textit{But cf.} Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation); Carey v. Musladin, 549 U.S. 70 (2006) (effect on defendant’s fair-trial rights of private-actor courtroom conduct—in this case, members of victim’s family wearing buttons with the victim’s photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes habeas relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences).
\textsuperscript{1148} 544 U.S. 622 (2005).
should be used “only in the presence of a special need.”\textsuperscript{1149} The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and “affronts the dignity and decorum of judicial proceedings.”\textsuperscript{1150} Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied a defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to the defendant\textsuperscript{1151} and (2) denied a defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied the defendant his constitutional right to present his own defense in a meaningful way.\textsuperscript{1152} Similarly, a questionable procedure may be saved by its combination with another. Thus, it does not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial \textit{de novo} available under the state’s court system.\textsuperscript{1153}

\textbf{Prosecutorial Misconduct.}—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause “cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through

\textsuperscript{1149} 544 U.S. at 626. In Illinois v. Allen, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that “no person should be tried while shackled and gagged except as a last resort.”

\textsuperscript{1150} 544 U.S. at 630, 631 (internal quotation marks omitted).

\textsuperscript{1151} The defendant called the witness because the prosecution would not.

\textsuperscript{1152} Chambers v. Mississippi, 410 U.S. 284 (1973). \textit{See also} Davis v. Alaska, 415 U.S. 786 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant’s culpability). \textit{But see} Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of mens rea).

\textsuperscript{1153} North v. Russell, 427 U.S. 328 (1976).
a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance... is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.”

The above-quoted language was dictum, but the principle it enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict and has upset convictions found to have been so procured. Extending the principle, the Court in Miller v. Pate overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a habeas corpus proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial. In Brady v. Maryland, the Court held “that the suppres-

1155 The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in Ex parte Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), cert. denied, 305 U.S. 598 (1938).
In the former case, the principal prosecution witness was defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. See also Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the habeas corpus hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? Cf. Durley v. Mayo, 351 U.S. 277 (1956). But see Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).
1158 386 U.S. 1 (1967).
1159 The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent
sion by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” In that case, the prosecution had suppressed an extrajudicial confession of defendant’s accomplice that he had actually committed the murder.

“The heart of the holding in *Brady* is the prosecution’s suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence’s favorable character for the defense, and (c) the materiality of the evidence.”

In *United States v. Agurs*, the Court summarized and somewhat expanded the prosecutor’s obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there

Prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant’s role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting). 1160

In Jencks v. United States, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. Cf. Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

Although the state court in *Brady* had allowed a partial retrial so that the accomplice’s confession could be considered in the jury’s determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant’s appeal of this latter decision was rejected, as the issue, as the Court saw it, was whether the state court could have excluded the defendant’s confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

Moore v. Illinois, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). See also Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no due process violation where prosecutor’s failure to disclose the result of a witness’ polygraph test would not have affected the outcome of the case). The beginning in *Brady* toward a general requirement of criminal discovery was not carried forward. See the division of opinion in Giles v. Maryland, 386 U.S. 68 (1967).

In Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 23, 27 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant’s conviction, the lower courts had erred in failing to assess its effect with respect to the defendant’s capital sentence.

is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial. Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for “all *Brady* material” or for “anything exculpatory,” a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence. Under this third prong, if the prosecutor did not reveal the relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant’s guilt.

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate level of materiality by classifying the situation under which the exculpating information was withheld. Second, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in *United States v. Bagley*.

In *Bagley*, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. This materiality standard, found in contexts outside
of Brady inquiries,\textsuperscript{1170} is applied not only to exculpatory material, but also to material that would be relevant to the impeachment of witnesses.\textsuperscript{1171} Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.\textsuperscript{1172}

The Supreme Court has also held that “Brady suppression occurs when the government fails to turn over even evidence that is ‘known only to police investigators and not to the prosecutor.’ ... ‘[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.’”\textsuperscript{1173}

Proof, Burden of Proof, and Presumptions.—It had long been presumed that “reasonable doubt” was the proper standard for criminal cases,\textsuperscript{1174} but, because the standard was so widely accepted, it was only relatively recently that the Court had the opportunity to pronounce it guaranteed by due process. In 1970, the Court held in \textit{In re Winship} that the Due Process Clauses of the Fifth and Fourteenth Amendments “[p]rotect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”\textsuperscript{1175}


\textsuperscript{1171} 473 U.S. at 676–77. See also Wearry v. Cain, 577 U.S. ___, No. 14–10008, slip op. at 9 (2016) (per curiam) (finding that a state post-conviction court had improperly (1) evaluated the materiality of each piece of evidence in isolation, rather than cumulatively; (2) emphasized reasons jurors might disregard the new evidence, while ignoring reasons why they might not; and (3) failed to consider the statements of two impeaching witnesses).

\textsuperscript{1172} Strickler v. Greene, 527 U.S. 263, 296 (1999); see also Turner v. United States, 582 U.S. ___, No. 15–1503, slip op. at 12 (2017) (holding that, when considering the withheld evidence in the context of the entire record, the evidence was “too little, too weak, or too distant” from the central evidentiary issues in the case to meet Brady’s standards for materiality.)


The standard is closely related to the presumption of innocence, which helps to ensure a defendant a fair trial, and requires that a jury consider a case solely on the evidence. The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

The Court had long held that, under the Due Process Clause, it would set aside convictions that are supported by no evidence at all. The holding of the Winship case, however, left open the question as to whether appellate courts should weigh the sufficiency of trial evidence. Thus, in Jackson v. Virginia, the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether it believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any ra-


E.g., Deutch v. United States, 367 U.S. 456, 471 (1961). See also Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). But see Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned Coffin v. United States, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

Justice Harlan’s Winship concurrence, id. at 368, proceeded on the basis that, because there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.

tional trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 1181

Because due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, 1182 the Court held in Mullaney v. Wilbur 1183 that it was unconstitutional to require a defendant charged with murder to prove that he acted “in the heat of passion on sudden provocation” in order to reduce the homicide to manslaughter. The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision, however, called into question the practice in many states under which some burdens of persuasion 1184 were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion—a significant and weighty task given the large numbers of affirmative defenses.

The Court, however, summarily rejected the argument that Mullaney means that the prosecution must negate an insanity defense, 1185 and, later, in Patterson v. New York, 1186 upheld a state statute that required a defendant asserting “extreme emotional dis-

1181 Id. at 316, 18–19. See also Musacchio v. United States, 577 U.S. ___, No. 14–1095, slip op. (2016) (“When a jury finds guilt after being instructed on all elements of the charged crime plus one more element,” the fact that the government did not introduce evidence of the additional element—which was not required to prove the offense, but was included in the erroneous jury instruction—“does not implicate the principles that sufficiency review protects.”); Griffin v. United States, 502 U.S. 46 (1991) (general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conviction, but is adequate to support conviction as to another object).


1183 These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

1184 The general notion of “burden of proof” can be divided into the “burden of production” (providing probative evidence on a particular issue) and a “burden of persuasion” (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). Mullaney, 421 U.S. at 695 n.20.

1185 Rivera v. Delaware, 429 U.S. 877 (1976), dismissing as not presenting a substantial federal question an appeal from a holding that Mullaney did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence. See Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of Rivera). Justice Rehnquist and Chief Justice Burger concurring in Mullaney, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt.

Proving the defense would reduce a murder offense to manslaughter. The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. See also Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In Dixon, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a “willful” violation (having knowledge of the facts that constitute the offense) and the other requiring a “knowing” violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of mens rea (such as “malicious intent”) might require that a prosecutor prove that a defendant’s intent was without justification or excuse, the Court held that neither of the forms of mens rea at issue in Dixon contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

Dissenting in Patterson, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. Patterson was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is “prior calculation and design”). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.
the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.\footnote{1191}

Another important distinction that can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. Although a criminal conviction is generally established by a jury using the “beyond a reasonable doubt” standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient “preponderance of the evidence” standard. The Court has taken a formalistic approach to this issue, allowing states to designate essentially which facts fall under which of these two categories. For instance, the Court has held that whether a defendant “visibly possessed a gun” during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.\footnote{1192}

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in \textit{Apprendi v. New Jersey}. In \textit{Apprendi} the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.\footnote{1193} This led, in turn, to the Court's overruling conflicting prior case law that had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.\footnote{1194} These holdings are subject to at least one exception, however,\footnote{1195} and the decisions might be evaded by legislatures re-

\footnote{1191} 548 U.S. at 770, 774.  
\footnote{1192} McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. See discussion in “Criminal Proceedings to Which the Guarantee Applies,” supra.  
\footnote{1193} 530 U.S. 466, 490 (2000) (interpreting New Jersey’s “hate crime” law). It should be noted that, prior to its decision in \textit{Apprendi}, the Court had held that sentencing factors determinative of minimum sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of \textit{McMillan} was put in doubt by \textit{Apprendi}, \textit{McMillan} was subsequently reaffirmed in Harris v. United States, 536 U.S. 545 (2002).  
\footnote{1195} This limiting principle does not apply to sentencing enhancements based on recidivism. \textit{Apprendi}, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). See also Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).
vising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a “presumed fact” that is a required element of a crime, is established by another fact, the “basic fact.” In *Tot v. United States*, the Court held that a statutory presumption was valid under the Due Process Clause only if it met a “rational connection” test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. “Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience.”

In *Leary v. United States*, this due process test was stiffened to require that, for such a “rational connection” to exist, it must “at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” Thus, the Court voided a provision that permitted a jury to infer from a defendant’s possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court’s satisfaction that, although the greater part of marijuana consumed in the United States is of foreign origin, there was still a good amount produced domestically and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported. The Court left open the question whether a presumption that survived the “rational connection” test “must also satisfy the criminal ‘reasonable doubt’ standard if proof of the crime charged or an essential element thereof depends upon its use.”

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1196 See, e.g., *Yee Hem v. United States*, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); *Manley v. Georgia*, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvent of a bank shall be deemed fraudulent).

1197 319 U.S. 463, 467–68 (1943). Compare *United States v. Gainey*, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was “carrying on” or aiding in “carrying on” its operation), with *United States v. Romano*, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).


1199 395 U.S. at 37–54. Although some of the reasoning in *Yee Hem*, supra, was disapproved, it was factually distinguished as involving users of “hard” narcotics.

1200 395 U.S. at 36 n.84. The matter was also left open in *Turner v. United States*, 396 U.S. 398 (1970) (judged by either “rational connection” or “reasonable doubt,” a presumption that the possessor of heroin knew it was illegally imported was valid,
In a later case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, “since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt.”

But, with respect to permissive presumptions, “the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary.”

Thus, due process was not violated by the application of the statute that provides that “the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.”

The division of the Court in these cases and in the Mullaney v. Wilbur line of cases clearly shows the unsettled nature of the issues they concern.

The Problem of the Incompetent or Insane Defendant.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial. When it becomes evident during the trial that a defendant is or has become insane or incompetent but the same presumption with regard to cocaine was invalid under the “rational connection” test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possession knew it was stolen satisfies due process). Ulster County Court v. Allen, 442 U.S. 140, 167 (1979).

442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. See also Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O’Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been “battered” in the past meant that the defendant, the child’s father, had necessarily done the battering).

442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. See also Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O’Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been “battered” in the past meant that the defendant, the child’s father, had necessarily done the battering).


Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, supra.
petent to stand trial, the court on its own initiative must conduct a
hearing on the issue. Although there is no constitutional require-
ment that the state assume the burden of proving a defendant com-
petent, the state must provide the defendant with a chance to prove
that he is incompetent to stand trial. Thus, a statutory presump-
tion that a criminal defendant is competent to stand trial or a re-
quirement that the defendant bear the burden of proving incompe-
tence by a preponderance of the evidence does not violate due
process.

When a state determines that a person charged with a crimi-
nal offense is incompetent to stand trial, he cannot be committed
indefinitely for that reason. The court’s power is to commit him to
a period no longer than is necessary to determine whether there is
a substantial probability that he will attain his capacity in the fore-
seeable future. If it is determined that he will not, then the state
must either release the defendant or institute the customary civil
commitment proceeding that would be required to commit any other
citizen.

Where a defendant is found competent to stand trial, a state
appears to have significant discretion in how it takes account of men-
tal illness or defect at the time of the offense in determining crimi-
nal responsibility. The Court has identified several tests that are
used by states in varying combinations to address the issue: the
M’Naghten test (cognitive incapacity or moral incapacity), voli-

1205 Pate v. Robinson, 383 U.S. 375, 378 (1966); see also Drope v. Missouri, 420
U.S. 162, 180 (1975) (noting the relevant circumstances that may require a trial
court to inquire into the mental competency of the defendant). In Ake v. Oklahoma,
the Court established that, when an indigent defendant’s mental condition is both
relevant to the punishment and seriously in question, the state must provide the
defendant with access to a mental health expert who is sufficiently available to the
defense and independent from the prosecution to effectively “assist in evaluation,
preparation, and presentation of the defense.” 470 U.S. 68, 83 (1985). While the Court
has not decided whether Ake requires that the state provide a qualified mental health
expert who is available exclusively to the defense team, see McWilliams v. Dunn,
582 U.S. __, No. 16–5294, slip op. at 13 (2017), a state nevertheless deprives an
indigent defendant of due process when it provides a competent psychiatrist only to
examine the defendant without also requiring that an expert provide the defense
with help in evaluating, preparing, and presenting its case. Id., at 15.

1206 Medina v. California, 505 U.S. 437 (1992). It is a violation of due process,
however, for a state to require that a defendant must prove competence to stand


1209 M’Naghten’s Case, 8 Eng. Rep. 718 (1843), states that “[T]o establish a de-

fence on the ground of insanity, it must be clearly proved that, at the time of the
committing of the act, the party accused was laboring under such a defect of reason,
from disease of the mind, as not to know the nature and quality of the act he was
doing; or, if he did know it, that he did not know he was doing what was wrong.” 8
tional incapacity, and the irresistible-impulse test. 

"[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted. The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment." Thus, the insanity-defense acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society." It follows, however, that a state may not indefinitely confine an insanity-defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.

The Court held in Ford v. Wainwright that the Eighth Amendment prohibits the state from executing a person who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding that satisfies the requirements of due process. Due process is not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or

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1210 See Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

1211 See State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

1212 Clark, 548 U.S. at 752. In Clark, the Court considered an Arizona statute, based on the M'Naghten case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753.

1213 Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

1214 463 U.S. at 368.

1215 463 U.S. at 370.


The Court, however, left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, “As was our approach in *Ford v. Wainwright* with regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.’”

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*, the Court had found that an individual has a significant “liberty interest” in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*, the Court found that this liberty interest could in “rare” instances be outweighed by the government’s interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case. Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant’s ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the

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1218 There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that “the ascertainment of a prisoner’s sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding “far less formal than a trial,” that the state “should provide an impartial officer or board that can receive evidence and argument from the prisoner’s counsel.” Id. at 427. Concurring Justice O’Connor, joined by Justice White, emphasized Florida’s denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell’s opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court’s holding.

1219 477 U.S. at 416–17.

1220 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986). The Court quoted this language again in Schriro v. Smith, holding that “[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith’s mental retardation claim.” 546 U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to “adopt[ ] their own measures for adjudicating claims of mental retardation,” though “those measures might, in their application, be subject to constitutional challenge.” Id.

1221 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).


1223 For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government’s interest in prosecution. 539 U.S. at 180.
same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

**Guilty Pleas.**—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. Often the defendant does so as part of a “plea bargain” with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense.\(^{1224}\) Although the government may not structure its system so as to coerce a guilty plea,\(^{1225}\) a guilty plea that is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.\(^{1226}\) The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,\(^{1227}\) and it is permissible for a prosecutor during such plea bargains to require a defendant to forgo his right to a trial in return for escaping additional charges that are likely upon conviction to result in a more severe penalty.\(^{1228}\) But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.\(^{1229}\)

\(^{1224}\) There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty.


\(^{1228}\) Bordenkircher v. Hayes, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969). See also United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction).

\(^{1229}\) Blackledge v. Perry, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a de novo trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based...
In accepting a guilty plea, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly, and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 1231

Sentencing.—In the absence of errors by the sentencing judge, or of sentencing jurors considering invalid factors, the significance of the same conduct. The distinction the Court draws between this case and Bordenkircher and Goodwin is that of pretrial conduct, in which vindictiveness is not likely, and post-trial conduct, in which vindictiveness is more likely and is not permitted. Accord, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

1230 Boykin v. Alabama, 395 U.S. 238 (1969). In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). See also Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

1231 Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

1232 In Townsend v. Burke, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

1233 In Hicks v. Oklahoma, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years.
cance of procedural due process at sentencing is limited. In Williams v. New York, the Court upheld the imposition of the death penalty, despite a jury’s recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material. Further, disclosure of such information to the defense could well dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In Gardner v. Florida, however, the Court limited the application of Williams to capital cases.

In United States v. Grayson, a noncapital case, the Court relied heavily on Williams in holding that a sentencing judge may properly consider his belief that the defendant was untruthful in

Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks’ conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury’s discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, see Chewning v. Cunningham, 388 U.S. 443 (1962); Oyler v. Boles, 388 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).


In Gardner, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when Williams was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. See also Lankford v. Idaho, 506 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge’s and prosecutor’s actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

his trial testimony in deciding to impose a more severe sentence
than he would otherwise have imposed. the Court declared that,
under the current scheme of individualized indeterminate senten-
cing, the judge must be free to consider the broadest range of information in assessing the defendant’s prospects for rehabilitation; defen-
dant’s truthfulness, as assessed by the trial judge from his own
observations, is relevant information.1239

There are various sentencing proceedings, however, that so im-
licate substantial rights that additional procedural protections are
required.1240 Thus, in Specht v. Patterson,1241 the Court considered
da defendant who had been convicted of taking indecent liberties,
which carried a maximum sentence of ten years, but was sen-
tenced under a sex offenders statute to an indefinite term of one
day to life. The sex offenders law, the Court observed, did not make
the commission of the particular offense the basis for sentencing.
Instead, by triggering a new hearing to determine whether the con-
victed person was a public threat, a habitual offender, or mentally
ill, the law in effect constituted a new charge that must be accom-
panied by procedural safeguards. And in Mempa v. Rhay,1242 the
Court held that, when sentencing is deferred subject to probation
and the terms of probation are allegedly violated so that the con-
victed defendant is returned for sentencing, he must then be repre-
sented by counsel, inasmuch as it is a point in the process where
substantial rights of the defendant may be affected.

Due process considerations can also come into play in sentenc-
ing if the state attempts to withhold relevant information from the
jury. For instance, in Simmons v. South Carolina, the Court held
that due process requires that if prosecutor makes an argument for
the death penalty based on the future dangerousness of the defen-
dant to society, the jury must then be informed if the only alterna-
tive to a death sentence is a life sentence without possibility of pa-
role.1243 But, in Ramdass v. Angelone,1244 the Court refused to apply

1239 438 U.S. at 49–52. See also United States v. Tucker, 404 U.S. 443, 446 (1972);
1240 See, e.g., Kent v. United States, 383 U.S. 541, 545, 561, 563 (1966), where
the Court required that before a juvenile court decided to waive jurisdiction and
transfer a juvenile to an adult court it must hold a hearing and permit defense coun-
sel to examine the probation officer’s report which formed the basis for the court’s
decision. Kent was ambiguous whether it was based on statutory interpretation or
constitutional analysis. In re Gault, 387 U.S. 1 (1967), however, appears to have
constitutionalized the language.
1241 386 U.S. 605 (1967).
1243 512 U.S. 154 (1994). See also Lynch v. Arizona, 578 U.S. ___, No. 15–8366,
slip op. at 3–4 (2016) (holding that the possibility of clemency and the potential for
future “legislative reform” does not justify a departure from the rule of Simmons);
the reasoning of Simmons because the defendant was not technically parole ineligible at time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others. If the judge does impose a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.

Because the possibility of vindictiveness in resentencing is de minimis when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.


North Carolina v. Pearce, 395 U.S. 711 (1969). Pearce was held to be nonretroactive in Michigan v. Payne, 412 U.S. 47 (1973). When a state provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial de novo in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in Pearce, because the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). But see Blackledge v. Perry, 417 U.S. 21 (1974), discussed supra.

1246 An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The Pearce presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

Corrective Process: Appeals and Other Remedies. — "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review." 1249 This holding has been reaffirmed,1250 although the Court has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents. 1251

A state is not free, however, to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In Frank v. Mangum, 1252 the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, the Court has stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment, 1253 and the Court has held that to burden this process, such as by limiting the right to petition for habeas corpus, is to deny the convicted defendant his constitutional rights. 1254

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and

1249 McKane v. Durston, 153 U.S. 684, 687 (1894). See also Andrews v. Swartz, 156 U.S. 272, 275 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).
1251 The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. See analysis under "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," infra.
1252 237 U.S. 309, 335 (1915).
1254 Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).
if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."

If a state provides a mode of redress, then a defendant must first exhaust that mode. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of habeas corpus.

When appellate or other corrective process is made available, because it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that, when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court’s sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law. But, in Moore v. Dempsey, while insisting that it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of habeas corpus to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, Moore marked the abandonment of the Supreme Court’s deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in Brown v. Mississippi and now taken for granted.

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1256 In Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), the Court had taken for review a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Clark and Brennan each wrote a concurring opinion.
1258 261 U.S. 86 (1923).
The Court has held, however, that the Due Process Clause does not provide convicted persons a right to postconviction access to the state’s evidence for DNA testing. Chief Justice Roberts, in a five-to-four decision, noted that 46 states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute that allows federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate postconviction relief procedures. The Court, therefore, saw “no reason to constitutionalize the issue.” It also expressed concern that “[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?”

Rights of Prisoners.—Until relatively recently the view prevailed that a prisoner “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state.” This view is not now the law, and may never have been wholly correct. In 1948 the Court declared that “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights”; “many,” indicated less than “all,” and it was clear that the Due Process and Equal Protection Clauses to some extent do apply to prisoners. More direct acknowledgment of constitutional protection came in 1972: “[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to

1261 557 U.S. ___, No. 08–6, slip op. at 2.
1262 557 U.S. ___, No. 08–6, slip op. at 20 (citation omitted). Justice Stevens, in a dissenting opinion joined by Justices Ginsburg and Breyer and in part by Justice Souter, concluded, “[t]here is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case.” Id. at 17.
appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the government for redress of grievances . . . .”

However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.

Save for challenges to conditions of confinement of pretrial detainees, the Court has generally treated challenges to prison conditions as a whole under the Cruel and Unusual Punishments Clause of the Eighth Amendment, while challenges to particular incidents and practices are pursued under the Due Process Clause or more specific provisions, such as the First Amendment’s speech and religion clauses.

Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have the right to petition for redress of grievances, which includes access to

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1269 See Bell v. Wolfish, 441 U.S. 520, 535–40 (1979). Persons not yet convicted of a crime may be detained by the government upon the appropriate determination of probable cause, and the government is entitled to “employ devices that are calculated to effectuate [a] detention.” Id. at 537. Nonetheless, the Court has held that the Due Process Clause protects a pretrial detainee from being subject to conditions that amount to punishment, which can be demonstrated through (1) actions taken with the “express intent to punish” or (2) the use of restrictions or conditions on confinement that are not reasonably related to a legitimate goal. See Wolfish, 441 U.S. at 538, 561. More recently, the Court clarified the standard by which the due process rights of pretrial detainees are adjudged with respect to excessive force claims. Specifically, in Kingsley v. Hendrickson, the Court held that, in order for a pretrial detainee to prove an excessive force claim in violation of his due process rights, a plaintiff must show that an officer’s use of force was objectively unreasonable, depending on the facts and circumstances from the perspective of a reasonable officer on the scene, see 576 U.S. ____, No. 14–6368, slip op. at 6–7 (2015), aligning the due process excessive force analysis with the standard for excessive force claims brought under the Fourth Amendment. Cf. Graham v. Connor, 490 U.S. 386, 398 (1989) (holding that a “free citizen’s claim that law enforcement officials used excessive force . . . [is] properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard”). Liability for actions taken by the government in the context of a pretrial detainee due process lawsuit does not, therefore, turn on whether a particular officer subjectively knew that the conduct being taken was unreasonable. See Kingsley, slip op. at 1.

1270 See “Prisons and Punishment,” supra.


the courts for purposes of presenting their complaints, and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators. And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.

In *Turner v. Safley*, the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: “[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on the liberty or safety of guards, other inmates, or visitors. On the other hand, “if an inmate claimant can point to an alternative that

1273 Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. See Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the state “enable [a] prisoner to discover grievances, and to litigate effectively”).


1275 Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if “reasonably related to legitimate penological interests”). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a “strict scrutiny” standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).


1277 482 U.S. at 89 (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child). See Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over which a prisoner’s parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse).

1278 For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

1279 482 U.S. at 90, 92.

fully accommodated the prisoner’s rights at de minimis cost to valid penological interests,” it would suggest unreasonableness.1281

Fourth Amendment protection is incompatible with “the concept of incarceration and the needs and objectives of penal institutions”; hence, a prisoner has no reasonable expectation of privacy in his prison cell protecting him from “shakedown” searches designed to root out weapons, drugs, and other contraband.1282 Avenues of redress “for calculated harassment unrelated to prison needs” are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.1283 Existence of “a meaningful postdeprivation remedy” for unauthorized, intentional deprivation of an inmate’s property by prison personnel protects the inmate’s due process rights.1284 Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.1285

A change of the conditions under which a prisoner is housed, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an “atypical and significant hardship” on the inmate.1286 In Wolff v. McDonnell,1287 the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of a defendant’s rights is not available. Rather, the analysis must proceed by identifying the interest in “liberty” that the clause protects. Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of “liberty” entitles him to the minimum procedures appropriate under the circumstances.1288 What the minimum procedures consist of is to be determined by balancing the prison-

1281 482 U.S. at 91.
1284 Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). But see Zinermon v. Burch, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not “unauthorized”).
1288 418 U.S. at 557. This analysis, of course, tracks the interest analysis discussed under “The Interests Protected: Entitlements and Positivist Recognition,” supra.
er’s interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions.

The Court in *Wolff* held that the prison must afford the subject of a disciplinary proceeding “advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken.” 1289 In addition, an “inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.” 1290 Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt threaten valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose. 1291 Revocation of good time credits, the Court later ruled, must be supported by “some evidence in the record,” but an amount that “might be characterized as meager” is constitutionally sufficient. 1292

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Because the state had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason.

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1289 418 U.S. at 563.
1290 418 U.S. at 566. However, the Court later ruled that the reasons for denying an inmate’s request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).
at all; consequently, there was nothing to hold a hearing about. The same principles govern interstate prison transfers.

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited. On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a “mental disease or defect” must, for two reasons, be preceded by a hearing. First, the statute gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner’s sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.

The kind of hearing that is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in Washington v. Harper. There the Court held that a judicial hearing was not required. Instead, the inmate’s substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

*Probation and Parole.*—Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions that are imposed; others who are jailed may subsequently qualify for release on parole before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority, it was long assumed that the administrators of the systems did not have to accord procedural due process either in the grant-

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1295 Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an “atypical and significant hardship”). In Wilkinson, the Court upheld Ohio’s multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219–20.
1298 Ughbanke v. Armstrong, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a “present” from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935), the Court’s premise was that as a matter of grace
ing stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*, the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed that indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer*, a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." What process is due, then, turned upon the state's interests. Its principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, it should be "able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly

the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

1300 408 U.S. 471 (1972).
1301 408 U.S. at 480, 482.
1302 408 U.S. at 483.
as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.\footnote{1303}

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the states to develop, but the Court specified minimum requirements of due process. \footnote{1304} "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole."\footnote{1305} Ordinarily, the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,\footnote{1305} but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.\footnote{1306}

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The state should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documen-

\footnote{1303} 408 U.S. at 484–87.  
\footnote{1304} 408 U.S. at 489.  
\footnote{1306} Bearden v. Georgia, 461 U.S. 660, 672 (1983).
tary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.\textsuperscript{1307}

With respect to the granting of parole, the Court’s analysis of the Due Process Clause’s meaning in \textit{Greenholtz v. Nebraska Penal Inmates}\textsuperscript{1308} is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectation of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,\textsuperscript{1309} and the full panoply of due process guarantees is not required.\textsuperscript{1310} Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.\textsuperscript{1311}

\begin{itemize}
\item \textsuperscript{1307} Gagnon v. Scarpelli, 411 U.S. 778 (1973).
\item \textsuperscript{1308} 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court’s analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22.
\item \textsuperscript{1309} Following \textit{Greenholtz}, the Court held in Board of Pardons v. Allen, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner “shall” be released upon certain findings by a parole board. Accord Swarthout v. Cooke, 562 U.S. \underline{10–333}, slip op. (2011) (\textit{per curiam}).
\item \textsuperscript{1310} The Court in \textit{Greenholtz} held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board’s largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. Accord Swarthout v. Cooke, 562 U.S. \underline{10–333}, slip op. (2011) (\textit{per curiam}).
\item \textsuperscript{1311} Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence, commutation being necessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had
The Problem of the Juvenile Offender.—All fifty states and the District of Columbia provide for dealing with juvenile offenders outside the criminal system for adult offenders. Their juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of the 20th century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as parens patriae for the juvenile offender and was in no sense his adversary.

Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in In re Gault that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.

their sentences commuted were promptly paroled. In Van Curen, the Court made express what had been implicit in Dimschat; the “mutually explicit understandings” concept under which some property interests are found protected does not apply to liberty interests. Van Curen is also interesting because there the parole board had granted the petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board.

1312 For analysis of the state laws as well as application of constitutional principles to juveniles, see Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System (2d ed. 2006).
1313 In re Gault, 387 U.S. 1, 12–29 (1967).
1314 387 U.S. 1 (1967).
1315 "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-
Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination. It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be “waived” to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*. Subsequently, the Court held that the “essentials of due process and fair treatment” required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult, but still later the Court held that jury trials were not constitutionally required in juvenile trials.

washed walls, regimented routine and institutional hours . . . ’ Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.”

—387 U.S. at 27–28. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.


—In *re Winship*, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. “The Court’s opinion today rests entirely on the assumption that all juvenile proceedings are ‘criminal prosecutions,’ hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.” Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377.

—McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun’s opinion of the Court, which was joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not “a criminal prosecution” within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a “fundamental fairness” approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id. at 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a
On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile’s waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach “permits—indeed it mandates— inquiry into all the circumstances surrounding the interrogation . . . including evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . .”

In another case the Court ruled that, although the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate. Instead, a simple reasonableness standard governs all searches of students’ persons and effects by school authorities.

The Court ruled in *Schall v. Martin* that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of “serious risk” that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guar-
anteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults.\textsuperscript{1324} With the Court having clarified the constitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In \textit{Stanford v. Kentucky},\textsuperscript{1325} the Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16.\textsuperscript{1326} In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists.\textsuperscript{1327} Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

\textbf{The Problem of Civil Commitment.}—As with juvenile offenders, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of “protective commitment” are involuntary commitments for treatment of insanity and other degrees of mental disability, alcoholism, narcotics addiction, sexual psychopathy, and the like. In \textit{O'Connor v. Donaldson},\textsuperscript{1328} the Court held that “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”\textsuperscript{1329} The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally con

\textsuperscript{1325} 492 U.S. 361 (1989).
\textsuperscript{1327} See analysis of Eighth Amendment principles, under “Capital Punishment,” \textit{supra}. 1328 422 U.S. 563 (1975). The Court bypassed “the difficult issues of constitutional law” raised by the lower courts’ resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under “Liberty Interests of People with Mental Disabilities: Commitment and Treatment,” \textit{supra}.
fined. Left to another day were such questions as “when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness” and the right, if any, to receive treatment for the confined person’s illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful post-deprivation remedy can cure the due process violation.

Procedurally, it is clear that an individual’s liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state’s aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of “clear and convincing” evidence.

In Parham v. J.R., the Court confronted difficult questions as to what due process requires in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the state, when such children are wards of the state. Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential


for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children. Similarly, the same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government. Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.

**EQUAL PROTECTION OF THE LAWS**

**Scope and Application**

**State Action.**—The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties. As the Court has noted, “the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.” Although state action requirements also apply to other provisions of the Constitution and to federal governmental ac-

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1335 442 U.S. at 598–617. The dissenters agreed on this point. Id. at 626–37.
1336 442 U.S. at 617–20. The dissenters would have required a preconfinement hearing. Id. at 637–38.
1337 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.
1338 The Amendment provides that “no State” and “nor shall any State” engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. See, e.g., Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq. These statutes, however, are generally based on Congress's power to regulate commerce. See Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
1339 Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 109 U.S. 3, 11 (1883).
1340 The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress's enforcement powers under section 5 of the Amendment. For discussion of the latter, see Section 5, Enforcement, “State Action,” infra. Several
tions, the doctrine is most often associated with the application of the Equal Protection Clause to the states.

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment. In addition, acts by other branches of government “by whatever instruments or in whatever modes that action may be taken” can result in a finding of “state action.” But the difficulty for the Court has been when the conduct complained of is not so clearly the action of a state. For instance, is it state action when a minor state official’s act was not authorized or perhaps was even forbidden by state law? What if a private party engages in discrimination while in a special relationship with governmental authority? “The vital requirement is State responsibility,” Justice Frankfurter once wrote, “that somewhere, somehow, there be an infusion of conduct by officials, panoplied with State power, into any scheme” to deny protected rights.

The state action doctrine is not just a textual interpretation of the Fourteenth Amendment, but may also serve the purposes of federalism. Thus, following the Civil War, when the Court sought to other constitutional rights are similarly limited—the Fifteenth Amendment (racial discrimination in voting), the Nineteenth Amendment (sex discrimination in voting) and the Twenty-sixth Amendment (voting rights for 18-year olds)—although the Thirteenth Amendment, banning slavery and involuntary servitude, is not.

The scope and reach of the “state action” doctrine is the same whether a state or the National Government is concerned. See CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973).


Ex parte Virginia, 100 U.S. 339, 346 (1880). “A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State’s power, his act is that of the State.” Id. at 346–47.

reassert states’ rights, it imposed a rather rigid state action standard, limiting the circumstances under which discrimination suits could be pursued. During the civil rights movement of the 1950s and 1960s, however, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in non-racial cases.\textsuperscript{1346} “Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.”\textsuperscript{1347}

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original \textit{Brown} cases as well as many subsequent cases arose in the context of statutorily mandated separation of the races, and therefore the finding of state action occasioned no controversy.\textsuperscript{1348} In the South, the aftermath of the case more often involved disputes over which remedies were needed to achieve a unitary system than it did the requirements of state action.\textsuperscript{1349} But if racial segregation is not the result of state action in some aspect,

\textsuperscript{1346} The history of the state action doctrine makes clear that the Court has considerable discretion and that the weighing of the opposing values and interests will lead to substantially different applications of the tests. “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715, 722 (1961).

\textsuperscript{1347} \textit{Lugar v. Edmondson Oil Co.}, 457 U.S. 922, 936–37 (1982). “Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.” \textit{Peterson v. City of Greenville}, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).


\textsuperscript{1349} See “Brown’s Aftermath,” supra.
then its existence is not subject to constitutional remedy.\footnote{1350} Distinguishing between the two situations has occasioned much controversy.

For instance, in a case arising from a Denver, Colorado school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that \textit{de jure} racial segregation caused by “intentionally segregative school board actions” is to be treated as if it had been mandated by statute, and is to be distinguished from \textit{de facto} segregation arising from actions not associated with the state.\footnote{1351} In addition, when it is proved that a meaningful portion of a school system is segregated as a result of official action, the responsible agency must then bear the burden of proving that other school segregation within the system is adventitious and not the result of official action.\footnote{1352} Moreover, the Court has also apparently adopted a rule that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can devolve upon the agency so that so that subsequent facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.\footnote{1353}

Different results follow, however, when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. “Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-
district segregation.” 1354 The de jure/de facto distinction is thus well established in school cases and is firmly grounded upon the “state action” language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the state. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded African-Americans from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge’s action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner. 1355 The fact that the “state action” category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in Yick Wo v. Hopkins, 1356 in which the Court found unconstitutional state action in the discriminatory administration of an ordinance that was fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action unattributable to the state for purposes of the Fourteenth Amendment. “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” 1357 When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of “custom” 1358 or through hortatory admonitions by public officials to private parties to act in a

1356 118 U.S. 356 (1886).
1357 United States v. Classic, 313 U.S. 299, 326 (1941). See also Screws v. United States, 325 U.S. 91, 109 (1945) (citation omitted); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). See also United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines Nat’l Bank v. Bennett, 284 U.S. 239, 246 (1931), “acts done ‘by virtue of public position under a State government . . . and . . . in the name and for the State’ . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law.” Note that, for purposes of being amenable to suit in federal court, however, the immunity of the states does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. Ex parte Young, 209 U.S. 123 (1908). Cf. Screws v. United States, 325 U.S. at 147–48.
discriminatory manner, the action is state action. In addition, when a state clothes a private party with official authority, that private party may not engage in conduct forbidden the state.

Beyond this are cases where a private individual discriminates, and the question is whether a state has encouraged the effort or has impermissibly aided it. Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*. There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by white sellers to black buyers. The covenants standing alone, Chief Justice Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, this situation is to be distinguished from where "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."
Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the state, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the state in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered. But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.

It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans v. Abney*, a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park should never be used by African-Americans, ruled that the city could not operate the park in a segregated fashion. Instead of striking the segregation requirement from the will, however, the court instead ordered return of the property to the decedent’s heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator’s intent with no racial motivation itself, and distinguished *Shelley* on the basis that African-Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.

-actions for violations of racially restrictive covenants would not be judicially entertained.

*Shelley* was struck down in 1954, 348 U.S. 880 (1954), rehearing granted, judgment vacated and certiorari dismissed, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the “sit-in” cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* *Bell v. Maryland*, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with* id. at 326 (Justices Black, Harlan, and White dissenting).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limitations on such rules. See id. at 265 (finding state action). Similarly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id. at 916 n.51.

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The case of Reitman v. Mulkey was similar to Shelley in both its controversy and the uncertainty of its rationale. In Reitman, the Court struck down an amendment to the California Constitution that prohibited the state and its subdivisions and agencies from forbidding racial discrimination in private housing. The Court, finding the provision to deny equal protection of the laws, appeared to ground its decision on either of two lines of reasoning. First was that the provision constituted state action to impermissibly encourage private racial discrimination. Second was that the provision made discriminatory racial practices immune from the ordinary legislative process, and thus impermissibly burdened minorities in the achievement of legitimate aims. In a subsequent case, Hunter v. Erickson, the latter rationale was used in a unanimous decision voiding an Akron ordinance, which suspended an “open housing” ordinance and provided that any future ordinance regulating transactions in real property “on the basis of race, color, religion, national origin or ancestry” must be submitted to a vote of the people before it could become effective.

Two later decisions involving state referenda on busing for integration confirm that the condemning factor of Mulkey and Hunter was the imposition of barriers to racial amelioration legislation.

Both cases agree that “the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed

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1369 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.
1370 See, e.g., 387 U.S. at 377 (language suggesting both lines of reasoning). But see City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).
1372 In contrast, other ordinances would become effective when passed, except that petitions could be submitted to revoke those ordinances by referendum. 393 U.S. at 389–90 (1969). In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff’d, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner’s program to ameliorate de facto segregation. The federal court held the law void, relying on Mulkey to conclude that the statute encouraged racial discrimination and that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the de facto segregation problem.
1373 Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A five-to-four majority in Seattle found the fault to be a racially based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to-1 majority in Crawford found that repeal of a measure to bus to undo de facto segregation, without imposing any barrier to other remedial devices, was permissible.
as embodying a presumptively invalid racial classification."\footnote{\textit{Crawford}, 458 U.S. at 539, quoted in \textit{Seattle}, 458 U.S. at 483. \textit{See also} \textit{Dayton Bd. of Educ. v. Brinkman}, 433 U.S. 406, 414 (1977).} It is thus not impermissible merely to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play.\footnote{\textit{Burton v. Wilmington Parking Authority}, 365 U.S. 715 (1961) (private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it").} There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."\footnote{365 U.S. at 722.} State action has been found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the state and the state prescribed a general election ballot made up of party nominees chosen in the primaries.\footnote{37 Smith v. Allwright, 321 U.S. 649, 664 (1944).} Although the City of Philadelphia was acting as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the city was held to be engaged in forbidden state action in discriminating against African-Americans in admission.\footnote{Pennsylvania \textit{v. Board of Trustees}, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. \textit{In re Girard College Trusteeship}, 391 Pa. 434, 138 A.2d 844, \textit{cert. denied}, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. \textit{Brown v. Pennsylvania}, 392 F.2d 120 (3d Cir.), \textit{cert. denied}, 391 U.S. 921 (1968).} When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.\footnote{\textit{Evans v. Newton}, 392 F.2d 120 (3d Cir.), \textit{cert. denied}, 391 U.S. 921 (1968).}

In a significant case in which the Court explored a lengthy list of contacts between the state and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African-Americans from its restaurant. The Court emphasized that the build-
ing was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee, and that the financial success of the restaurant benefitted the governmental agency. The “degree of state participation and involvement in discriminatory action,” therefore, was sufficient to condemn it.  

The question arose, then, what degree of state participation was “significant”? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The “sit-in” cases of the early 1960s presented all these questions and more but did not resolve them.  

The basics of an answer came in *Moose Lodge No. 107 v. Irvis*, in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from discriminating against African-Americans. It denied that private discrimination became constitutionally impermissible “if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever,” since any such rule would eviscerate the state action doctrine. Rather, “where the impetus for the discrimination is private, the State must have ‘significantly involved itself with invidious discrimination.’” Moreover, although the state had extensive powers to regulate in detail the liquor dealings of its licensees, “it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club’s enterprise.” And there was nothing in the licensing relationship here that approached “the symbiotic relationship between lessor and lessee” that the Court had found in *Burton*.  

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of “state action.” Rather, “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that

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1381 See, e.g., the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).
1382 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. Id. at 177–79.
1383 407 U.S. at 173.
1384 407 U.S. at 176–77.
1385 407 U.S. at 174–75.
the action of the latter may be fairly treated as that of the State itself." Or, to quote Judge Friendly, who first enunciated the test this way, the “essential point” is “that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint." Therefore, the Court found no such nexus between the state and a public utility’s action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the state had conferred in effect a monopoly status upon the utility, nor that in reviewing the company’s tariff schedules the regulatory commission had in effect approved the termination provision (but had not required the practice, had “not put its own weight on the side of the proposed practice by ordering it”) operated to make the utility’s action the state’s action. Significantly tightening the standard further against a finding of “state action,” the Court asserted that plaintiffs must establish not only that a private party “acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . .” And the actions are to be attributable to the state apparently only if the state compelled the actions and not if the state merely established the process through statute or regulation under which the private party acted.

Thus, when a private party, having someone’s goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statute to sell the goods and retain his charges out of the proceeds, his actions are not govern-

1387 Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). See also NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over national collegiate athletic association’s activities, the application of association rules leading to a state university’s suspending its basketball coach could not be ascribed to the state.). But see Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001) (where statewide public school scholastic association is “overwhelmingly” composed of public school officials for that state, this “entwinement” is sufficient to ascribe actions of association to state).
1388 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked “a sharp departure” from precedent, “that state authorization and approval of ‘private’ conduct has been held to support a finding of state action.” Id. at 389. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.
mental action and need not follow the dictates of the Due Process Clause.\textsuperscript{1391} Or, where a state workers' compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.\textsuperscript{1392} In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.\textsuperscript{1393}

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a “public function.”\textsuperscript{1394} For instance, in Marsh v. Alabama,\textsuperscript{1395} a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town, but the Court reversed. It is not entirely clear from the Court's opinion what it was that made the privately owned town one to which the Constitution applied. In essence, it appears to have been that the town “had all the characteristics of any other American town” and that it was “like” a state. “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”\textsuperscript{1396} A subsequent attempt to extend Marsh to privately owned shopping centers was at first successful, but was soon turned back, resulting in a sharp curtailment of the “public function” doctrine.\textsuperscript{1397}

\textsuperscript{1391} 436 U.S. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).


\textsuperscript{1393} Blum v. Yaretsky, 457 U.S. 991 (1982).

\textsuperscript{1394} This rationale is one of those that emerges from various opinions in Terry v. Adams, 345 U.S. 461 (1953) (holding that a political association limited to white voters that held internal elections to designate which of its member would run in the Texas Democratic primaries was acting as part of the state-established electoral system).

\textsuperscript{1395} 326 U.S. 501 (1946).

\textsuperscript{1396} 326 U.S. at 506.

\textsuperscript{1397} See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), limited in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and overruled in Hudgens v. NLRB, 424 U.S. 507 (1976). The Marsh principle is good only when private property has taken on all the attributes of a municipality. Id. at 516–17.
Attempts to apply this theory to other kinds of private conduct, such as operation of private utilities,\textsuperscript{1398} use of permissive state laws to secure property claimed to belong to creditors,\textsuperscript{1399} maintaining schools for “problem” children referred by public institutions,\textsuperscript{1400} provision of workers’ compensation coverage by private insurance companies,\textsuperscript{1401} and operation of nursing homes in which patient care is almost all funded by public resources,\textsuperscript{1402} proved unavailing. The question is not “whether a private group is serving a ‘public function.’ . . . That a private entity performs a function which serves the public does not make its acts state action.”\textsuperscript{1403} The “public function” doctrine is to be limited to a delegation of “a power ‘traditionally exclusively reserved to the State.’ ”\textsuperscript{1404}

Public function did play an important part, however, in the Court’s finding state action in the exercise of peremptory challenges in jury selection by non-governmental parties. Using tests developed in an earlier case involving garnishment and attachment,\textsuperscript{1405} the Court found state action in the racially discriminatory use of such challenges during \textit{voir dire} in a civil case.\textsuperscript{1406} The Court first asked “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority,” and then “whether the private party charged with the deprivation could be described in all fairness as a state actor.” In answering the second question, the Court considered three factors: “the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”\textsuperscript{1407} There was no question that the exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the “overt” and “significant” assistance of the court.

\textsuperscript{1402} Blum v. Yaretsky, 457 U.S. 991, 1011–1012 (1982).
\textsuperscript{1405} Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).
In addition, jury selection was found to be a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor, and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals." Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." Dissenting Justice O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action, even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant’s defense," because it involves selection of persons to wield governmental power.

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1408 500 U.S. at 624, 625.
1409 500 U.S. at 628.
1410 500 U.S. at 639, 643.
1413 505 U.S. at 54. Justice O’Connor, again dissenting, pointed out that the Court’s distinction was inconsistent with Dodson’s declaration that public defenders are not vested with state authority “when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” Id. at 65–66. Justice Scalia, also dissenting again, decried reduction of Edmonson “to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.” Id. at 69–70. Chief Justice Rehnquist, who had dissented in Edmonson, concurred in McCollum in the belief that it was controlled by Edmonson, and Justice Thomas, who had not participated in Edmonson, expressed similar views in a concurrence.
Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subject to constitutional constraints. Many lower courts had held state action to exist in such circumstances. However the question might have been answered under prior Court holdings, it is evident that the more recent cases would not generally support a finding of state action in these cases. In Rendell-Baker v. Kohn, a private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In Blum v. Yaretsky, a nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the state included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the state was involved, either through coercion or encouragement.

"That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating

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1417 The rules developed by the Court for general business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). To the latter point, see Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).
that the State is responsible for decisions made by the entity in
the course of its business." 1418

In the social welfare area, the Court has drawn a sharp distinc-
tion between governmental action subject to substantive due pro-
cess requirements, and governmental inaction, not so constrained.
There being "no affirmative right to governmental aid," the Court
announced in DeShaney v. Winnebago County Social Services De-
partment 1419 that "as a general matter, . . . a State's failure to pro-
tect an individual against private violence simply does not consti-
tute a violation of the Due Process Clause." Before there can be
state involvement creating an affirmative duty to protect an indi-
vidual, the Court explained, the state must have taken a person
into its custody and held him there against his will so as to re-
strict his freedom to act on his own behalf. Thus, although the Court
had recognized due process violations for failure to provide ade-
quate medical care to incarcerated prisoners, 1420 and for failure to
ensure reasonable safety for involuntarily committed mental pa-
tients, 1421 no such affirmative duty arose from the failure of social
services agents to protect an abused child from further abuse from
his parent. Even though possible abuse had been reported to the
agency and confirmed and monitored by the agency, and the agency
had done nothing to protect the child, the Court emphasized that
the actual injury was inflicted by the parent and "did not occur while
[the child] was in the State's custody." 1422 Although the state may
have incurred liability in tort through the negligence of its social
workers, "[n]ot every tort committed by a state actor [is] a constitu-
tional violation." 1423 "[I]t is well to remember . . . that the harm
was inflicted not by the State of Wisconsin, but by [the child's] fa-
ther." 1424

Judicial inquiry into the existence of "state action" may lead to
different results depending on what remedy is sought to be en-
forced. While cases may be brought against a private actor to com-
pel him to halt his discriminatory action (for example, to enjoin him
to admit blacks to a lunch counter), one could just as readily bring
suit against the government to compel it to cease aiding the pri-
ivate actor in his discriminatory conduct. Enforcing the latter rem-
edy might well avoid constitutional issues that an order directed to

1418 457 U.S. at 1011.
1422 489 U.S. at 201.
1423 489 U.S. at 202.
1424 489 U.S. at 203.
the private party would raise. In either case, however, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy. In a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government’s action “impermissibly fostered” the private conduct.

Thus, in Norwood v. Harrison, the Court struck down the provision of free textbooks by a state to racially segregated private schools (which were set up to avoid desegregated public schools), even though the textbook program predated the establishment of these schools. “[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has ‘a significant tendency to facilitate, reinforce, and support private discrimination.’ . . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations.” And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses “involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds.” The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.

1425 For example, if a Court finds a relationship between the state and a discriminating private group (which may have rights of association protected by the First Amendment), a remedy directed against the relationship might succeed, where a direction to such group to eliminate such discrimination might not. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Justice Douglas dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. See Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).


1429 Unlike the situation in which private club discrimination is attacked directly, “the question of the existence of state action centers in the extent of the city’s
It should be noted, however, that, without mentioning these cases, the Court has interposed a potentially significant barrier to use of the principle set out in them. In a 1976 decision, which it has since expanded, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must show that revocation of the benefit would cause the institutions to cease the complained-of conduct.1430

“Person”.—In the case in which it was first called upon to interpret this clause, the Court doubted whether “any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.” 1431 Nonetheless, in deciding the Granger Cases shortly thereafter, the Justices, as with the due process clause, seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.1432 Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the Equal Protection Clause applied to corporations. “We are all of the opinion that it does.”1433 The word has been given the broadest possible meaning. “These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences

of race, of color, or of nationality. . . .” 1434 The only qualification is that a municipal corporation cannot invoke the clause against its state. 1435

“Within Its Jurisdiction.” — Persons “within its jurisdiction” are entitled to equal protection from a state. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several states, the Court has rarely construed the phrase in relation to natural persons. 1436 As to business entities, it was first held that a foreign corporation that was not doing business in a state in a manner that subjected it to the process of a state’s courts was not “within the jurisdiction” of the state and could not complain that resident creditors were given preferences in the distribution of assets of an insolvent corporation. 1437 This holding was subsequently qualified, however, with the Court holding that a foreign corporation seeking to recover possession of property wrongfully taken in one state, but suing in another state in which it was not licensed to do business, was “within the jurisdiction” of the latter state, so that unequal burdens could not be imposed on the maintenance of the suit. 1438 The test of amenability to service of process within the state was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual. 1439 On the other hand, if a state has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws, but not necessarily to identical treatment with domestic corporations. 1440

Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Four-

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1436 But see Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a state are “within its jurisdiction” and may thus raise equal protection claims).
The desire to provide a firm constitutional basis for already-enacted civil rights legislation and to place repeal beyond the accomplishment of a simple majority in a future Congress was important to its sponsors. No doubt there were conflicting interpretations of the phrase “equal protection” among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was. Although the Court early recognized that African-Americans were the primary intended beneficiaries of the protections thus adopted, the spare language was majestically unconfined to so limited a class or to so limited a purpose. Though efforts to argue for an expansive interpretation met with little initial success, the equal protection standard ultimately came to be applicable to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

The Traditional Standard: Restrained Review.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation. It is still most often applied there, although it appears in many other contexts as well, including so-called “class-

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1441 The story is recounted in J. James, The Framing of the Fourteenth Amendment (1956). See also Journal of the Joint Committee of Fifteen on Reconstruction (B. Kendrick, ed. 1914). The floor debates are collected in 1 Statutory History of the United States: Civil Rights 181 (B. Schwartz, ed. 1970).


1446 In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the Equal Protection Clause as “the usual last resort of constitutional arguments.”

1447 See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

1448 Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and pa-
of-one" challenges. A more active review has been developed for classifications based on a "suspect" indicium or affecting a "fundamental" interest. "The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote, "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Thus, the mere fact of classification will not void legislation, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." Or, more succinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."
How then is the line between permissible and invidious classification to be determined? In *Lindsley v. Natural Carbonic Gas Co.*, the Court summarized one version of the rules still prevailing. “1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.” Especially because of the emphasis upon the necessity for total arbitrariness, utter irrationality, and the fact that the Court will strain to conceive of a set of facts that will justify the classification, the test is extremely lenient and, assuming the existence of a constitutionally permissible goal, no classification will ever be upset. But, contemporaneously with this test, the Court also pronounced another lenient standard which did leave to the courts a judgmental role. In *F.S. Royster Guano Co. v. Virginia*, the court put forward the following test: “[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Use of the latter standard did in fact result in some invalidations.

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*253 U.S. 412 (1920).


E.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) (striking down a tax on the out-of-state income of domestic corporations that did business in the state, when domestic corporations that engaged only in out-of-state business were exempted); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (striking down a graduated tax on gross receipts as arbitrary because it was insufficiently related to net profits); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936) (striking down a
But then, coincident with the demise of substantive due process in the area of economic regulation, the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification. Strengthening the deference was the recognition of discretion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the Lindsley standard, complete with the conceiving-of-a-basis and the one-step-at-a-time rationale, and it has applied this relaxed standard to social welfare regulations. In other cases, it has used the Royster Guano standard and has looked to the actual goal articulated by milk-price-control regulation that distinguished between certain milk producers based on their dates of entry into the market).

E.g., Tigner v. Texas, 310 U.S. 141 (1940) (exclusion of agriculture and livestock from price-fixing statute justified by heightened concerns surrounding concentrations of power in other industries); Kotch v. Board of River Port Pilot Comm’rs, 330 U.S. 552 (1947) (where apprenticeship was a requirement to obtain a river pilot license, allowing river pilots to apprentice mostly friends and relatives justified upon desire to create a cohesive piloting community); Goeaert v. Cleary, 335 U.S. 464 (1948) (court will not question legislature’s determination that allowing women to bartend gives rise to moral and social problems, but that such problems are relieved when a barmaid’s husband or father is the owner of the bar); Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding ban on advertising on the side of delivery trucks except by the business employing the truck, as legislature could determine that the nature and extent of the distraction presented by the latter advertising did not present the same threat to traffic); McGowan v. Maryland, 366 U.S. 420 (1961) (allowing the sale of certain products on Sunday, while prohibiting the sale of others, does not exceed a state’s wide discretion to affect some groups of citizens differently than others).
the legislature in determining whether the classification had a reasonable relationship to that goal,\textsuperscript{1464} although it has usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.\textsuperscript{1465}

Attempts to develop a consistent principle have so far been unsuccessful. In \textit{Railroad Retirement Board v. Fritz},\textsuperscript{1466} the Court acknowledged that “[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test under equal protection principles,” but then went on to note the differences between \textit{Lindsley} and \textit{Royster Guano} and chose the former.


\textsuperscript{1465} E.g., Lindsey v. Normet, 405 U.S. 56, 74–79 (1972) (requirement for tenant to post forfeitable bond for twice the amount of rent expected to accrue pending appellate decision on landlord-tenant dispute violates Equal Protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot provide dissimilar access to contraceptives for married and unmarried persons); James v. Strange, 407 U.S. 128 (1972) (statute allowing state to seek recoupment of attorney fees from indigent defendants who were provided legal counsel may not treat defendants differently from other civil debtors); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (state may not exclude households containing a person unrelated to other members of the household from food stamp program); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted). The Court in Reed v. Reed, 404 U.S. 71, 76 (1971), used the \textit{Royster Guano} formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.

\textsuperscript{1466} 449 U.S. 166, 174–79 (1980). The quotation is at 176–77 n.10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id. at 186–97 (Justice Brennan dissenting). The Court observed, however, that it was “constitutionally irrelevant” whether the plausible basis was in fact within Congress’s reasoning, inasmuch as the Court has never required a legislature to articulate its reasons for enacting a statute. Id. at 179. For a continuation of the debate over actual purpose and conceivable justification, see Kassel v. Consolidated Freightways Corp., 450 U.S. 682, 680–85 (1981) (Justice Brennan concurring), and id. at 702–06 (Justice Rehnquist dissenting). Cf. Schweiker v. Wilson, 450 U.S. 221, 243–45 (1981) (Justice Powell dissenting).
But, shortly, in *Schweiker v. Wilson*, in an opinion written by a different Justice, the Court sustained another classification, using the *Royster Guano* standard to evaluate whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had pursued a permissible goal, but setting aside the decision of the state court that the classification would not promote that goal; the Court announced that it was irrelevant whether in fact the goal would be promoted, the question instead being whether the legislature “could rationally have decided” that it would.

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to. In the main, the issues in recent years have not involved the validity of classifications, but rather the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using. Clarity in this area, then, must await presentation to the Court of a classification that it would sustain under the *Lindsley* standard and invalidate under *Royster Guano*.

**The New Standards: Active Review.**—When government legislates or acts either on the basis of a “suspect” classification or with regard to a “fundamental” interest, the traditional standard of equal protection review is abandoned, and the Court exercises a “strict scrutiny.” Under this standard government must demonstrate a high degree of need, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within the Court, it has now created a third category, finding several classifications to be worthy of a degree of “intermediate” scrutiny requiring

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1467 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.

1468 Justice Blackmun wrote the Court’s opinion in *Wilson*, Justice Rehnquist in *Fritz*.


1470 In City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283 (1982), the Court observed that it was not clear whether it would apply *Royster Guano* to the classification at issue, citing *Fritz* as well as Craig v. Boren, 429 U.S. 190 (1976), an intermediate standard case involving gender. Justice Powell denied that *Royster Guano* or Reed v. Reed had ever been rejected. Id. at 301 n.6 (dissenting). See also id. at 296–97 (Justice White).

1471 The exception is Reed v. Reed, 404 U.S. 71 (1971), which, though it purported to apply *Royster Guano*, may have applied heightened scrutiny. See Zobel v. Williams, 457 U.S. 55, 61–63 (1982), in which the Court found the classifications not rationally related to the goals, without discussing which standard it was using.
ing a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of “suspect” categories is classification by race. First in the line of cases dealing with this issue is *Korematsu v. United States*,\(^{1472}\) concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure was “immediately suspect” and subject to “rigid scrutiny.” The school segregation cases\(^{1473}\) purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications “bear a far heavier burden of justification” than other classifications and were invalid because no “over-riding statutory purpose”\(^{1474}\) was shown and they were not necessary to some “legitimate overriding purpose.”\(^{1475}\) “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”\(^{1476}\) Remedial racial classifications, that is, the development of “affirmative action” or similar programs that classify on the basis of race for the purpose of ameliorating conditions resulting from past discrimination, are subject to more than traditional review scrutiny, but whether the highest or some intermediate standard is the applicable test is uncertain.\(^{1477}\) A measure that does not draw a distinction explicitly on race but that does draw a line between those who seek to use the law to do away with or modify racial discrimination and those who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect.\(^{1478}\)

\(^{1472}\) 323 U.S. 214, 216 (1944). In applying “rigid scrutiny,” however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.


\(^{1474}\) Loving v. Virginia, 388 U.S. 1, 11 (1967). In Lee v. Washington, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.


\(^{1476}\) Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287–20 (1978) (Justice Powell announcing judgment of Court) (suspect), and id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (Chief Justice Burger announcing judgment of Court) (“a most searching examination” but not choosing a particular analysis), and id. at 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect, to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review, and to pass on statutory and administrative treatments of illegitimates inconsistently. Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.

However, in a major evaluation of equal protection analysis early in this period, the Court reaffirmed a two-tier approach, determining that where the interests involved that did not occasion strict scrutiny, the Court would decide the case on minimum rationality standards. Justice Powell, writing for the Court in *San Antonio School Dist. v. Rodriguez*, decisively rejected the contention that a *de facto* wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis, a holding that has several times been strongly reaffirmed by the Court. But the Court’s rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, “serve important governmental objectives and must be substantially related to achievement of those objectives.” And classifications that disadvantage illegitimates are subject to a similar

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1484 411 U.S. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.
1486 *Craig v. Boren*, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when “fundamental” rights and “suspect classes” are absent, id. at 210 (concurring), and added: “As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid
though less exacting scrutiny of purpose and fit. This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.

The Court has so far resisted further expansion of classifications that must be justified by a standard more stringent than rational basis. For example, the Court has held that age classifications are neither suspect nor entitled to intermediate scrutiny. Although the Court resists the creation of new suspect or "quasi-

reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." Id. at 210, n.*. Justice Stevens wrote that in his view the two-tiered approach does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classification. Id. at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, E.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect. Applying strict scrutiny, see, e.g., Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, see Foley v. Connellie, 435 U.S. 291 (1978); Ambach v. Norwich, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). See also Plyler v. Doe, 457 U.S. 202 (1982).

suspect" classifications, it may still, on occasion, apply the Royster Guano rather than the Lindsley standard of rationality.\footnote{City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); see discussion, supra.}

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.\footnote{Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).}

It is thought\footnote{Shapiro v. Thompson, 394 U.S. at 660 (Justice Harlan dissenting).} that the “fundamental right” theory had its origins in Skinner v. Oklahoma ex rel. Williamson,\footnote{316 U.S. 535, 541 (1942).} in which the Court subjected to “strict scrutiny” a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected “one of the basic civil rights.” In the apportionment decisions, Chief Justice Warren observed that, “since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”\footnote{Reynolds v. Sims, 377 U.S. 533, 562 (1964).} A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility\footnote{Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).} and the phrase “compelling state interest” was used several times in Justice Brennan’s opinion in Shapiro v. Thompson.\footnote{394 U.S. 618, 627, 634, 638 (1969).} Thereafter, the phrase was used in several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.\footnote{Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).}

Although no opinion of the Court attempted to delineate the process by which certain “fundamental” rights were differentiated from...
others, it was evident from the cases that the right to vote, the right of interstate travel, and the right to be free of wealth distinctions in the criminal process and the right of procreation were at least some of those interests that triggered active review when de jure or de facto official distinctions were made with respect to them. In Rodriguez, the Court also sought to rationalize and restrict this branch of active review, as that case involved both a claim that de facto wealth classifications should be suspect and a claim that education was a fundamental interest, so that providing less of it to people because they were poor triggered a compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as Rodriguez did not ultimately prevent the Court’s adoption of a “three-tier” or “sliding-tier” standard of review, Justice Powell’s admonition that only interests expressly or impliedly protected by the Constitution should be considered “fundamental” did not prevent the expansion of the list of such interests. The difficulty was that Court decisions on the right to vote, the right to travel, the right to procreate, as well as other rights, premise the constitutional violation to be of the Equal Protection Clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right. Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification. Although denials of public funding of abortions were

1498 This indefiniteness has been a recurring theme in dissents. E.g., Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Justice Harlan); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist).
1501 E.g., Tate v. Short, 401 U.S. 395 (1971).
1505 Zobel v. Williams, 457 U.S. 55, 69 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O’Connor concurring) (travel).
held to implicate no fundamental interest—abortion’s being a fundamental interest—and no suspect classification—because only poor women needed public funding.\textsuperscript{1507}—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.\textsuperscript{1508} And, in \textit{Plyler v. Doe},\textsuperscript{1509} the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.\textsuperscript{1510}

An open question after \textit{Obergefell v. Hodges}, the 2015 case finding the right to same-sex marriage is protected by the Constitution, is the extent to which the Court is reconceptualizing equal protection analysis.\textsuperscript{1511} In \textit{Obergefell}, the Court concluded that state laws that distinguished between marriages between same- and opposite-sex married couples violated the Equal Protection Clause.\textsuperscript{1512} However, in lieu of more traditional equal protection analysis, the \textit{Obergefell} Court did not identify whether the base classification made by the challenged state marriage laws was “suspect.” Nor did the \textit{Obergefell} Court engage in a balancing test to determine whether the purpose of the state classification was tailored to or fit the contours of the classification. Instead, the Court merely declared that state laws prohibiting same-sex marriage “abridge[d] central precepts of equality.”\textsuperscript{1513} It remains to be seen whether \textit{Obergefell} signals a new direction for the Court’s equal protection jurisprudence or is merely an anomaly that indicates the fluctuating nature of active review, as the doctrine has been subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. Nonetheless, as will be more fully reviewed below, the sliding scale of review underlies many of the Court’s most recent equal protection cases, even if the jurisprudence and its doctrinal basis have not been fully elucidated or consistently endorsed by the Court.

**Testing Facialy Neutral Classifications Which Impact on Minorities**

A classification made expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropri-\textsuperscript{1507} \textit{Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).} \textsuperscript{1508} \textit{E.g., Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).} \textsuperscript{1509} \textit{457 U.S. 202 (1982).} \textsuperscript{1510} \textit{See 576 U.S. ---, No. 14–556, slip op. at 2, 28 (2015).} \textsuperscript{1511} \textit{Id. at 22.} \textsuperscript{1512} \textit{Id.}
ate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.\textsuperscript{1513} But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the Equal Protection Clause, a much more difficult case is presented.

In Washington v. Davis, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.\textsuperscript{1514} For a time, in reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation, lower courts had questioned this proposition.\textsuperscript{1515} Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate numbers of blacks, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.\textsuperscript{1516} Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent

\textsuperscript{1513} See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focusing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).

\textsuperscript{1514} 426 U.S. 229, 242 (1976) ("[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id. at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). See also Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4–H Clubs is permissible, given wholly voluntary nature of membership).

\textsuperscript{1515} The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also drew the conclusion (and the Davis Court read it as actually deciding) that, because the pools were closed for both whites and blacks, there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. See also Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.\textsuperscript{1517} These cases were disapproved in \textit{Davis}, but the Court noted that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”\textsuperscript{1518}

The application of \textit{Davis} in the following Terms led to both elucidation and not a little confusion. Looking to a challenged zoning decision of a local board that had a harsher impact upon blacks and low-income persons than upon others, the Court in \textit{Village of Arlington Heights v. Metropolitan Housing Dev. Corp.}\textsuperscript{1519} explained in some detail how inquiry into motivation would work. First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing “a discriminatory purpose” among permissible purposes shifts the burden to the defendant to show that

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\item[1517] See Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between \textit{de facto} and \textit{de jure} segregation. In \textit{Cisneros v. Corpus Christi Indep. School Dist.} 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the “\textit{de facto} and \textit{de jure} nomenclature” to be “meaningless.” After the distinction was reiterated in \textit{Keyes v. Denver School District}, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), vacated and remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), \textit{modified and adhered to}, 564 F.2d 182, \textit{reh. denied}, 579 F.2d 910 (5th Cir. 1977–78), \textit{cert. denied}, 443 U.S. 915 (1979). \textit{See also United States v. Texas Educ. Agency}, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabinied in \textit{Massachusetts Personnel Adm’r v. Feeney}, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by \textit{Columbus Bd. of Educ. v. Penick}, 443 U.S. 449, 464–65 (1979).


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the same decision would have resulted absent the impermissible motive. Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case. In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender-based; too many men are non-veterans to permit such a conclusion, and some women are veterans. That the preference implicitly incorporated past official discrimination against women was held not to

1520 429 U.S. at 265–66, 270 n.21. See also Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

1521 Arlington Heights, 429 U.S. at 266.

1522 429 U.S. 267–68.
detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 1523

Moreover, in City of Mobile v. Bolden 1524 a plurality of the Court apparently attempted to do away with the totality of circumstances test and to separately evaluate each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics by listing and weighing a series of factors which in totality showed invidious discrimination, but the Court did not consider whether its ruling was premised on discriminatory purpose or adverse impact. 1525 But in the plurality opinion in Mobile, each of the factors, viewed “alone,” was deemed insufficient to show purposeful discrimination. 1526 Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent. 1527 But,

1523 Massachusetts Personnel Adm’r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of Davis and Arlington Heights to all nonracial classifications attacked under the Equal Protection Clause. But compare Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the Davis standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

1524 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the Equal Protection Clause in the “fundamental interest” context, vote dilution, rather than just in the suspect classification context.

1525 White v. Regester, 412 U.S. 755 (1972), was the prior case. See also Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice White, the author of Register, dissented in Mobile, 446 U.S. at 94, on the basis that “the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in White v. Register.” Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

1526 446 U.S. at 65–74.

1527 446 U.S. at 73–74. The principal formulation of the test was in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), aff’d on other grounds sub nom.
contemporaneously with Congress’s statutory rejection of the *Mobile* plurality standards, the Court, in *Rogers v. Lodge*, appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of “circumstantial evidence” that is more reminiscent of pre-*Washington v. Davis* cases than of the more recent decisions.

*Rogers v. Lodge* was also a multimember electoral district case brought under the Equal Protection Clause and the Fifteenth Amendment. The fact that the system operated to cancel out or dilute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. “An invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.” Turning to the lower court’s enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was “important evidence of purposeful exclusion.” Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the “depressed socio-economic status” of the black population as being both...
a result of past discrimination and a barrier to black access to voting power.\footnote{458 U.S. at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.} As for the district court’s application of the test, the Court reviewed it under the deferential “clearly erroneous” standard and affirmed it.

The Court in a jury discrimination case also seemed to allow what it had said in \textit{Davis} and \textit{Arlington Heights} it would not permit.\footnote{430 U.S. at 493–94. This had been recognized in \textit{Washington v. Davis}, 426 U.S. 229, 241 (1976), and \textit{Village of Arlington Heights v. Metropolitan Housing Dev. Corp.}, 429 U.S. 292, 286 n.13 (1977).} Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that the plaintiff’s showing that 79 percent of the county’s population was Spanish-surnamed, whereas jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed, was sufficient to establish a \textit{prima facie} case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.\footnote{Castaneda \textit{v. Partida}, 430 U.S. 482 (1977).} Second, the jury selection process was “highly subjective” and thus easily manipulated for discriminatory purposes, unlike the process in \textit{Davis} and \textit{Arlington Heights}, which was regularized and open to inspection.\footnote{Castaneda \textit{v. Partida}, 430 U.S. 482, 494, 497–99 (1977).} Thus, jury cases are likely to continue to be special cases and, in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

\section*{TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER}

**Taxation**

At the outset, the Court did not regard the Equal Protection Clause as having any bearing on taxation.\footnote{Davidson \textit{v. City of New Orleans}, 96 U.S. 97, 106 (1878).} It soon, however, en...
tertained cases assailing specific tax laws under this provision, and in 1890 it cautiously conceded that “clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.” The Court observed, however, that the Equal Protection Clause “was not intended to compel the State to adopt an iron rule of equal taxation” and propounded some conclusions that remain valid today. In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

Classification for Purpose of Taxation.—The power of the state to classify for purposes of taxation is “of wide range and flexibility.” A state may adjust its taxing system in such a way as

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1541 The state “may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution.” 134 U.S. at 237. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

1542 Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1918). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a state in contrast with a rate of 10 cents per $100 on deposits in the state. Madden v. Kentucky, 309 U.S. 83 (1940).


Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'n's v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without
the state, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfoest, 286 U.S. 165 (1932).

Gambling: slot machines on excursion riverboats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass’n of Central Iowa, 539 U.S. 193 (2003).

Theaters: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).


Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nash-ville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illi-nois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:


Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the state selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesaler in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).
to favor certain industries or forms of industry and may tax different types of taxpayers differently, despite the fact that they compete. It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed." Classification may not be arbitrary. It must be based on a real and substantial difference and the difference need not be great or conspicuous, but there must be no discrimination in favor of one as against another of the same class. Also, discriminations of an unusual character are scrutinized with special care. A gross sales tax graduated at increasing rates with the volume of sales, a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country, and a gross receipts tax levied on corporations operating taxicabs, but not on individuals, have been held to be a repugnant to the Equal Protection Clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.

One not within the class claimed to be discriminated against cannot challenge the constitutionality of a statute on the ground that it denies equal protection of the law. If a tax applies to a class that may be separately taxed, those within the class may not...

complain because the class might have been more aptly defined or because others, not of the class, are taxed improperly.\footnote{1556 Morf v. Bingaman, 298 U.S. 407, 413 (1936).}

**Foreign Corporations and Nonresidents.**—The Equal Protection Clause does not require identical taxes upon all foreign and domestic corporations in every case.\footnote{1557 Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). See also Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).} In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that state in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the state, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.\footnote{1558 Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).} Later cases whittled down this rule considerably. The Court decided that “after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,”\footnote{1559 Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).} and that where it has acquired property of a fixed and permanent nature in a state, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.\footnote{1560 Southern Ry. v. Green, 216 U.S. 400, 418 (1910).} A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the Equal Protection Clause where foreign companies writing only casualty insurance were not subject to a similar tax.\footnote{1561 Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).} Later, the doctrine of Philadelphia Fire Association v. New York was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.\footnote{1562 Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945).} Even though the right of a foreign corporation to do business in a state rests on a license, the Equal Protection Clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.\footnote{1563 Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).} The Court, in *WHYY Inc. v. Glassboro*,\footnote{1564 393 U.S. 117 (1968).} held that a foreign nonprofit corporation licensed to do business in the taxing state is denied equal protection of the law where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation.
solely because it was organized under the laws of a sister state and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing state.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*, the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose. However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.

**Income Taxes.**—A state law that taxes the entire income of domestic corporations that do business in the state, including that derived within the state, while exempting entirely the income received outside the state by domestic corporations that do no local business, is arbitrary and invalid. In taxing the income of a non-resident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the state, although residents are permitted to deduct all losses, wherever incurred. A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year that were deductible from gross income under the law in ef-

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1565 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

1566 470 U.S. at 880.

1567 The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual per se invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).


fect when they were received, does not violate the Equal Protection Clause.\textsuperscript{1570}

\textbf{Inheritance Taxes}.—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.\textsuperscript{1571} A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs.\textsuperscript{1572} There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.\textsuperscript{1573} Vested and contingent remainders may be treated differently.\textsuperscript{1574} The exemption of property bequeathed to charitable or educational institutions may be limited to those within the state.\textsuperscript{1575} In computing the tax collectible from a nonresident decedent's property within the state, a state may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the state bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.\textsuperscript{1576}

\textbf{Motor Vehicle Taxes}.—In demanding compensation for the use of highways, a state may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.\textsuperscript{1577} A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than it taxes similar vehicles carrying property not for hire, is reasonable, because the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less extensive than that of one engaged in business as a common carrier.\textsuperscript{1578} A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than are taxes on property not so employed.\textsuperscript{1579} Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and pri-

\begin{footnotesize}
\begin{enumerate}
\item[1572] Billings v. Illinois, 188 U.S. 97 (1903).
\item[1573] Campbell v. California, 200 U.S. 87 (1906).
\item[1574] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).
\item[1575] Board of Educ. v. Illinois, 203 U.S. 553 (1906).
\item[1578] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).
\end{enumerate}
\end{footnotesize}
A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the state for purpose of sale does not violate the Equal Protection Clause as applied to cars moving in caravans. The exemption from a tax for a permit to bring cars into the state in caravans of cars moved for sale between zones in the state is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt from the tax. Also sustained as valid have been exemptions of vehicles weighing less than 3,000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed; and exemptions from vehicle registration and license fees levied on private carriers operating a motor vehicle in the business of transporting persons or property for hire, the exemptions including one for vehicles hauling people and farm products exclusively between points not having railroad facilities and not passing through or beyond municipalities having railroad facilities.

Property Taxes.—The state’s latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy, whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy. A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the state. Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.

Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the Equal Protection Clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of dis-

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1586 Missouri v. Dockery, 191 U.S. 165 (1903).
1587 Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).
Subsequently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*, found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals.

Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, whereas assessments on property that has stayed in the same hands since 1976 may rise no more than 2% per year. *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a coherent state policy. California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.

*Allegheny Pittsburgh* was similarly distinguished in *Armour v. City of Indianapolis*, where the Court held that Indianapolis, which had abandoned one method of assessing payments against affected lots for sewer projects for another, could forgive outstanding assessments payments without refunding assessments already paid. In *Armour*, owners of affected lots had been given the option of paying in one lump sum, or of paying in 10, 20 or 30-year installment plan. Despite arguments that the forgiveness of the assessment resulted in a significant disparity in the assessment paid by similarly-situated homeowners, the Court found that avoiding the administrative burden of continuing to collect the outstanding fees was a rational basis for the City's decision.

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level. Equal protection is denied if a state does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is di-
rected the burden of seeking an upward revision of the assessment of other members of the class.\textsuperscript{1597} A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.\textsuperscript{1598}

**Special Assessment.**—A special assessment is not discriminatory because apportioned on an \textit{ad valorem} basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.\textsuperscript{1599} Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.\textsuperscript{1600} A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.\textsuperscript{1601} A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.\textsuperscript{1602} In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having fewer than 25 miles of main line within the district than for those having more.\textsuperscript{1603}

**Police Power Regulation**

**Classification.**—Justice Holmes’ characterization of the Equal Protection Clause as the “usual last refuge of constitutional arguments”\textsuperscript{1604} was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

“[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achieve-
ment of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”1605 The Court has made it clear that only the totally irrational classification in the economic field will be struck down,1606 and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.1607 So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature “could rationally have decided” that its classification would foster its goal.1608 The Court has con-

1606 City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. “When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.” Id. at 303–04.
1607 The “grandfather” clause upheld in Dukes preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both “grandfathered” vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305–06. See also Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).
1608 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evi-
dence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newspaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.


Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm’n v. Lowe, 281 U.S. 451 (1930).


Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden’s Farm Products Co. v. Ten Eyck, 297 U.S.
251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Ref. Co. v. Edy, 249 U.S. 427 (1919).

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a state, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). See also North v. Russell, 427 U.S. 328, 338 (1976). Geographic distinctions in regulatory laws


Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).


Landlord-tenant: requiring trial no later than six days after service of complaint and limiting triable issues to the tenant’s default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for non-payment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).


Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S. 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other states from registration requirement, Stornaas v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles
demned a variety of statutory classifications as failing the rational

v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 259 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Cooney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a state may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Bread v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).


Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. Otis v. Parker, 187 U.S. 608 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley,
basis test, although some of the cases are of doubtful vitality today
and some have been questioned. Thus, the Court invalidated a sta-
tute that forbade stock insurance companies to act through agents
who were their salaried employees but permitted mutual compa-
nies to operate in this manner.1609 A law that required private mo-
tor vehicle carriers to obtain certificates of convenience and neces-
sity and to furnish security for the protection of the public was held
invalid because of the exemption of carriers of fish, farm, and dairy
products.1610 The same result befell a statute that permitted mill
dealers without well-advertised trade names the benefit of a price
differential but that restricted this benefit to such dealers entering
the business before a certain date.1611 In a decision since overruled,
the Court struck down a law that exempted by name the American
Express Company from the terms pertaining to the licensing, bond-
ing, regulation, and inspection of “currency exchanges” engaged in
the sale of money orders.1612

Other Business and Employment Relations

Labor Relations.—Objections to labor legislation on the ground
that the limitation of particular regulations to specified industries
was obnoxious to the Equal Protection Clause have been consist-
tently overruled.1613 Statutes limiting hours of labor for employees
in mines, smelters,1614 mills, factories,1615 or on public works1616
have been sustained. And a statute forbidding persons engaged in
mining and manufacturing to issue orders for payment of labor unless
redeemable at face value in cash was similarly held unobjection-

703 (1885); Pet v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for neg-
ligence in the delivery of interstate messages, which did not forbid express compa-
nies and other common carriers to limit their liability by contract. Western Union

Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of
case’s validity, but interpreting it as standing for the proposition that no showing of
a valid legislative purpose had been made).
1612 Morey v. Doud, 354 U.S. 457 (1957), overruled by City of New Orleans v.
Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by pre-
cise description rather than by name.
(upholding limitation on the authority of public university professors to bargain over
instructional workloads).
The exemption of mines employing fewer than ten persons from a law pertaining to measurement of coal to determine a miner’s wages is not unreasonable. All corporations or public service corporations may be required to issue to employees who leave their service letters stating the nature of the service and the cause of leaving even though other employers are not so required.

Industries may be classified in a workers’ compensation act according to the respective hazards of each, and the exemption of farm laborers and domestic servants does not render such an act invalid. A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the Equal Protection Clause. At a time when protective labor legislation generally was falling under “liberty of contract” applications of the Due Process Clause, the Court generally approved protective legislation directed solely to women workers and this solicitude continued into present times in the approval of laws that were more questionable, but passage of the sex discrimination provision of the Civil Rights Act of 1964 has generally called into question all such protective legislation addressed solely to women.

Monopolies and Unfair Trade Practices.—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals, or to vendors of commodities but not to vendors of labor, have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act that exempts agricultural products in the hands of the

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1623 Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Nor is it a denial of equal protection for a city to refuse to withhold from its employees’ paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. City of Charlotte v. Firefighters, 426 U.S. 283 (1976).
1624 E.g., Muller v. Oregon, 208 U.S. 412 (1908).
1628 International Harvester Co. v. Missouri, 234 U.S. 199 (1914).
producer is valid. Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried. A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies that enter into illegal combinations, does not violate the Equal Protection Clause. A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause. Likewise, enforcement of an unfair sales act, under which merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction, effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps “across the board,” as a discount for payment in cash.

Administrative Discretion.—A municipal ordinance that vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality. But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city, or from building line restrictions. Written permission of the mayor or president of the city council may be required before any person shall move a building on a street. The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes. In a later case, the Court held that the unfettered discretion of river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not

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1629 Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)).
1635 Fischer v. St. Louis, 194 U.S. 361 (1904).
1638 Gundling v. Chicago, 177 U.S. 183 (1900).
a denial of equal protection to persons not selected despite the fact
that such apprenticeship was requisite for appointment as a pilot.

Social Welfare.—The traditional "reasonable basis" standard
of equal protection adjudication developed in the main in cases in-
volving state regulation of business and industry. "The administra-
tion of public welfare assistance, by contrast, involves the most ba-
sic economic needs of impoverished human beings. We recognize
the dramatically real factual difference between the cited cases and this
one, but we can find no basis for applying a different constitutional
standard." Thus, a formula for dispensing aid to dependent chil-
dren that imposed an upper limit on the amount one family could
receive, regardless of the number of children in the family, so that
the more children in a family the less money per child was re-
ceived, was found to be rationally related to the legitimate state
interest in encouraging employment and in maintaining an equi-
table balance between welfare families and the families of the work-

ing poor. Similarly, a state welfare assistance formula that, af-


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to married woman under 62 with dependent children in her care whose husband
retires or becomes disabled but denying benefits to divorced woman under 62 with
dependents represents rational judgment with respect to likely dependency of mar-
rried but not divorced women); Califano v. Boles, 443 U.S. 292 (1979) (limitation
of benefits to widows and divorced wives of wage earners does not deny equal protec-
tion to mother of illegitimate child of wage earner who was never married to wage
earner).
and then on the premise that Congress was actuated by an improper purpose.\footnote{1644 Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (also questioning rationality).}

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest that would place a bar upon the legislature’s giving landlords a much more favorable and summary process of judicially controlled eviction actions than was available in other kinds of litigation.\footnote{1645 Lindsey v. Normet, 405 U.S. 56 (1972). The Court did invalidate one provision of the law requiring tenants against whom an eviction judgment had been entered after a trial to post a bond in double the amount of rent to become due by the determination of the appeal, because it bore no reasonable relationship to any valid state objective and arbitrarily distinguished between defendants in eviction actions and defendants in other actions. Id. at 74–79.}

However, a statute that prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and that contained no limitation on dispensation to married persons was held to violate the Equal Protection Clause on several grounds. On the basis of the right infringed by the limitation, the Court saw no rational basis for the state to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of which the Court doubted in any case.\footnote{1646 Eisenstadt v. Baird, 405 U.S. 438 (1972).}

Also denying equal protection was a law affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.\footnote{1647 Stanley v. Illinois, 405 U.S. 645, 658 (1972).}

Punishment of Crime.—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.\footnote{1648 Pace v. Alabama, 106 U.S. 583 (1883). See Salzburg v. Maryland, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In North v. Russell, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.} Comparative gravity of criminal offenses is, however, largely a matter of state discretion, and the fact that some offenses are punished with less severity than others does not
deny equal protection. A statute denying state prisoners good-time credit for pre-sentence incarceration, but permitting those prisoners who obtain bail or other release immediately to receive good-time credit for the entire period that they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection. The distinction is rationally justified by the fact that good-time credit is designed to encourage prisoners to engage in rehabilitation courses and activities that exist only in state prisons and not in local jails.

A statute that provided that convicted defendants sentenced to imprisonment must reimburse the state for the furnishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation. Similarly, a statute enabling the state to recover the costs of such transcripts and other legal defense fees by a civil action violated equal protection because indigent defendants against whom judgment was entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors. But a bail reform statute that provided for liberalized forms of release and that imposed the costs of operating the system upon one category of re-
leased defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system. The Court has applied the clause strictly to prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency.

**EQUAL PROTECTION AND RACE**

**Overview**

The Fourteenth Amendment “is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.”

Thus, a state law that on its face discriminated against African-Americans was void. In addition,
“[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

Education

*Development and Application of “Separate But Equal”.*—Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race, but the Court in *Plessy v. Ferguson* adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts. *Plessy* concerned not schools but a state law requiring “equal but separate” facilities for rail transportation and requiring the separation of “white and colored” passengers. “The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power.”

The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, “even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”

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1664 163 U.S. 537 (1896).
1665 Roberts v. City of Boston, 59 Mass. 198, 206 (1849).
1666 *Plessy v. Ferguson*, 163 U.S. 537, 543–44 (1896). “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” *Id.* at 552, 559.
1667 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan’s well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African-Americans with a badge of inferiority. “[I]n view of the
Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African-Americans and sent to school with them rather than with whites.\(^{1668}\) and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African-Americans.\(^{1669}\) And no violation of the Equal Protection Clause was found when a state law prohibited a private college from teaching whites and African-Americans together.\(^{1670}\)

In 1938, the Court began to move away from “separate but equal.” It held that a state that operated a law school open to whites only and did not operate any law school open to African-Americans violated an applicant’s right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.\(^{1671}\) When Texas established a law school for African-Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.\(^{1672}\) Equally objectionable was the fact that when Oklahoma admitted an African-American law student to its only law school it required him to remain physically separate from the other students.\(^{1673}\)

**Brown v. Board of Education.**—“Separate but equal” was formally abandoned in *Brown v. Board of Education*,\(^{1674}\) which involved challenges to segregation *per se* in the schools of four states in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not “turn the clock back to 1867 . . . or even to 1896,” but must

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\(^{1668}\) Gong Lum v. Rice, 275 U.S. 78 (1927).
\(^{1669}\) Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).
\(^{1670}\) Berea College v. Kentucky, 211 U.S. 45 (1908).
\(^{1674}\) Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).
rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the Equal Protection Clause was violated by such separation. “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”  

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. “At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.” The lower courts were directed to “require that the defendants make a prompt and reasonable start toward full compliance,” although “[o]nce such a start has been made,” some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be “in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system.” In any event, however, the lower courts were to require compliance “with all deliberate speed.”

Brown’s Aftermath.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock. In the main, these years were taken up with enactment and administration of “pupil placement laws” by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation. The lower courts eventually began voiding these laws for discriminatory application, permitting class actions, and the Supreme Court
voided the exhaustion of state remedies requirement. In the early 1960s, various state practices—school closings, minority transfer plans, zoning and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the Brown mandate.

About this time, “freedom of choice” plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered. Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate led to a change of attitude in the lower courts and the Supreme Court. In Green v. School Board of New Kent County, the Court posited the principle that the only desegrega-

1681 Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964) (holding that “under the circumstances” the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the “private” schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, see Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff’d, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff’d, 368 U.S. 515 (1962).
1682 Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.
1683 Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).
1685 E.g., Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), rev’d on other grounds, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).
1686 Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. §§ 2000d et seq. (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to affirm guidance to state and local officials in interpretations of the law and were accepted as authoritative by the courts and used. Davis v. Board of School Comm’rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).
tion plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an affirmative obligation to achieve it. School boards must present to the district courts “a plan that promises realistically to work and promises realistically to work now,” in such a manner as “to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.” Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the merging into one system of faculty, staff, and services, so that no school could be marked as either a “black” or a “white” school.

**Implementation of School Desegregation.**—In the aftermath of *Green*, the various Courts of Appeals held inadequate an increasing number of school board plans based on “freedom of choice,” on zoning which followed traditional residential patterns, or on some combination of the two. The Supreme Court’s next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that “continued operation of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school

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1688 *Green*, 391 U.S. at 439, 442 (1968). “*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” Id. at 437–38. The case laid to rest the dictum of *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution “does not require integration” but “merely forbids discrimination.” *Green* and *Raney v. Board of Educ. of Gould School Dist.*, 391 U.S. 443 (1968), found “freedom of choice” plans inadequate, and *Monroe v. Board of Comm’rs of City of Jackson*, 391 U.S. 450 (1968), found a “free transfer” plan inadequate.

1689 Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

1690 United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), mod. and aff’d, 380 F.2d 385 (5th Cir.) (en banc), cert. denied, 389 U.S. 840 (1967).

systems at once and to operate now and hereafter only unitary schools.”

In the October 1970 Term the Court in Swann v. Charlotte-Mecklenburg Board of Education undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process. The opinion in Swann emphasized that the goal since Brown was the dismantling of an officially imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Although "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan that contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials. When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in Swann determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in this remedial process, conscious assignment of students and drawing of boundaries

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1693 402 U.S. 1 (1971); see also Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).
1695 402 U.S. at 18.
1696 402 U.S. at 25–27.
1697 402 U.S. at 22–25.
on the basis of race is permissible.\textsuperscript{1698} Transportation of students—busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.\textsuperscript{1699} Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.\textsuperscript{1700}

\textbf{Northern Schools: Inter- and Intradistrict Desegregation.—} The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was \textit{de jure} and what remedies should be imposed when such official separation was found.\textsuperscript{1701}

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in \textit{Milliken v. Bradley}\textsuperscript{1702} set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school

\textsuperscript{1698} 402 U.S. at 27–29.
\textsuperscript{1699} 402 U.S. at 29–31.
\textsuperscript{1700} 402 U.S. at 31–32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.
\textsuperscript{1701} The presence or absence of a statute mandating separation provides no talisman indicating the distinction between \textit{de jure} and \textit{de facto} segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as \textit{Ex parte Virginia}, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.
\textsuperscript{1702} 418 U.S. 717 (1974).
districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district. The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." Too, the complexity of formulating and overseeing the implementation of a plan that would effect a de facto consolidation of multiple school districts, the Court indicated, would impose a task that few, if any, judges are qualified to perform and one that would deprive the people of control of their schools through elected representatives. "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." "The controlling principle consistently expounded in our holdings," the Court wrote in the Detroit case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation." Although this axiom caused little problem when the violation consisted of statutorily mandated separation, it re-

1703 418 U.S. at 745.  
1704 418 U.S. at 741–42.  
1705 418 U.S. at 742–43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.  
1706 Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an interdistrict order. Id. at 757, 762, 781.  
1707 418 U.S. at 744. See Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in Milliken was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in Milliken).  
1708 When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is re-
quired a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory, but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but later the Court appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District.* The lower courts had found the school segregation existing within one part of the city to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that, when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden then shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.

*Keyes* then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to the violation found; by creating presumptions *Keyes* simply afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the “controlling principle” of...
school desegregation cases, the Court appeared to move away from
the *Keyes* approach. First, the Court held that federal equity power
was lacking to impose orders to correct demographic shifts “not at-
tributed to any segregative actions on the part of the defen-
dants.” A district court that had ordered implementation of a
student assignment plan that resulted in a racially neutral system
exceeded its authority, the Court held, by ordering annual readjust-
ments to offset the demographic changes.

Second, in the first *Dayton* case the lower courts had found three
constitutional violations that had resulted in some pupil segrega-
tion, and, based on these three, viewed as “cumulative violations,”
a district-wide transportation plan had been imposed. Reversing, the
Supreme Court reiterated that the remedial powers of the federal
courts are called forth by violations and are limited by the scope of
those violations. “Once a constitutional violation is found, a federal
court is required to tailor ‘the scope of the remedy’ to fit ‘the na-
ture and extent of the constitutional violation.’ ” The goal is to
restore the plaintiffs to the position they would have occupied had
they not been subject to unconstitutional action. Lower courts “must
determine how much incremental segregative effect these vi ola-
tions had on the racial distribution of the Dayton school population
as presently constituted, when that distribution is compared to what
it would have been in the absence of such constitutional violations.
The remedy must be designed to redress that difference, and only
if there has been a systemwide impact may there be a systemwide
remedy.” The Court then sent the case back to the district court
for the taking of evidence, the finding of the nature of the viola-
tions, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly ap-
plied in subsequent appeals of the *Dayton* case after remand and

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1711 Of significance was the disallowance of the disproportionate impact analy-
sis in constitutional interpretation and the adoption of an apparently strengthened
intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington
Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Massachusetts Per-
sonnel Adm'r v. Feeney, 442 U.S. 256 (1979). This principle applies in the school
1713 427 U.S. at 436.
Gautreaux, 425 U.S. 284, 294 (1976)).
not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan,
the author of *Keyes*, concurred on the basis that the violations found did not justify
the remedy imposed, asserting that the methods of proof used in *Keyes* were still
valid. Id. at 421.
in an appeal from Columbus, Ohio.\textsuperscript{1716} Following the Supreme Court standards, the Dayton district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The Columbus district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in \textit{Brown v. Board of Education}. The Keyes presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”\textsuperscript{1717} Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be used to infer segregative intent, thus satisfying the \textit{Davis-Arlington Heights} standards.\textsuperscript{1718} The Court further affirmed the district-wide remedies, holding that its earlier Dayton ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.\textsuperscript{1719}

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the \textit{Detroit} case, the Court unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of \textit{de jure} segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account


\textsuperscript{1717} Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). \textit{Contrast} the Court’s more recent decision in Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam), holding that adoption of “a wholly neutral admissions policy” for voluntary membership in state-sponsored 4–H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a “wholly different milieu” from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court’s per curiam opinion).

\textsuperscript{1718} 443 U.S. at 461–65.

\textsuperscript{1719} 443 U.S. at 465–67.
the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.\textsuperscript{1720}

The broad scope of federal courts' remedial powers was more recently reaffirmed in \textit{Missouri v. Jenkins}.\textsuperscript{1721} There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials "the opportunity to devise their own solutions."\textsuperscript{1722}

\textbf{Efforts to Curb Busing and Other Desegregation Remedies.—}\n
Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for \textit{de jure} racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. \textit{Swann}, of course, sanctioned an order requiring fairly extensive busing, as did the more recent \textit{Dayton} and \textit{Columbus} cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,\textsuperscript{1723} and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.\textsuperscript{1724} Congress enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been largely ineffectual.\textsuperscript{1725} 

\textsuperscript{1720} Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.

\textsuperscript{1721} 495 U.S. 33 (1990).

\textsuperscript{1722} 495 U.S. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.


ger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.\textsuperscript{1726}

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for \textit{de jure} segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.\textsuperscript{1727} Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students’ course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both \textit{de jure} and \textit{de facto} segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and, with near unanimity of result if not of reasoning, it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.\textsuperscript{1728} The Court discerned no such impediment in


\textsuperscript{1728} Washington v. Seattle School Dist., 458 U.S. 457, 470–82 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O’Connor, and
the California measure, a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the state continued under an obligation to alleviate de facto segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.\footnote{1729}

The Court subsequently declined to extend the reasoning of these cases to remedies for exclusively de facto racial segregation. In \textit{Schuette v. Coalition to Defend Affirmative Action},\footnote{1730} the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by that state's voters, to prohibit the use of race-based preferences as part of the admissions process for state universities. A plurality of the \textit{Schuette} Court restricted its prior holdings as applying only to those situations where state action had the serious risk, if not purpose, of causing specific injuries on account of race.\footnote{1731} Finding no similar risks of injury with regard to the Michigan Amendment and no similar allegations of past discrimination in the Michigan university system, the Court declined to "restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended."\footnote{1732} The plurality opinion and a majority of the Court, however, explicitly rejected a broader "political process theory" with respect to the constitutionality of race-based remedies. Specifically, the Court held that state action that places effective decision making over a policy that "inures primarily to the benefit of the minority" at a different level of government is not subject to heightened constitutional scrutiny.\footnote{1733}

\footnotesize{Chief Justice Burger. Id. at 488. The dissent essentially argued that because the state was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.}


\footnotesize{\textbf{1730} 572 U.S. ___, No. 12–682, slip op. (2014).}

\footnotesize{\textbf{1731} The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito. Justice Scalia authored an opinion concurring in judgment, joined by Justice Thomas, arguing that \textit{Seattle School District} and the case on which it was based should be overturned in their entirety. \textit{Schuette}, slip op. at 7–8 (Scalia, J., concurring in judgment). Justice Breyer also wrote an opinion concurring in judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Breyer relied on the facts that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring that the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) the underlying racial preference policy had been adopted by individual school administrations, not by elected officials. \textit{Id.} at 5, 22 (Sotomayor, J., dissenting). Justice Kagan recused herself.}

\footnotesize{\textbf{1732} \textit{Id.} at 3–4 (plurality opinion).}

\footnotesize{\textbf{1733} \textit{Id.} at 11 (plurality opinion).}
Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in Oklahoma City Board of Education v. Dowell, upon a showing that the purposes of the litigation have been “fully achieved”—i.e., that the school district is being operated “in compliance with the commands of the Equal Protection Clause,” that it has been so operated “for a reasonable period of time,” and that it is “unlikely” that the school board would return to its former violations. On remand, the trial court was directed to determine “whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [de jure] discrimination had been eliminated to the extent practicable.” In United States v. Fordice, the Court determined that Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior de jure, racially segregated, “dual” system of higher education. The state also, to the extent practicable and consistent with sound educational practices, had to eradicate policies and practices that were traceable to the dual system and that continued to have segregative effects. The Court identified several surviving aspects of Mississippi’s prior dual system that were constitutionally suspect and that had to be justified or eliminated. The state’s admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, was suspect because it originated as a means of preserving segregation. Also suspect were the widespread duplication of programs, a possible remnant of the dual “separate-but-equal” system; institutional mission classifications that made three historically white schools the flagship “comprehensive” universities; and the retention and operation of all eight schools rather than the possible merger of some.

Juries

It has been established since Strauder v. West Virginia that exclusion of an identifiable racial or ethnic group from a grand jury.
that indicts a defendant or from petit jury\textsuperscript{1739} that tries him, or from both,\textsuperscript{1740} denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.\textsuperscript{1741} Even if the defendant’s race differs from that of the excluded jurors, the Court held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.\textsuperscript{1742} “Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.”\textsuperscript{1743} Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.\textsuperscript{1744}

A \textit{prima facie} case of deliberate and systematic exclusion is made when it is shown that no African-Americans have served on juries has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. \textit{See Ex parte Virginia,} 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.


\textsuperscript{1739} Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).


\textsuperscript{1741} Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. Cassell v. Texas, 339 U.S. 282 (1950); Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).


The Court in 1972 was substantially divided with respect to the reason for rejecting the “same class” rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.


for a period of years or when it is shown that the number of African-Americans who served was grossly disproportionate to the percentage of African-Americans in the population and eligible for jury service. Once this prima facie showing has been made, the burden is upon the jurisdiction to prove that it had not practiced discrimination; it is not adequate that jury selection officials testify under oath that they did not discriminate. Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices that made discrimination easy to accomplish, it has not outlawed discretionary selection pursuant to general standards of educational attainment and character that can be administered fairly. Similarly, it declined to rule that African-Americans must be included on all-white jury commissions that administer the jury selection laws in some states.

In Swain v. Alabama, African-Americans regularly appeared on jury venires but no African-American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African-American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African-Americans in the particular case was permissible, the Court held, regardless of the prosecutor’s motive, although it indicated that the consistent use of such challenges to remove African-Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African-American had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, the defendant’s claims were rejected.

The Swain holding as to the evidentiary standard was overruled in Batson v. Kentucky, the Court ruling that “a defendant may

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1748 Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African-Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African-Americans were marked with a “c”).
1750 396 U.S. at 340–41.
establish a *prima facie* case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s [own] trial.”

To rebut this showing, the prosecutor “must articulate a neutral explanation related to the particular case,” but the explanation “need not rise to the level justifying exercise of a challenge for cause.”

In fact, “[a]lthough the prosecutor must present a comprehensible reason, ‘[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible’; so long as the reason is not inherently discriminatory, it suffices.” Such a rebuttal having been offered, “the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating ‘the persuasiveness of the justification’ proffered by the prosecutor, but the ‘ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.’”

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Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit “panel majority improperly substituted its evaluation of the record for that of the state trial court.” Id. at 337–38. Justice Breyer, joined by Justice Souter, concurred but suggested “that legal life without peremptories is no longer unthinkable” and “that we should reconsider *Batson*’s test and the peremptory challenge system as a whole.” Id. at 344.

Rice v. Collins, 546 U.S. at 338 (citations omitted). “[I]f once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution.” Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (citation omitted).
on the issue of discriminatory intent must be sustained unless it is clearly erroneous," but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent. The Court has also extended Batson to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation and by a defendant in a criminal case, the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

Discrimination in the selection of grand jury foremen presents a closer question, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court “assumed without deciding” that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers. That situation was distinguished, however, in a due process challenge to the federal system, where the foreman’s responsibilities were “essentially clerical” and where the selection was from among the members of an already chosen jury.

To rule on a Batson objection based on a prospective juror’s demeanor during voir dire, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror’s demeanor. Thaler v. Haynes, 559 U.S. ___, No. 09–273, slip op. (2010).

Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal habeas review. Felkner v. Jackson, 562 U.S. ___, No. 10–797, slip op. at 4 (2011) (per curiam) (citation omitted).

See, e.g., Foster v. Chatman, 578 U.S. ___, No. 14–8349, slip op. at 10–23 (2016) (applying the three-step process set forth in Batson to allow a death row inmate to pursue an appeal on the grounds that the state court’s conclusion that the defendant had not shown purposeful discrimination during voir dire was clearly erroneous given that the prosecution’s justifications for striking African-American jurors, while seeming “reasonable enough,” had “no grounding in fact,” were contradicted by the record, and had shifted over time); Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (finding the prosecution’s race-neutral explanation for its peremptory challenge of an African-American juror to be implausible, and that this “implausibility” was “reinforced by the prosecutor’s acceptance of white jurors” whom the prosecution could have challenged for the same reasons that it claimed to have challenged the African-American juror); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (finding discrimination in the use of peremptory strikes based on various factors, including the high ratio of African-Americans struck from the venire panel, some of whom were struck on grounds that “appeared equally on point as to some white jurors who served”).
Capital Punishment

In *McCleskey v. Kemp* the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as “fundamentally different” from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.

“Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.” Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.

Housing

*Buchanan v. Warley* invalidated an ordinance that prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and that prohibited whites from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the Equal Protection Clause, the judicial enforcement of them, either by injunctive relief or through entertaining principles protecting black defendants from “the injuries of stigmatization and prejudice” associated with discrimination. Id. at 347.

The decision was 5–4, with Justice Powell’s opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O’Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court’s usual approach to capital punishment, in which greater scrutiny is required. Id. at 340, 347–48, 366.

Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant’s background or character, or to the nature of the offense; the Court also cited the “traditionally ‘wide discretion’” accorded decisions of prosecutors. Id. at 296.

The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor “to rebut a study that analyzes the past conduct of scores of prosecutors” whereas the peremptory challenge inquiry would focus only on the prosecutor’s own acts. 481 U.S. at 296 n.17.

damage actions, does.\textsuperscript{1767} Referendum passage of a constitutional amendment repealing a “fair housing” law and prohibiting further state or local action in that direction was held unconstitutional in \textit{Reitman v. Mulkey},\textsuperscript{1768} though on somewhat ambiguous grounds, whereas a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found not to violate the Equal Protection Clause.\textsuperscript{1769} Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.\textsuperscript{1770} Provision of publicly assisted housing, of course, must be on a non-discriminatory basis.\textsuperscript{1771}

\textbf{Other Areas of Discrimination}

\textit{Transportation}.—The “separate but equal” doctrine won Supreme Court endorsement in the transportation context,\textsuperscript{1772} and its passing in the education field did not long predate its demise in transportation as well.\textsuperscript{1773} During the interval, the Court held invalid a state statute that permitted carriers to provide sleeping and dining cars for white persons only,\textsuperscript{1774} held that a carrier’s provision of unequal, or nonexistent, first class accommodations to African-Americans violated the Interstate Commerce Act,\textsuperscript{1775} and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.\textsuperscript{1776} \textit{Bovinyt v. Virginia}\textsuperscript{1777} voided a trespass conviction of an interstate African-American bus passenger who had refused to leave a restaurant that the Court viewed as an integral part of the facilities devoted to-in-
terstate commerce and therefore subject to the Interstate Commerce Act.

**Public Facilities.**—In the aftermath of *Brown v. Board of Education*, the Court, in a lengthy series of *per curiam* opinions, established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.\(^{1778}\) A municipality could not operate a racially segregated park pursuant to a will that left the property for that purpose and that specified that only whites could use the park,\(^{1779}\) but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent’s heirs.\(^{1780}\) A municipality under court order to desegregate its publicly owned swimming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them.\(^{1781}\)

**Marriage.**—Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,\(^{1782}\) as are statutes that penalize interracial cohabitation.\(^{1783}\) Nor may a court deny custody of a child based on a parent’s remarriage to a person of another race and the presumed “best interests of the child” to be free from the prejudice and stigmatization that might result.\(^{1784}\)


\(^{1779}\) Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the operation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id. at 312, 315.

\(^{1780}\) Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in effectuating the testator’s intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the Equal Protection Clause. Justices Douglas and Brennan dissented. Id. at 448, 450.

\(^{1781}\) Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African-Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.

\(^{1782}\) Loving v. Virginia, 388 U.S. 1 (1967).


Judicial System.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience, or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.

Public Designation.—It is unconstitutional to designate candidates on the ballot by race and apparently any sort of designation by race on public records is suspect, although not necessarily unlawful.

Public Accommodations.—Whether discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court’s attention considerably in the early 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation. Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.

Elections.—Although, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress, the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well. Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is sub-

1786 Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).
1789 Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African-Americans in voting, tax and property records).
ject to Fourteenth and Fifteenth Amendment and statutory attack.1794

“Affirmative Action”: Remedial Use of Racial Classifications

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of “reverse discrimination,” in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class. Although the Court had previously accepted the use of suspect criteria such as race to formulate remedies for specific instances of past discrimination and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination, it was not until the late 1970s that the Court gave plenary review to programs that expressly used race as the primary consideration for awarding a public benefit.

In United Jewish Organizations v. Carey, New York State had drawn a plan that consciously used racial criteria to create districts with nonwhite populations in order to comply with the Veto.

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1795 While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. E.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id. at 280 n.8. In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. Accord, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421 (1986).


1797 Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

1798 The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the Court did not reach the merits.

ing Rights Act and to obtain the United States Attorney General’s approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.1800

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice White argued that compliance with the Act necessarily required states to be race conscious in the drawing of lines so as not to dilute minority voting strength. Justice White noted that this requirement was not dependent upon a showing of past discrimination and that the states retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.1801

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the state had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength, because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.1802

1800 For a detailed discussion of the use of racial considerations in apportionment and districting by the states, see infra Amendment 14: Section 1: Rights Guaranteed: Fundamental Interests: The Political Process: Apportionment and Districting.
1801 430 U.S. at 155–65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.
1802 430 U.S. at 165–68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society’s latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General’s supervision made the difference to him in this case. Id. at 168. Justices Stewart and Pow-
It was anticipated that Regents of the University of California v. Bakke would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In Bakke, the Davis campus medical school admitted 100 students each year. Of these slots, the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had the 16 positions not been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications, however, could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.

Justice Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the Justices concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. See 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger). The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the Equal Protection Clause proscribed. 438 U.S. at 284–87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun). They thus reached the constitutional issue.

438 U.S. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " Id. at 359.
tions asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination. Justice Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the result in *Bakke*. In *Fullilove v. Klutznick*, the Court, still lacking a majority opinion, upheld a federal statute requiring that at least ten percent of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these findings need not be extensive nor express and may be collected in

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1806 438 U.S. at 287–320.
1807 See 438 U.S. at 319–20 (Justice Powell).
1808 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dis- sented in one opinion, id. at 522, while Justice Stevens dissented in another, id. at 532.
1809 448 U.S. at 517.
many ways. Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination. But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans. As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In Wygant v. Jackson Board of Education, the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In United States v. Paradise, the Court upheld as a remedy for past dis-

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1810 Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled, but that they have some such power seems evident. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in section 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.


1812 448 U.S. at 484–89 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

1813 Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that “the statutory prohibition with which the employer must contend was not intended to extend as far as that of the Constitution,” and that “voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace.” Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency’s voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency) (emphasis in original). The constitutionality of the agency’s plan was not challenged. See id. at 620 n.2.


crimination a court-ordered racial quota in promotions. Justice White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees. By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*, the Court invalidated a minority set-aside requirement that holders of construction contracts with the city subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the city's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC* applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.

In *Croson*, the Court ruled that the city had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population

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1816 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved. 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

1817 480 U.S. at 182–83 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (opinion of Justice Brennan), id. at 189 (Justice Stevens).

1818 488 U.S. 469 (1989). *Croson* was decided by a 6–3 vote. The portions of Justice O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. The latter two Justices joined only part of Justice O'Connor's opinion; each added a separate concurring opinion. Justice Scalia concurred separately; Justices Marshall, Brennan, and Blackmun dissented.

1819 497 U.S. 547 (1990). This was a 5–4 decision, Justice Brennan's opinion of the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion joined by Justice Scalia.

1820 497 U.S. at 564–65.
of the city. “[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task.”\textsuperscript{1821} The overinclusive definition of minorities, including U.S. citizens who are “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts,” also “impugned the city’s claim of remedial motivation,” there having been “no evidence” of any past discrimination against non-blacks in the Richmond construction industry.\textsuperscript{1822} It followed that Richmond’s set-aside program also was not “narrowly tailored” to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur “from anywhere in the country” could obtain an absolute racial preference.\textsuperscript{1823}

At issue in \textit{Metro Broadcasting} were two minority preference policies of the FCC, one recognizing an “enhancement” for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a “distress sale” transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in \textit{Fullilove}—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore “the imprimatur of longstanding congressional support and direction.”\textsuperscript{1824}

\textit{Metro Broadcasting} was noteworthy for several other reasons as well. The Court rejected the dissent’s argument—seemingly accepted by a \textit{Croson} majority—that Congress’s more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.\textsuperscript{1825} This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be “important” rather than “compelling,” and the means adopted need only be “substantially related” rather than “narrowly tailored” to furthering the interest.

\textsuperscript{1821} 488 U.S. at 501–02.
\textsuperscript{1822} 488 U.S. at 506.
\textsuperscript{1823} 488 U.S. at 508.
\textsuperscript{1824} 497 U.S. at 600. Justice O’Connor’s dissenting opinion contended that the case “does not present ‘a considered decision of the Congress and the President.’” Id. at 607 (quoting Fullilove, 448 U.S. at 473).
\textsuperscript{1825} 497 U.S. at 563 & n.11. For the dissenting views of Justice O’Connor see id. at 606–07. \textit{See also Croson}, 488 U.S. at 504 (opinion of Court).
The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena*\(^{1826}\) that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefitted by the particular classification; there is no intermediate standard applicable to “benign” racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race “should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection . . . has not been infringed.”\(^{1827}\)

By applying strict scrutiny, the Court was in essence affirming Justice Powell’s individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Powell’s suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell’s line of reasoning in the cases of *Grutter v. Bollinger*,\(^{1828}\) and *Gratz v. Bollinger*.\(^{1829}\)

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (e.g., grade point average, Law School Admissions Test score, personal statement, recommendations) and on “soft” variables (e.g., strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . .” Although, the policy did not limit the seeking of diversity to “ethnic and racial” classifications, it did seek a “critical

\(^{1826}\) 515 U.S. 200 (1995). This was a 5–4 decision. Justice O’Connor’s opinion for Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

\(^{1827}\) 515 U.S. at 227 (emphasis original).


\(^{1829}\) 539 U.S. 244 (2003).
mass" of minorities so that those students would not feel isolated.\footnote{539 U.S. at 316.}

The \textit{Grutter} Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."\footnote{539 U.S. at 335.} As the university did not rely on quotas, but rather relied on "flexible assessments" of a student’s record, the Court found that the university's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.\footnote{Grutter, 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant’s race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin (\textit{Fisher I}), 570 U.S. ___, No. 11–345, slip op. at 10 (2013) (citation omitted). In its 2013 decision in \textit{Fisher}, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in \textit{Fisher} addressing the Texas program directly. See Fisher v. Univ. of Tex. at Austin (\textit{Fisher II}), 579 U.S. ___, No. 14–981, slip op. (2016).}

The law school’s admission policy in \textit{Grutter}, however, can be contrasted with the university’s undergraduate admission policy. In \textit{Gratz}, the Court evaluated the undergraduate program's “selection index,” which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was that an applicant would be entitled to 20 points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the “flagging” of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.\footnote{539 U.S. at 272–73.}

The Court in \textit{Gratz} struck down this admissions policy, relying again on Justice Powell’s decision in \textit{Bakke}. Although Justice Pow-
ell had thought it permissible that “race or ethnic background . . . be deemed a ‘plus’ in a particular applicant’s file,” the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an “underrepresented minority” group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an “administrative challenge,” the Court found that the policy was not narrowly tailored to achieve respondents’ asserted compelling interest in diversity.

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin’s (UT’s) use of “scores” based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP). The Court itself suggested that the “sui generis” nature of the UT program, coupled with the “fact that this case has been litigated on a somewhat artificial basis” because the record lacked information about the impact of Texas’s TTPP, may limit the decision’s value for “prospective guidance.” Nonetheless, certain language in the Court’s decision, along with its application of the three “controlling factors” set forth in the Court’s 2013 decision in *Fisher*, seem likely to have some influence, as they represent the Court’s most recent jurisprudence on whether and when institutions of higher education may take race into consideration.

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1834 438 U.S. at 317.
1835 438 U.S. at 284–85.
1836 *Fisher II*, slip. op. at 3–4.
1837 *Id.* at 8.
1838 *Id.* at 10.
1839 *Id.*
1840 *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. ___, No. 11–345, slip op. at 10 (2013). The first of these principles is that strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.” *Id.* at 7. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an “academic judgment” to which “some, but not complete, judicial deference is proper.” *Id.* at 9. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests “about as well” and “at tolerable administrative expense.” *Id.* at 11.
in their admission decisions. Specifically, the 2016 Fisher decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university's "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances."\(^{1841}\) and emphasized that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement."\(^{1842}\) Nonetheless, while citing these constraints, the 2016 Fisher decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state's compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.\(^{1843}\) The Court further concurred with UT's view that the alleged "critical mass" of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,\(^{1844}\) and that UT had found other means of promoting student-body diversity were unworkable.\(^{1845}\) In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a "reasoned, principled explanation" of the university's interests and its efforts to achieve those interests in a manner that was no broader than necessary.\(^{1846}\) The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy

\(^{1841}\) Fisher II, slip op. at 10.

\(^{1842}\) Id.

\(^{1843}\) Id. at 11–13. On the other hand, the Court emphasized that the university cannot claim educational benefits in "diversity writ large." Id. at 12. "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." Id. The Court also noted that the asserted goals of UT's affirmative action program "mirror" those approved in earlier cases (e.g., ending stereotypes and promoting cross-racial understanding). Id. at 13.

\(^{1844}\) Id. at 13–15. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately 75% of the incoming class is admitted under the 10% plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. Id. at 15.

\(^{1845}\) Id. at 15–19.

\(^{1846}\) Id. at 13 ("Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record").
once the university has provided sufficient support for its approach.\footnote{1847}

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after Grutter and Gratz, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in Parents Involved in Community Schools v. Seattle School District No. 1,\footnote{1848} the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be “de facto” racial imbalance in the schools, used “racial tiebreakers” to determine school assignments.\footnote{1849} As in Bakke, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

In an opinion by Chief Justice Roberts, a majority of the Court in Parents Involved in Community Schools agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in Grutter, but rather focused primarily on racial considerations.\footnote{1850} Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating “de facto” racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,\footnote{1851}

\footnote{1847} Id. at 13–14.
\footnote{1848} 551 U.S. 701 (2007). Another case involving racial diversity in public schools, Meredith v. Jefferson County Board of Education, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.
\footnote{1849} In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district’s overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school’s black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.
\footnote{1850} 127 S. Ct. at 2753–54. The Court also noted that, in Grutter, the Court had relied upon “considerations unique to institutions of higher education.” Id. at 2754 (finding that, as stated in Grutter, 539 U.S. at 329, because of the “expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition”).
\footnote{1851} In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky’s plan and the use of the “crude racial cat-
suggested in separate concurrence that relieving “racial isolation” could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications “as a last resort” if other means failed. As Justice Kennedy’s concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Roberts’ opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

Alienage and Nationality.—“It has long been settled . . . that the term ‘person’ [in the Equal Protection Clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.” Thus, one of the earli-

gories” of “white” and “non-white” (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

1852 127 S. Ct. at 2760–61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawn coverage of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

1853 Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .' ”).

1854 Graham v. Richardson, 403 U.S. 365, 371 (1971). See also Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Aliens in the United States, including those whose presence is not authorized by the federal government, are “persons” to whom the Fifth and Fourteenth Amendments apply. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); Plyler v. Doe, 457 U.S. 202, 210–16 (1982). However, the power to regulate immigration has permitted the federal government to discriminate on the basis of alienage, at least so long as the discrimination satisfies the rational basis standard of review. See Mathews v. Diaz, 426 U.S. 67, 79–80, 83 (1976) (holding that federal conditions upon alien eligibility for public assistance were not “wholly irrational,” and observing that “In the exercise of its broad power over naturaliza-
tion and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’ ”).

Nonetheless, with regard to statutes that touch upon immigration-related matters but do not address the entry or exclusion of aliens, the Court has suggested that if such a law discriminates on the basis of suspect factors other than alienage or na-
tional origin a more “exacting standard of review” may be required. See Sessions v. Morales-Santana, 582 U.S. ___, No. 15–1191, slip op. 14–17 (2017) (distinguishing between immigration and citizenship contexts and applying heightened scrutiny to hold that a derivative citizenship statute which discriminated by gender violated equal protection principles).
est equal protection decisions struck down the administration of a facially lawful licensing ordinance that was being applied to discriminate against Chinese. In many subsequent cases, however, the Court recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens. But, in Hirabayashi v. United States, the Court announced that “[d]istinctions between citizens solely because of their ancestry” were “odious to a free people whose institutions are founded upon the doctrine of equality.” And, in Korematsu v. United States, classifications based upon race and nationality were said to be suspect and subject to the “most rigid scrutiny.” These dicta resulted in a 1948 decision that appeared to call into question the rationale of the “particular interest” doctrine under which earlier discrimination had been justified. In the 1948 decision, the Court held void a statute barring issuance of commercial fishing licenses to persons “ineligible to citizenship,” which in effect meant resident alien Japanese. “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under nondiscriminatory laws.” Justice Black said for the Court that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”

Announcing “that classifications based on alienage . . . are inherently suspect and subject to close scrutiny,” the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility. Thereafter, in a series of decisions, the

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1857 320 U.S. 81, 100 (1943).
1858 323 U.S. 214, 216 (1944).
1859 Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948).
1860 334 U.S. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible of being read as questioning the premise of the earlier cases.
Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major “political function” exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In *Sugarman v. Dougall*,¹ the Court voided the total exclusion of aliens from a state’s competitive civil service. A state’s power “to preserve the basic conception of a political community” enables it to prescribe the qualifications of its officers and voters,² the Court held, and this power would extend “also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.”³ But a flat ban upon much of the state’s career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classification the state must employ means that are precisely drawn in light of the valid purpose.⁴

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the state had not met the “heavy burden” of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The state’s admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.⁵

³ *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Such state restrictions are “not wholly immune from scrutiny under the Equal Protection Clause.” Id. at 648.
⁴ Justice Rehnquist dissented. 413 U.S. at 649. In the course of the opinion, the Court held inapplicable the doctrine of “special public interest,” the idea that a State’s concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The “political function” exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. *Bernal v. Fainter*, 467 U.S. 216 (1984).
⁵ *In re Griffiths*, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (*Sugarman* dissent also applicable to *Griffiths*).
from one of the "common occupations of the community," hence its bar on licensing aliens as civil engineers was voided.\(^{1867}\)

In Nyquist v. Mauclet,\(^{1868}\) the Court seemed to expand the doctrine. The statute that was challenged restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, because any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a "discrete and insular minority"—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."\(^{1869}\) Two proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

In the following Term, however, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"\(^{1870}\) Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,'... as part of the sovereign's obligation 'to preserve the basic conception of a political community.'"\(^{1871}\) Discrimination by a state against aliens is not sub-
ject to strict scrutiny, but need meet only the rational basis test. It
is therefore permissible to reserve to citizens offices having the “most
important policy responsibilities,” a principle drawn from Sugar-
man, but the critical factor in this case is its analysis finding that
“the police function is . . . one of the basic functions of government
. . . . The execution of the broad powers vested in [police officers]
affects members of the public significantly and often in the most
sensitive areas of daily life. . . . Clearly the exercise of police au-
thority calls for a very high degree of judgment and discretion, the
abuse or misuse of which can have serious impact on individuals.
The office of a policeman is in no sense one of ‘the common occupa-
tions of the community.’ . . . ”

Continuing to enlarge the exception, the Court in *Ambach v. Norwick* 1873 upheld a bar to qualifying as a public school teacher
for resident aliens who have not manifested an intention to apply
for citizenship. The “governmental function” test took on added sig-
ificance, the Court saying that the “distinction between citizens
and aliens, though ordinarily irrelevant to private activity, is funda-
mental to the definition and government of a State.” 1874 Thus, “gov-
ernmental entities, when exercising the functions of government,
have wider latitude in limiting the participation of noncitizens.” 1875 Teachers, the Court thought, because of the role of public
education in inculcating civic values and in preparing children for
participation in society as citizens and because of the responsibility
and discretion they have in fulfilling that role, perform a task that
“go[es] to the heart of representative government.” 1876 The citizen-
ship requirement need only bear a rational relationship to the state
interest, and the Court concluded it clearly did so.

patronage dismissals of police officers, the Court had nonetheless recognized an ex-
ception for policymaking officers which it did not extend to the police.
1873 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Jus-
tice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices
Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of
course, that held invalid as a disqualification for receipt of educational assistance in

1876 441 U.S. at 75–80. The quotation, id. at 76, is from Sugarman v. Dougall,
413 U.S. 634, 647 (1973).
Then, in *Cabell v. Chavez-Salido,* the Court, by a 5-to-4 vote, sustained a state law imposing a citizenship requirement upon all positions designated as “peace officers,” upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as “peace officers” did not reach so far nor was it so broad and haphazard as to belie the claim that the state was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. “[T]he classifications used need not be precise; there need only be a substantial fit.” As to the particular positions, the Court held that “they, like the state troopers involved in *Foley,* sufficiently partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens.”

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose attempts by the states to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity—when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government—its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny. However, the “political function” standard is elastic, and so long as disqualifications are attached to specific occupations rather than to the civil service in general, as in *Sugarman,* the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that

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1878 454 U.S. at 442.
1879 454 U.S. at 445.
1880 454 U.S. at 438–39.
1881 Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.
Because it was clear that the undocumented status of the children was relevant to valid government goals, and because the Court had previously held that access to education was not a "fundamental interest" that triggered strict scrutiny of governmental distinctions relating to education, the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that provoked special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these children would stamp them with an "enduring disability" that would harm both them and the state all their lives. The Court evaluated each of the state's attempted justifications and found none of them satisfying the level of review demanded. It seems evident that *Plyler v. Doe* is a unique case and that, whatever it may stand for doctrinally, a sufficiently similar factual situation calling for application of its standards is unlikely to arise.

**Sex.**—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones that prevailed well into the twentieth century. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The con-

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1882 *Plyler v. Doe*, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id. at 242.

1883 In *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id. at 18, 25 n.60, 37. The *Plyler* Court's emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 235 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id. at 231, 236.

1884 457 U.S. at 223–24.

1885 Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the state and contribute to its welfare. 457 U.S. at 227–30.
stitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”

On the same premise, a statute restricting the franchise to men was sustained.

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours or minimum wages or by restricting some of the things women could be required to do. A 1961 decision upheld a state law that required jury service of men but that gave women the option of serving or not. “We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”

Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women. In a highly controversial ruling, the Court sustained a state law that forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception of women working in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: “If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference.”

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: “If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference.”

Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: “The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.”


West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

E.g., Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.


being justified by the consideration that such women would be under the eyes of a protective male.\textsuperscript{1893}

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work.\textsuperscript{1894} Some states have followed suit.\textsuperscript{1895} While the proposed Equal Rights Amendment was before the states and ultimately failed to be ratified,\textsuperscript{1896} the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification of sex classifications.

In Reed v. Reed,\textsuperscript{1897} the Court held invalid a state probate law that gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the state advanced in de-

\textsuperscript{1893} Goeaert v. Cleary, 335 U.S. 464 (1948).


\textsuperscript{1895} See, e.g., Roberts v. United States Jaycees, 468 U.S. 699 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

\textsuperscript{1896} On the Equal Rights Amendment, see discussion of "Ratification," supra.

\textsuperscript{1897} 404 U.S. 71 (1971).
fense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a state may be advanced by a classification based solely on sex.1898

It is now established that sex classifications, in order to withstand equal protection scrutiny, “must serve important governmental objectives and must be substantially related to achievement of those objectives.”1899 Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,1900 a majority of the Court has arrived at the intermediate standard that many had thought it was applying in any event.1901 The Court first examines the statutory


1900 In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id. at 684–87 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. Id. at 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id. at 691. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), Justice O’Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.1901

1901 Although their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny; Justices Powell and Stevens have since joined or written opinions stating the test and applying it. E.g., Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, 441 U.S. at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. But see Califano
or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.\(^\text{1902}\)

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.\(^{1903}\) Similarly, a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.\(^{1904}\)

Even when the negative "stereotype" that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In \textit{J. E. B. v. Alabama ex rel. T. B.},\(^{1905}\) the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine

\footnote{The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.}


\footnote{Taylor \textit{v. Louisiana}, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in \textit{Hoyt \textit{v. Florida}}, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.}

\footnote{511 U.S. 127 (1994).}
the litigants’ interest by tainting the proceedings, and in addition
would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however,
are not without some basis in fact, and sex may sometimes be a
reliable proxy for the characteristic, such as need, with which it is
the legislature’s actual intention to deal. But heightened scrutiny
requires evidence of the existence of the distinguishing fact and its
close correspondence with the condition for which sex stands as proxy.
Thus, in the case that first expressly announced the intermediate
scrutiny standard, the Court struck down a state statute that pro-
hibited the sale of “non-intoxicating” 3.2 beer to males under 21
and to females under 18.1906 Accepting the argument that traffic safety
was an important governmental objective, the Court emphasized that
sex is an often inaccurate proxy for other, more germane classifica-
tions. Taking the statistics offered by the state as of value, while
cautions that statistical analysis is a “dubious” business that is
in tension with the “normative philosophy that underlies the Equal
Protection Clause,” the Court thought the correlation between males
and females arrested for drunk driving showed an unduly tenuous
fit to allow the use of sex as a distinction.1907

Invalidating an Alabama law imposing alimony obligations upon
males but not upon females, the Court in Orr v. Orr acknowledged
that assisting needy spouses was a legitimate and important gov-
ernmental objective. Ordinarily, therefore, the Court would have con-
sidered whether sex was a sufficiently accurate proxy for depen-
dency, and, if it found that it was, then it would have concluded
that the classification based on sex had “a fair and substantial re-
lation to the object of the legislation.”1908 However, the Court ob-
served that the state already conducted individualized hearings with
respect to the need of the wife, so that with little if any additional
burden needy males could be identified and helped. The use of the
sex standard as a proxy, therefore, was not justified because it need-
lessly burdened needy men and advantaged financially secure women
whose husbands were in need.1909

1909 440 U.S. at 281–83. An administrative convenience justifica
tion was not available, therefore. Id. at 281 & n.12. Although such an argument has been accepted as
a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427
U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In Lucas, 427 U.S. at 509–10, the Court interpreted Frontiero v. Richardson, 411
U.S. 677 (1973), as having required a showing at least that for every dollar lost to a
recipient not meeting the general purpose qualification a dollar is saved in adminis-
the Court said that “[i]t may be that there are levels of administrative convenience
Various forms of discrimination between unwed mothers and unwed fathers received different treatments based on the Court’s perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the state dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.\footnote{Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. Id. at 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger).}

On the other hand, the Court sustained a Georgia statute that permitted the mother of an illegitimate child to sue for the wrongful death of the child but that allowed the father to sue only if he had legitimated the child and there is no mother.\footnote{Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the state—to avoid difficulties in proving paternity—was an important one and was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. Id. at 353–58. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id. at 359. Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in Caban, dissented.}

that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers.” Justice Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).
edge or legitimate the child before the child's 18th birthday.\textsuperscript{1912} The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about legitimacy.

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a “dependent” for allowances while a servicewoman’s spouse was not considered a “dependent” unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.\textsuperscript{1913} In \textit{Weinberger v. Wiesenfeld},\textsuperscript{1914} the Court struck down a Social Security provision that gave survivor’s benefits based on the insured’s earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker’s did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and

\textsuperscript{1913} \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973).
\textsuperscript{1914} 420 U.S. 636 (1975).

\textsuperscript{1914} See also \textit{Miller v. Albright}, 523 U.S. 420, 424 (1998) (opinion of Stevens, J.) (concluding that a requirement in a citizenship statute that children born abroad and out of wedlock to citizen fathers, but not to citizen mothers, obtain formal proof of paternity by age 18 does not violate the equal protection component of the Fifth Amendment’s Due Process Clause). Importantly, however, the Court in \textit{Sessions v. Morales-Santana} distinguished \textit{Nguyen} and \textit{Miller} in ruling that a derivative citizenship statute for children born abroad and out of wedlock to a U.S. citizen and foreign national violated equal protection principles because the statute imposed lengthier physical presence requirements on citizen fathers than citizen mothers. \textsuperscript{1915} See 582 U.S. \_, No. 15–1191, slip op. 15–16 (2017). Specifically, the \textit{Morales-Santana} Court held that unlike the statute at issue in \textit{Nguyen} and \textit{Miller}, the physical presence requirement being challenged in \textit{Morales-Santana} did nothing to demonstrate the parent’s tie to the child and was not a “minimal” burden on the citizen parent. \textit{Id.} at 16. The \textit{Morales-Santana} Court also concluded that, while the Court in \textit{Fiallo v. Bell}, 430 U.S. 787 (1977), had applied a very deferential standard when reviewing gender-based distinctions in the context of alien admission preferences, a “more exacting standard of review” was appropriate when assessing the permissibility of such distinctions in the application of derivative citizenship statutes. \textit{Id.} at 14–17 (describing the \textit{Fiallo} Court's ruling as being supported by the “extremely broad power to admit or exclude aliens” and concluding that heightened scrutiny was appropriate in the review of gender-based distinctions made by a derivative citizenship statute, which did not touch upon the “entry preference for aliens” governed by \textit{Fiallo}).
take care of the children while a man would not. Because the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill-fitted the end and was invidiously discriminatory.

But, when, in *Califano v. Goldfarb*, the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency that ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy. Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, nei-

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1915 430 U.S. 199 (1977). The dissent argued that whatever the classification used, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id. at 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). In *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in *Goldfarb*, only Justice Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

1916 430 U.S. at 204–09, 212–17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year “grace period” was upheld in *Heckler v. Mathews*, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.
ther purpose was served by the sex classification actually used in this statute.\footnote{1917}

Again, the Court divided closely when it \textit{sustained} two instances of classifications claimed to constitute sex discrimination. In \textit{Rostker v. Goldberg},\footnote{1918} rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of \textit{Craig v. Boren}. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been “unthinking” or “reflexively” based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only “sufficiently but closely” related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.\footnote{1919}

In \textit{Michael M. v. Superior Court},\footnote{1920} the Court expressly adopted the \textit{Craig v. Boren} intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. \textit{Michael M.} involved the constitutionality of a statute that pun-
ished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that, although the law was founded on a clear sex distinction, it was justified because it served an important governmental interest—the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that, for purposes of this classification, men and women were not similarly situated, and the statute did not deny equal protection.\footnote{1921 450 U.S. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. Id. at 488, 496.}

Cases of “benign” discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. \textit{Kahn v. Shevin}\footnote{1922 416 U.S. 351 (1974).} upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the state had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was “reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden.”\footnote{1923 416 U.S. at 355.} And, in \textit{Schlesinger v. Ballard},\footnote{1924 419 U.S. 498 (1975).} the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard’s case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the professed justification of remedial purpose without searching inquiry, later cases caution that “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any in-
quiry into the actual purposes underlying a statutory scheme." 1925 Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective. 1926

Many of these lines of cases converged in Mississippi University for Women v. Hogan, 1927 in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefitting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school that did accept men, and he would have had difficulty doing so and retaining his job. The state defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." 1928 But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the


1926 Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in Webster had been adopted expressly to relieve past societal discrimination. The four Goldfarb dissenters concurred specially, finding no difference between the two provisions. Id. at 321.


1928 458 U.S. at 728.
discriminatory classification.” 1929 Even if the classification was pre-
mised on the proffered basis, the Court concluded, it did not sub-
stantially and directly relate to the objective, because the school per-
mitted men to audit the nursing classes and women could still be
adversely affected by the presence of men. 1930

In a 1996 case, the Court required that a state demonstrate “ex-
ceedingly persuasive justification” for gender discrimination. When a female applicant challenged the exclusion of women from the
historically male-only Virginia Military Institute (VMI), the State of
Virginia defended the exclusion of females as essential to the na-
ture of training at the military school. 1931 The state argued that
the VMI program, which included rigorous physical training, depre-
vation of personal privacy, and an “adversative model” that fea-
tured minute regulation of behavior, would need to be unaccept-
ably modified to facilitate the admission of women. While recognizing
that women’s admission would require accommodation such as dif-
ferent housing assignments and physical training programs, the Court
found that the reasons set forth by the state were not “exceedingly
persuasive,” and thus the state did not meet its burden of justifica-
tion. The Court also rejected the argument that a parallel program
established by the state at a private women’s college served as an
adequate substitute, finding that the program lacked the military-
style structure found at VMI, and that it did not equal VMI in fac-
ulty, facilities, prestige or alumni network.

The Court in Sessions v. Morales-Santana applied the “exceed-
ingly persuasive justification” test to strike down a gender-based
classification found in a statute that allowed for the acquisition of

1929 458 U.S. at 730. In addition to obligating the state to show that in fact there
was existing discrimination or effects from past discrimination, the Court also ap-
peared to take the substantial step of requiring the state “to establish that the legis-
lation intended the single-sex policy to compensate for any perceived discrimina-
tion.” Id. at 730 n.16. A requirement that the proffered purpose be the actual one
and that it must be shown that the legislature actually had that purpose in mind
would be a notable stiffening of equal protection standards.

1930 In the major dissent, Justice Powell argued that only a rational basis stan-
doed ought to be applied to sex classifications that would “expand women’s choices,”
but that the exclusion here satisfied intermediate review because it promoted diver-
sity of educational opportunity and was premised on the belief that single-sex col-
leges offer “distinctive benefits” to society. Id. at 735, 740 (emphasis by Justice), 743.
The Court noted that, because the state maintained no other single-sex public uni-
versity or college, the case did not present “the question of whether States can pro-
vide ‘separate but equal’ undergraduate institutions for males and females,” id. at
720 n.1, although Justice Powell thought the decision did preclude such institu-
tions. Id. at 742–44. See Vorcheimer v. School Dist. of Philadelphia, 532 F. 2d 880
(3d Cir. 1976) (finding no equal protection violation in maintenance of two single-
sex high schools of equal educational offerings, one for males, one for females), aff’d
by an equally divided Court, 430 U.S. 703 (1977) (Justice Rehnquist not participat-
ing).

U.S. citizenship by a child born abroad to an unwed couple if one of the parents was a U.S. citizen.\textsuperscript{1932} The law at issue in \textit{Morales-Santana}, which had been enacted many decades earlier, conditioned the grant of citizenship on the U.S. citizen parent’s physical presence in the United States prior to the child’s birth, providing a shorter presence requirement for an unwed U.S. citizen mother relative to the unwed U.S. citizen father.\textsuperscript{1933} According to the majority, such a classification “must substantially serve an important government interest today,” and the law in question was based on “two once habitual, but now untenable, assumptions”: (1) that marriage presupposes that the husband is dominant and the wife is subordinate; (2) an unwed mother is the natural and sole guardian of a non-marital child.\textsuperscript{1934} Having found that the law was an “overbroad generalization[]” about males and females and was based on the “obsolescing view” about unwed fathers, the Court concluded that the citizenship provision’s “discrete duration-of-residency requirements for unwed mothers and fathers who have accepted parental responsibility [was] stunningly anachronistic.”\textsuperscript{1935}

\textsuperscript{1932} See Sessions v. Morales-Santana, 582 U.S. ___ , No. 15–1191, slip op. at 2 (2017) (holding that “the gender line Congress drew is incompatible with the requirement that the Government accord to all persons ‘the equal protection of the laws.’”).

\textsuperscript{1933} Id. at 2–3 (describing 8 U.S.C. §§ 1401 & 1409 (1958 ed.)).

\textsuperscript{1934} Id. at 9 (citing Obergefell v. Hodges, 576 U.S. ___ , No. 14–556, slip op. at 20 (2015)) (emphasis in original).

\textsuperscript{1935} Id. at 10.

\textsuperscript{1936} Id. at 13.

\textsuperscript{1937} Id. at 14. In so holding, the Morales-Santana Court rejected the government’s argument that the challenged law’s gender distinction helped ensure that the child born abroad and out of wedlock to a U.S. citizen and foreign national would have a strong connection with the United States. \textit{Id.} at 17. The government’s argued that an unwed alien mother, on account of being the only legally recognized parent, would have a “competing national influence” upon the child that warranted the requirement that the U.S. father have a longer physical connection with the United States. \textit{Id.} The Court concluded that the argument was based on the assumption that an alien father of a nonmarital child would not accept parental responsibility, a “[lump characterization]” about gender roles that did not pass equal protection inspection. \textit{Id.} at 18. Moreover, even assuming that an interest in ensuring a connection to the United States could support the law, the Court held that the law’s gender-based means could not serve the desired end because the law allowed for an individual with no ties whatsoever to the United States to become a citizen if his U.S. citizen mother lived in the country for a year prior to his birth. \textit{Id.} at 18–19.

The Court also rejected the government’s argument that Congress wished to reduce the risk of “statelessness” for the foreign-born child of a U.S. citizen mother; an argument premised on the belief that countries are more likely to grant citizenship to the child of a citizen mother than to the child of a citizen father. \textit{Id.} at 19. The Court noted there was little evidence that a statelessness concern prompted the physical presence requirements, \textit{id.} at 19–20, and the Court also was skeptical that the risk of statelessness in actuality disproportionately endangered the children of unwed U.S. citizen mothers. \textit{Id.} at 21–23.
In response to what the lower court had described as the “most vexing problem” in the case, the Morales-Santana Court, in crafting a remedy for the equal protection violation, deviated from the presumption that “extension, rather than nullification” of the denied benefit is generally the “proper course.” The Court observed that Congress had established derivative citizenship rules that varied depending upon whether one or both parents were U.S. citizens and whether the child was born in or outside marriage. Justice Ginsburg writing for the majority concluded that extending the much-shorter physical presence requirement applicable to unwed U.S. citizen mothers to unwed U.S. citizen fathers would run significantly counter to Congress’s intentions when it established this statutory scheme, because such a remedy would result in a longer physical presence requirement for a married U.S. citizen who had a child abroad than for a similarly situated unmarried U.S. citizen. As a result, the Court held that the longer physical presence requirement for unwed U.S. citizen fathers governed, as that is the remedy that “Congress likely would have chosen had it been apprised of the constitutional infirmity.”

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In Cleveland Board of Education v. LaFleur, which was decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels. The absence of supportable reasons in one

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1938 See Morales-Santana v. Lynch, 804 F.3d 521, 535 (2d Cir. 2015).
1939 See Morales-Santana, slip op. at 25 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).
1940 Id. at 2–4, 26.
1941 Id. at 26 (“For if [the] one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S. citizen parent is married?”).
1942 Id. at 27 (internal citations and quotations omitted).
1944 Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon “gender as such.” Classification was on the basis of preg-
case and their presence in the other may well have made the significant difference.

Illegitimacy

After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply. Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim. The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent, but the theme that seems to be imposed on them by the more recent cases is that

1945 The first cases set the stage for the lack of consistency. Compare Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws that precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, with Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workers' compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.


1946 The major inconsistency arises from three 5-to-4 decisions. Labine v. Vincent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762 (1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978). Justice Powell was the swing vote for different disposition of the latter two cases.
so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute’s legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.1948

Intestate succession rights for illegitimates has divided the Court over the entire period. At first advertsing to the broad power of the states over descent of real property, the Court employed relaxed scrutiny to sustain a law denying illegitimates the right to share equally with legitimatees in the estate of their common father, who had acknowledged the illegitimates but who had died intestate.1949 Labine was strongly disapproved, however, and virtually overruled in Trimble v. Gordon,1950 which found an equal protection violation in a statute allowing illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had “acknowledged” the child and the child had been legitimated by the marriage of the parents. The father in Trimble had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.1951 Second, the as-

Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, Lalli v. Lalli, 439 U.S. at 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, Trimble v. Gordon, 430 U.S. at 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell applied his own intermediate scrutiny and selectively voided and sustained. See Lalli v. Lalli, supra (plurality opinion by Justice Powell).

1948 A classification that absolutely distinguishes between legitimatees and illegitimatees is not alone subject to such review; one that distinguishes among classes of illegitimatees is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. E.g., Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).


1950 430 U.S. 762 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist disented, finding the statute “constitutionally indistinguishable” from the one sustained in Labine. Id. at 776. Justice Rehnquist also dissented separately. Id. at 777.

sertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.\footnote{Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.} Third, the argument that the law presented no insurmountable barrier to illegitimates inheriting since a decedent could have left a will, married the mother, or taken steps to legitimate the child, was rejected as inapposite.\footnote{430 U.S. at 773–74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The Trimble Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). See also Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); and compare id. at 736 (Justice Powell dissenting).} Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the “fit” necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing “to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.” \footnote{Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist’s dissent is especially critical of this approach. Id. at 777, 781–86. Also not interfering with orderly administration of estates is application of Trimble in a probate proceeding ongoing at the time Trimble was decided; the fact that the death had occurred prior to Trimble was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).} Because the state law did not follow a reasonable middle ground, it was invalidated.

A reasonable middle ground was discerned, at least by Justice Powell, in Lalli v. Lalli,\footnote{439 U.S. 259 (1978). The four Trimble dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought Trimble wrongly decided and ripe for overruling. Id. at 276. The four dissenters, who had joined the Trimble majority with Justice Powell, thought the two cases were indistinguishable. Id. at 277.} concerning a statute that permitted legitimate children to inherit automatically from both their parents, while illegitimates could inherit automatically only from their moth-
ers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father’s lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as “my son” and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father’s lifetime declaring the child as his met the “middle ground” requirement of Trimble; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the deceased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, although the state’s interest could no doubt have been served by permitting other kinds of proof, that too is not the test of the statute’s validity. Hence, the balancing necessitated by the Court’s promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.1956

The Court’s difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. “[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an es-

1956 Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In Parham v. Hughes, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to a wrongful death action by the father of an illegitimate child who had not legitimated him; in Caban v. Mohammed, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.
sentential right to a child simply because its natural father has not married its mother." 1957

Similarly, the Court struck down a federal Social Security provision that made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but that made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illegitimates was necessary to avoid fraud. 1958

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit

1957 Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis added). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In Mills v. Hahluetzel, 456 U.S. 91 (1982), the Court invalidated the one-year limitation. Although a state has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in Pickett v. Brown, 462 U.S. 1 (1983), and a 6-year limit was struck down in Clark v. Jeter, 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in Gomez, 409 U.S. at 538. Also, the state's interest in imposing the 2-year limit was undercut by exceptions (e.g., for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state's more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience, which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits. 1959

Fundamental Interests: The Political Process

“The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . , absent of course the discrimination which the Constitution condemns.” 1960 The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the states for the electors of the most numerous branch of the legislature, and the states are authorized to determine the manner in which presidential electors are selected. 1961 The second section of the Fourteenth Amendment provides for a proportionate reduction in a state’s representation in the House when it denies the franchise to its qualified male citizens 1962 and specific discriminations on the basis of race, sex, and

1959 Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between Jiminez and Lucas is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read the purpose differently, see Califano v. Boles, 443 U.S. 282 (1979).


1961 Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors); Article I, § 4, cl. 1 (times, places, and manner of holding elections).

1962 Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the states to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting), Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, 400 U.S. at 229, 250 (concurring and dissenting). But see Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.
age are addressed in other Amendments. “We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot.”  

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized.” “Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”

“And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a ‘rational basis’ for the distinctions made are not applicable.” Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the

Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.\footnote{Thus, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34–35 nn.74 & 78 (1973), a major doctrinal effort to curb the “fundamental interest” side of the “new” equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nonetheless, citizens have a “constitutionally protected right to participate in elections,” which is protected by the Equal Protection Clause. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. Reynolds v. Sims, 377 U.S. 533, 562 (1964).}

\textbf{Voter Qualifications.}—States may require residency as a qualification to vote, but “durational residence laws . . . are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.”\footnote{Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (internal quotation marks omitted, emphasis added by the Court) (striking down a Tennessee statute that imposed a requirement of one year in the state and three months in the county). The Court did not indicate what, if any, shorter duration it would permit, although it noted that, in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, “Congress outlawed State durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before Congress prescribed a thirty-day period for purposes of voting in presidential elections.” Id. at 344. Note also that it does not matter whether one travels interstate or intrastate. Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff’d, 405 U.S. 1035 (1972).}

The Court applies “[t]his exacting test” because the right to vote is “a fundamental political right, . . . preservative of all rights,” and because a “durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.”\footnote{405 U.S. at 336, 338. See also Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against “requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day,” but expressing no opinion on the constitutionality of the requirement).}

The Court indicated that the states have “a legitimate and compelling interest” in preventing fraud by voters, but that “it is impossible to view durational residence requirements as necessary to achieve that state interest.”\footnote{Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable.}

However, a 50-day durational residence requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the state’s registration process. The period, the Court found, was necessary to achieve the state’s legitimate goals.\footnote{Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable.}
A state that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the state, the Court held, could not treat these persons as nonresidents for voting purposes. A statute that provided that anyone who entered military service outside the state could not establish voting residence in the state so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence. Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a "capricious or irrelevant factor" of wealth or ability to pay into an area in which it had no place. Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school, and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds or general obligation bonds. By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification." The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden."

The Court has also held that, because the activities of a water storage district fell so disproportionately on landowners as a group,
a limitation of the franchise in elections for the district's board of
directors to landowners, whether resident or not and whether natural
persons or not, excluding non-landowning residents and lessees
of land, and weighing the votes granted according to assessed valu-
ation of land, comported with equal protection standards. Advert-
ing to the reservation in prior local governmental unit election cases
that some functions of such units might be so specialized as to per-
mit deviation from the usual rules, the Court then proceeded to as-
sess the franchise restrictions according to the traditional stan-
dards of equal protection rather than by those of strict scrutiny. Also
narrowly approached was the issue of the effect of the Dis-

tricth's activities, the Court focusing upon the assessments against
landowners as the sole means of paying expenses rather than addi-
tionally noting the impact upon lessees and non-landowning resi-
dents of such functions as flood control. The approach taken in this
case seems different in great degree from that in prior cases and
could in the future alter the results in other local government cases.
These cases were extended somewhat in Ball v. James, a 5-to-4
decision that sustained a system in which voting eligibilit y was lim-
ited to landowners and votes were allocated to these voters on the
basis of the number of acres they owned. The entity was a water
reclamation district that stores and delivers water to 236,000 acres
of land in the state and subsidizes its water operations by selling
electricity to hundreds of thousands of consumers in a nearby met-
ropolitan area. The entity's board of directors was elected through
a system in which the eligibility to vote was as described above.
The Court thought the entity was a specialized and limited form to
which its general franchise rulings did not apply.

Finding that prevention of "raiding"—the practice whereby vot-
ers in sympathy with one party vote in another's primary election
in order to distort that election's results—is a legitimate and valid
state goal, as one element in the preservation of the integrity of
the electoral process, the Court sustained a state law requiring those

Associated Enterprises v. Toltec Watershed Improv. Dist., 410 U.S. 743 (1973) (limi-
tation of franchise to property owners in the creation and maintenance of district
upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id. at
735, 745.

1980 410 U.S. at 730, 732. Thus, the Court posited reasons that might have moved
the legislature to adopt the exclusions.


1982 The water district cases were distinguished in Quinn v. Millsap, 491 U.S.
95, 109 (1989), the Court holding that a "board of freeholders" appointed to recom-
 mend a reorganization of local government had a mandate "far more encompassing"
than land use issues, as its recommendations "affect[ ] all citizens . . . regardless of
land ownership."
voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party’s next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs’ voluntary failure to register that they did not meet the deadline.\footnote{1983 Rosario v. Rockefeller, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.} But a law that prohibited a person from voting in the primary election of a political party if he had voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, because it constituted a severe restriction upon a voter’s right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.\footnote{1984 Kusper v. Pontikes, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.} A less restrictive “closed primary” system was also invalidated, the Court finding insufficient justification for a state’s preventing a political party from allowing independents to vote in its primary.\footnote{1985 Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state’s justifications for “protect[ing] the integrity of the Party against the Party itself” were deemed insubstantial. Id. at 224.}

It must not be forgotten, however, that it is only when a state extends the franchise to some and denies it to others that a “right to vote” arises and is protected by the Equal Protection Clause. If a state chooses to fill an office by means other than through an election, neither the Equal Protection Clause nor any other constitutional provision prevents it from doing so. Thus, in Rodriguez v. Popular Democratic Party,\footnote{1986 457 U.S. 1 (1982). See also Fortson v. Morris, 385 U.S. 231 (1966) (legislature could select governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Board of Elections, 387 U.S. 105 (1967) (appointment rather than election of county school board); Valentí v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968) (three-judge court), aff’d, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).} the Court unanimously sustained a Puerto Rico statute that authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a state to provide for absen-

...
tee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.\textsuperscript{1987} Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.\textsuperscript{1988}

\textbf{Access to the Ballot.}—The Equal Protection Clause applies to state specification of qualifications for elective and appointive office. Although one may “have no right” to be elected or appointed to an office, all persons “do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.”\textsuperscript{1989} In \textit{Bullock v. Carter},\textsuperscript{1990} the Court used a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates that imposed the cost of the election wholly on the candidates and that made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the state's interest in regulating the ballot and did not serve that interest and because the cost of the election could be met out of the state treasury, thus avoiding the discrimination.\textsuperscript{1991}

\textsuperscript{1990} 405 U.S. 134, 142–44 (1972).
\textsuperscript{1991} 405 U.S. at 144–49.
Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party’s or the candidate’s “important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. . . . [T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.”\(^{1992}\) In the absence of reasonable alternative means of ballot access, the Court held, a state may not disqualify an indigent candidate unable to pay filing fees.\(^{1993}\)

In \textit{Clements v. Fashing}.\(^{1994}\) the Court sustained two provisions of state law, one that barred certain officeholders from seeking election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators’ terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations.

\(^{1993}\) Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, 415 U.S. at 722, but the Court indicated this would be inadequate. Id. at 719 n.5.
\(^{1994}\) 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances—ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates—limitations on candidate access to the ballot merit only traditional rational basis scrutiny, because candidacy is not a fundamental right. The plurality found both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell, O’Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality’s standard, but finding that inasmuch as the disparate treatment was based solely on the state’s classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the Equal Protection Clause. Id. at 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).
In Williams v. Rhodes,\textsuperscript{1995} a complex statutory structure that had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the state’s 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.\textsuperscript{1996} But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party’s primary election, while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought, is not to discriminate unlawfully, because the state placed no barriers of any sort in the way of obtaining signatures and because write-in votes were also freely permitted.\textsuperscript{1997}

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.\textsuperscript{1998} “[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on

\textsuperscript{1995} 393 U.S. 23 (1968). “[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.” Id. at 34. Justices Douglas and Harlan would have relied solely on the First Amendment, id. at 35, 41, and Justices Stewart and White and Chief Justice Warren dissented. Id. at 48, 61, 63.


the ballot.” Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, “very much a matter of considering the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.”

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totaled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. “[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot,” but the Court thought that one percent, or 22,000 signatures in 1972, “falls within the outer boundaries of support the State may require.” Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space. A state may validly require that each voter participate only once in each year’s nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates. Equally valid is a state requirement that a candidate for elective office, as

2000 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).
2001 American Party of Texas v. White, 415 U.S. 767, 783 (1974). In Storer v. Brown, 415 U.S. 724, 738–40 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days in 1972 to gather 325,000 signatures from a pool of qualified voters who had not voted in that year’s partisan primary elections. See also Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).
2002 American Party of Texas v. White, 415 U.S. 767, 788–91 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.
an independent or in a regular party, must not have been affiliated
with a political party, or with one other than the one of which he
seeks its nomination, within one year prior to the primary election
at which nominations for the general election are made. So too,
a state may limit access to the general election ballot to candidates
who received at least 1% of the primary votes cast for the particu-
lar office. But it is impermissible to print the names of the can-
didates of the two major parties only on the absentee ballots, leav-
ing off independents and other parties. Also invalidated was a
requirement that independent candidates for President and Vice-
President file nominating petitions by March 20 in order to qualify
for the November ballot.

**Apportionment and Districting.**—Prior to 1962, attacks in fed-
eral courts on the drawing of boundaries for congressional and legislativ

election districts or the apportionment of seats to previ-
ously existing units ran afoul of the “political question” doc-
trine, however, reinterpreted the doctrine to a
considerable degree and opened the federal courts to voter c

nan, Douglas and Marshall thought the state interest could be adequately served by
a shorter time period than a year before the primary election, which meant in effect
17 months before the general election. Id. at 755.
however, was state financing of the primary election expenses that excluded conven-
tion expenses of the small parties. Id. at 791–94. But the major parties had to hold
conventions simultaneously with the primary elections the cost of which they had to
bear. For consideration of similar contentions in the context of federal financing of
presidential elections, see Buckley v. Valeo, 424 U.S. 1, 93–97 (1976).
education, treating all candidates equally (candidates participating in a party pri-
mary also had to declare candidacy in March), and preserving political stability, were
deemed insufficient to justify the substantial impediment to independent candidates
and their supporters.
2008 This subject is also discussed under Article I, Section 2, Congressional District-
ing.
2009 See discussion, supra. Applicability of the doctrine to cases of this nature
was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287
U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549
(1946), but became the position of the Court in subsequent cases. Cook v. Fortson,
329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green,
335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartsfield v. Sloan, 357
2011 376 U.S. 1 (1964). Striking down a county unit system of electing a gover-
nor, the Court, in an opinion by Justice Douglas, had already coined a variant phrase
of the more popular “one man, one vote.” “The conception of political equality from
the Declaration of Independence to Lincoln’s Gettysburg Address, to the Fifteenth,
that, in the election of Members of the House of Representatives, districts were to be made up of substantially equal numbers of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.  

“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State.”

What was required was that each state “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.”

Among the principal issues raised by these decisions were which units were covered by the principle, to what degree of exactness population equality had to be achieved, and to what other elements of the apportionment and districting process the Equal Protection Clause extended.

The first issue has largely been resolved, although a few problem areas persist. It has been held that a school board, the members of which were appointed by boards elected in units of disparate populations, and that exercised only administrative powers rather than legislative powers, was not subject to the principle of the apportionment and districting process the Equal Protection Clause extended.

Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” Gray v. Sanders, 372 U.S. 368, 381 (1963).

2012 Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Donis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. “An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.” Id. at 736. In Reynolds v. Sims, Justice Harlan dissented wholly, denying that the Equal Protection Clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a “reformist” nonjudicial attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the Equal Protection Clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S. at 741, 744.


2014 377 U.S. at 577.
Avery v. Midland County

held that, when a state delegates lawmaking power to local government and provides for the election by district of the officials to whom the power is delegated, the districts must be established of substantially equal populations. But, in Hadley v. Junior College District, the Court abandoned much of the limitation that was explicit in these two decisions and held that, whenever a state chooses to vest “governmental functions” in a body and to elect the members of that body from districts, the districts must have substantially equal populations. The “governmental functions” should not be characterized as “legislative” or “administrative” or necessarily important or unimportant; it is the fact that members of the body are elected from districts that triggers the application.

The second issue has been largely but not precisely resolved. In Swann v. Adams, the Court set aside a lower court ruling “for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts. . . . De minimis deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.” Two congressional districting cases were disposed of on the basis of Swann, but, although the Court ruled that no congressional districting could be approved without “a good-faith effort to achieve precise mathematical equality” or the justifi-

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2016 390 U.S. 474 (1968). Justice Harlan continued his dissent from the Reynolds line of cases, id. at 486, while Justices Fortas and Stewart called for a more discerning application and would not have applied the principle to the county council here. Id. at 495, 509.
2017 397 U.S. 50 (1970). The governmental body here was the board of trustees of a junior college district. Justices Harlan and Stewart and Chief Justice Burger dissented. Id. at 59, 70.
2018 The Court observed that there might be instances “in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds, supra, might not be required . . . .” 397 U.S. at 56. For cases involving such units, see Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enterprises v. Toltec Watershed Imp. Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981). Judicial districts need not comply with Reynolds. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), aff’d, per curiam, 409 U.S. 1095 (1973).
cation of “each variance, no matter how small.” And, in Abate v. Mundt, the Court approved a plan for apportioning a county governing body that permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality that might in other circumstances invalidate a plan. The total population deviation allowed in Abate was 11.9%; the Court refused, however, to extend Abate to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City’s five boroughs on the New York City Board of Estimate.

Nine years after Reynolds v. Sims, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative redistricting, the Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

The Court relied on Swann in disapproving of only slightly smaller deviations (roughly 28% and 25%) in Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971). In Connor v. Williams, 404 U.S. 549, 550 (1972), the Court said of plaintiffs’ reliance on Preisler and Wells that “these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court’s plan as a design for permanent apportionment.”

In Evenwel v. Abbott, a case involving representation in the state legislature, the Court rejected the argument that the Equal Protection Clause prohibits states from using total population in determining voting districts and instead requires the use of the voting population. 578 U.S. ___, No. 14–940, slip op. (2016). The Court based its conclusion here, in part, on the debates over representation in the U.S. House and Senate at the time of the Constitution’s framing, as well as subsequent debates over the Fourteenth Amendment at the time of its ratification. Id. at 8–12. The Court also noted prior decisions focusing on “equality of representation,” and not “voter equality,” id. at 16, and the settled practices of all fifty states and “countless local jurisdictions” in apportioning representation based on total population. Id. at 18. It is important to note, however, that the Evenwel Court declined to find that apportionment based on total population is constitutionally required, and the Court has, in other cases, upheld the use of districts based on voting population. See Burns v. Richardson, 384 U.S. 73 (1966) (rejecting a challenge to Hawaii’s use of the registered-voter population).

New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989). Under the plan each of the City’s five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. Id. at 699–701.
lative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.\textsuperscript{2026} But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4\% deviation from equality of population was justified by the state’s policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions \textit{qua} subdivisions, because the legislature was responsible for much local legislation.\textsuperscript{2027} Second, just as the first case “demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a \textit{prima facie} case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”\textsuperscript{2028} This recognition of a \textit{de minimis} deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population

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\item\textsuperscript{2027} 410 U.S. at 325–30. The Court indicated that a 16.4\% deviation “may well approach tolerable limits.” Id. at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6\% and that the plan discriminated geographically against one section of the state, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20\% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. See also Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4\% deviation). \textit{But see} Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10\% intended to preserve political subdivision boundaries). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state’s least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O’Connor’s concurring opinion that a broader-based challenge to the plan, which contained a 16\% average deviation and an 89\% maximum deviation, could have succeeded.
\item\textsuperscript{2028} Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83\%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the \textit{de minimis} standard in White v. Regester, 412 U.S. 755 (1973), in which the maximum deviation was 9.9\%. “Very likely, larger differences between districts would not be tolerable without justification . . . .” Id. at 764. Justices Brennan, Douglas, and Marshall dissented. See also Brown v. Thomson, 462 U.S. 835, 842 (1983). “Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10\% falls within [the] category of minor deviations [insufficient to make out a \textit{prima facie} case].”
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change over the ten-year life of an apportionment, and by the relief it afforded federal courts by enabling them to avoid over-involvement in essentially a political process. The “goal of fair and effective representation” is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account. But when a judicially imposed plan is to be formulated upon state default, it “must ordinarily achieve the goal of population equality with little more than de minimis variation,” and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.

Subsequently, in its 2016 decision in *Harris v. Arizona Independent Redistricting Commission*, the Court reiterated the significance of the 10% threshold in challenges to state legislative voting districts, observing that “attacks on deviations under 10% will succeed only rarely, in unusual cases.” Instead, challengers must show that it is “more probable than not” that the deviation “reflects the predominance of illegitimate reapportionment factors rather than . . . legitimate considerations.” The Court unanimously agreed that the challengers in *Harris* had failed to meet this burden, as the record supported the district court’s conclusion that the deviation here—which was 8.8%—reflected the redistricting commission’s efforts to achieve compliance with the Voting Rights Act, and not to secure political advantage for the Democratic party. In particular, the Court noted that the difference in population between Democratic- and Republican-leaning districts may simply reflect the residential and voting patterns of minorities, and the redistricting commission’s efforts to maintain “ability-to-elect districts” (i.e., districts favorable to the election of minority candidates). In the Court’s view, there was no showing of “illegitimate factors”

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2030 *Chapman v. Meier*, 420 U.S. 1, 27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. *Id.* at 27 n.19. Apparently, therefore, the Court’s reference to both “de minimis” variations and “approximate population equality” must be read as referring to some range approximating the *Gaffney* principle. *See also Connor v. Finch*, 431 U.S. 407 (1977).

2031 578 U.S. ___, No. 14–232, slip op. at 5 (2016). *See also id.* (noting the “inherent difficulties” of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality).

2032 *Id.* at 1.

2033 *Id.* at 5–9.

2034 *Id.* at 9–10.
here, unlike in certain earlier cases (e.g., the creation of districts that seem to have no relation to keeping counties whole or preserving the cores of prior districts). The Court further noted that its decision in Shelby County v. Holder, which held unconstitutional a section of the Voting Rights Act relevant to this case, did not mean that Arizona’s attempt to comply with the Act could not have been a legitimate state interest, as Arizona created the plan at issue in 2010, and Shelby County was not decided until 2013.

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that racially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines. Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” A challenger can show racial predominance by “demonstrating that the legislature ‘subordinated’ other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to ‘racial considerations.’” Showing that a district’s “bizarre” shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim, although a plurality of the Justices would...
not preclude the creation of “reasonably compact” majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965. While the Court appeared to have weakened a challenger’s ability to establish equal protection claims in the early 2000s by deferring to a legislature’s articulation of legitimate political explanations for districting decisions, and by allowing for a correlation between race and political affiliation, more recent cases have shown such challenges are not entirely foreclosed.

Partisan or “political” gerrymandering raises more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance, and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, “we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States.”

In 1986, however, in a decision of potentially major import reminiscent of Baker v. Carr, the Court in Davis v. Bandemer ruled that partisan gerrymandering in state legislative redistricting is justiciable.

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2042 Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts). When a state relies on compliance with the Voting Rights Act “to justify race-based districting,” however, the state “must show (to meet the ‘narrow tailoring’ requirement) that it had ‘a strong basis in evidence’ for concluding that the statute required its action.” Cooper, 581 U.S. at ___, slip op. at 3 (quoting Ala. Legislative Black Caucus, 575 U.S. at ___, slip op. at 22). In other words, “the State must establish that it had ‘good reasons’ to think that it would transgress the Act if it did not draw race-based district lines.” Id. at 3 (quoting Ala. Legislative Black Caucus, 575 U.S. at ___, slip op. at 22) (emphasis in original).


2044 See Cooper, slip op. at 34 (holding that racial considerations predominated in the redrawing of two congressional districts in North Carolina and “that § 2 of the [Voting Rights Act] gave North Carolina no good reason to reshuffle voters because of their race”).


2047 478 U.S. 109 (1986). The vote on justiciability was 6–3, with Justice White’s opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by three of the majority Justices, who just two years earlier had denied that “the existence of noncompact or gerrymandered districts is by itself a constitutional violation.” Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall,
ticiable under the Equal Protection Clause. But, although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court’s holding of unconstitutionality was reversed by vote of 7 to 2. Thus, although courthouse doors were now ajar for claims of partisan gerrymandering, it was unclear what it would take to succeed on the merits.

On the justiciability issue, the Court viewed the “political question” criteria as no more applicable than they had been in Baker v. Carr. Because Reynolds v. Sims had declared “fair and effective representation for all citizens” to be “the basic aim of legislative apportionment,” and because racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of “judicially discoverable and manageable standards for resolving” gerrymandering issues, however, did not result in a consensus as to what those standards are. Although a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect.

Justice White’s plurality opinion suggested that there need be “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” Moreover, continued frustration of the chance to influence the political process cannot be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that “a heavy burden of proof” should be required, and that courts should look to a variety of factors as

dissenting from denial of stay in challenge to district court’s rejection of a remedial districting plan on the basis that it contained “an intentional gerrymander”).

2048 Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O’Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

2049 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. See D. Alfange, Jr., Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last, 1986 SUP. CT. REV. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

2050 The quotation is from the Baker v. Carr measure for existence of a political question, 369 U.S. 156, 217 (1962).

2051 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.
they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.²⁰⁵²

In the following years, however, litigants seeking to apply Davis against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In Vieth v. Jubelirer,²⁰⁵³ a four-Justice plurality would have overturned Davis v. Bandemer's holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,²⁰⁵⁴ that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,²⁰⁵⁵ and that the power to address the issue of political gerrymandering resides in Congress.²⁰⁵⁶

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack "of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."²⁰⁵⁷ But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. Davis v. Bandemer was thus preserved.²⁰⁵⁸

²⁰⁵⁴ 541 U.S. at 285–86.
²⁰⁵⁵ 541 U.S. at 281–90.
²⁰⁵⁶ 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).
²⁰⁵⁷ 541 U.S. at 307–08 (Justice Kennedy, concurring).
²⁰⁵⁸ 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.
In League of United Latin American Citizens v. Perry, a widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority. The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew." Apart from that, the “sole-motivation theory” fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights." Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.” The plurality also found “that mid-decade redistricting for exclusively partisan purposes” did not in this case “violate[ ] the one-person, one-vote requirement.” Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory. League of United Latin American Citizens v. Perry thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

548 U.S. 399, 417 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 423–443.
548 U.S. at 414.
548 U.S. at 414, 417.
548 U.S. at 418.
548 U.S. at 419.
548 U.S. at 420–21.
548 U.S. at 422.
It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently, but in *Whitcomb v. Chavis* the Court, while dealing with the issue on the merits, so enveloped it in strict standards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review. In *Chavis* the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members' numbers or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of blacks, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties that elected large delegations in blocs had in effect greater voting power than voters in other districts; this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of *Chavis*, the Court in *White v. Regester* affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied African-Americans and Mexican-Americans the opportunity to participate in the election process in a reliable and meaningful manner.

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2069 "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation.
Doubt was cast on the continuing vitality of *White v. Regester*, however, by the badly split opinion of the Court in *City of Mobile v. Bolden*. A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the Equal Protection Clause. Second, the plurality read *White v. Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test used in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.

Again switching course, the Court in *Rogers v. Lodge* approved the findings of the lower courts that a multimember electoral system for electing a county board of commissioners was being maintained for a racially discriminatory purpose, although it had not been instituted for that purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the *Mobile* dissenters, canvassed a range of factors that it held could combine to show a discriminatory motive, and largely overturned the limitations that the *Mobile* plurality had attempted to impose in this area. With the enactment of federal legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation.

by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” 412 U.S. at 765–66.

2070 *446 U.S. 55* (1980).

2071 *446 U.S. at 65–68* (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, see discussion, supra. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

2072 *458 U.S. 613* (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O’Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id. at 628, and Justice Stevens. Id. at 631.

2074 On the legislation, see “Congressional Definition of Fourteenth Amendment Rights,” *infra.*
v. *Gingles*,\(^{2075}\) the Court held that multimember districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is “sufficiently large and geographically compact to constitute a majority in a single-member district,” when it is politically cohesive, and when block voting by the majority “usually” defeats preferred candidates of the minority.

Finally, the Court has approved the discretionary exercise of equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment cases,\(^{2076}\) although that power is bounded by the constitutional violations found, so that courts do not have carte blanche, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.\(^{2077}\)

**Counting and Weighing of Votes.**—In *Bush v. Gore*,\(^{2078}\) a case of dramatic result but of perhaps limited significance for equal protection, the Supreme Court ended a ballot dispute that arose during the year 2000 presidential election. The Florida Supreme Court had ordered a partial manual recount of the Florida vote for Presidential Electors, requiring that all ballots that contained a “clear indication of the intent of the voter” be counted, but allowing the relevant counties to determine what physical characteristics of a bal-

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\(^{2075}\) 478 U.S. 30, 50–51 (1986). Use of multimember districting for purposes of political gerrymandering was at issue in *Davis v. Bandemer*, 478 U.S. 109 (1986), decided the same day as *Gingles*, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the Whitcomb v. Chavis reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and “the only discernible pattern [being] the appearance of these districts in areas where their winner-take-all aspects can best be employed to debase [one party’s] voting strength,” (id. at 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.


\(^{2078}\) 531 U.S. 98 (2000).
lot would satisfy this test. The Court held that the Equal Protection Clause would be violated by allowing arbitrary and disparate methods of discerning voter intent in the recounting of ballots. The decision was surprising to many, as a lack of uniformity in voting standards and procedures is inherent in the American system of decentralized voting administration. The Court, however, limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards." 2079 Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.

In cases where votes are given more or less weight by operation of law, it is not the weighing of votes itself that may violate the 14th Amendment, but the manner in which it is done. Gray v. Sanders, 2080 for instance, struck down the Georgia county unit system under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Because there were a few very populous counties and scores of poorly populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But Gordon v. Lance 2081 approved a provision requiring a 60-percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead prescribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—and the provision at issue in this case was neither directed to nor affected any identifiable class.

The Right to Travel

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis. 2082 The second, expressly addressed

2079 531 U.S. at 109.
2081 403 U.S. 1 (1971).
2082 Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The
by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the “Privileges and Immunities” of a citizen of the latter state. The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state’s citizenship.

Durational Residency Requirements.—Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, the Court approved a doctrinal shift, so that state laws that distinguished between their own citizens, based on how long they had been in the state, would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment. The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the state for the prescribed period and those who have not. But persons who have moved recently, at least from state to state, have exercised a right protected by the Constitution, and the durational residency classification either deters the exercise of that right or penalizes those who have exercised it. Any such classification is invalid “unless shown to

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2083 Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) (“without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”).


2085 Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Because the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the Privileges and Immunities Clause, Article IV, § 2, cl. 1.


be necessary to promote a *compelling* governmental interest." The constitutional right to travel has long been recognized, but it is only relatively recently that the strict standard of equal protection review has been applied to nullify durational residency requirements.

Thus, in *Shapiro v. Thompson*, durational residency requirements conditioning eligibility for welfare assistance on one year’s residence in the state were voided. If the purpose of the requirements was to inhibit migration by needy persons into the state or to bar the entry of those who came from low-paying states to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible. If, on the other hand, the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—then the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification that infringed a fundamental interest.

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where the durational residency requirements denied the franchise to newcomers, such administrative justifications were found constitutionally insufficient to justify the classification. The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law that limited welfare benefits for California citizens who had resided in the state for less than a year to the level of benefits that they would have received in the state of their prior residence.

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*. Although it is not clear what the precise basis of the ruling is, it appears that the Court found that the state’s interest in requiring that those who seek a divorce from its courts be genuinely attached to the state and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement. Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.

More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to “consume” benefits within a state’s borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).

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2095 For additional discussion of durational residence as a qualification to vote, see Voter Qualifications, supra.

2096 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id. at 418.

2097 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.


2100 Saenz v. Roe, 526 U.S. at 505.
A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska’s statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the state. The differences between the durational residency cases previously decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court’s decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.2101

Still unresolved are issues such as durational residency requirements for occupational licenses and other purposes.2102 But this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,2103 and the cases do not inhibit the states when, having reasons for doing so, they bar travel by certain persons.2104

Marriage and Familial Relations

In Zablocki v. Redhail,2105 importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a “fundamental interest” that necessitates “critical examination” of governmental restrictions that “interfere directly and substantially” with the right.2106 The Court struck down a statute that prohibited any resident under an obligation to

2101 Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court’s invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).
2102 La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.
2104 Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the state).
2106 Although the Court’s due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396–397 (Justice Powell concurring).
support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying “critical examination,” the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.  

Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations, and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was not served, the Court found, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully distinguished by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the decision. For example, in Califano v. Jobst, a unanimous Court sustained a Social Security provision that revoked disabled dependents’ benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents’ benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued, alleging that distinguishing between classes of persons who married eligible persons and who

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2107 434 U.S. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id. at 400, 406 n.10.

2108 434 U.S. at 386–87. Chief Justice Burger thought the interference here was “intentional and substantial,” whereas the provision in Jobst was neither. Id. at 391 (concurring).

married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits, as a means of lessening hardship and recognizing that dependency was likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated “simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.

Sexual Orientation

In *Romer v. Evans*, the Supreme Court struck down a state constitutional amendment that both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays’ and lesbians’ fundamental right to participate in the political process. The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to establish whether the legislative classification had a rational relation to a legitimate end.

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*2111* See, e.g., Quilloin v. Walcott, 434 U.S. 246 (1978) (state’s giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents); *Accord*, Lehr v. Robertson, 463 U.S. 248 (1983).


The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” The Court then rejected arguments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

In United States v. Windsor, the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which provided that for purposes of any federal act, ruling, regulation, or interpretation by an administrative agency, the word “spouse” would mean a person of the opposite sex who is a husband or a wife. In Windsor, the petitioner had been married to her same-sex partner in Canada and she lived in New York, where the marriage was recognized. After her partner died, the petitioner sought to claim a federal estate tax exemption for surviving spouses. In examining the federal statute, the Court initially noted that, while “[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States,” Section 3 of DOMA took the “unusual” step of departing from the “history and tradition of reliance on state law to define marriage” in order to alter the reach of over 1,000 federal laws and limit the scope of federal benefits. Citing to Romer, the Court noted that discrimination of “unusual character” warranted more careful scrutiny.

In approving of same-sex marriages, the State of New York was conferring a “dignity and status of immense import,” and the federal government, with Section 3 of DOMA, was aiming to impose “restrictions and disabilities” on and “injure the very class” New York.
Y ork sought to protect. In so doing, the Court concluded that Section 3 of DOMA was motivated by improper animus or purpose because the law’s avowed “purpose and practical” effect was to “impose a . . . stigma upon all who enter into same-sex marriages made lawful” by the states. Holding that “no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,” the Court held that Section 3 of DOMA violates “basic due process and equal protection principles applicable to the Federal Government.” In striking down Section 3, the Court did not expressly set out what test the government must meet to justify laws calling for differentiated treatment based on sexual orientation.

Two years after Windsor, the Court, in Obergefell v. Hodges, invalidated several state laws limiting the licensing and recognition of marriage to two people of the opposite sex. While the decision primarily rested on substantive due process grounds, the Court noted that the “right of same sex couples to marry” is “derived, too,” from the Fourteenth Amendment’s Equal Protection Clause. In so holding, the Court recognized a general “synergy” between the Due Process Clause and the Equal Protection Clause, noting that just as evolving societal norms inform the liberty rights of same-sex couples, so too do “new insights and societal understandings” about homosexuality reveal “unjustified inequality” with respect to traditional concepts about the institution of marriage. In this sense, the Court viewed marriage laws prohibiting the licensing and recognition of same-sex marriages as working a grave and continuing harm to same-sex couples, serving to “disrespect and subordinate them.” As a result, the Court ruled that the Equal Protection Clause prevents states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite sex couples.

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2122 Id. at 19–20.
2123 Id. at 21.
2124 Id. at 25–26.
2125 Id. at 20. Because the case was decided under the Due Process Clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue.
2126 Id. at 22.
2127 Id. at 10–19.
2128 Id. at 19.
2129 Id. at 19–21.
2130 Id. at 22.
2131 Id. at 23. Interestingly, however, the Obergefell Court did not engage in any traditional equal protection analysis in which a government’s classification is ad-
Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

Generally.—Whatever may be the status of wealth distinctions per se as a suspect classification, there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin v. Illinois*, surely one of the most seminal cases in modern constitutional law. There, the state conditioned full direct appellate review—review to which all convicted defendants were entitled—on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. “In criminal trials,” Justice Black wrote in the plurality opinion, “a State can no more discriminate on account of poverty than on account of religion, race, or color.” Although the state was not obligated to provide an appeal at all, when it does so it may not structure its system “in a way that discriminates against some convicted defendants on account of their poverty.” The system’s fault was that it treated defendants with money differently from defendants without money. “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

judged based on the nature of the classification and the relationship between the classification and the underlying justifications for the government policy. Instead the *Obergefell* Court concluded that state classifications distinguishing between opposite- and same-sex couples violated equal protection principles on their face and therefore were unconstitutional. *Id.* at 21–22; see also *supra* Equal Protection: Equal Protection: Judging Classifications by Law: The New Standards: Active Review.


*Griffin* U.S. 12 (1956).

2134 351 U.S. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the Due Process and Equal Protection Clauses. Justice Frankfurter’s concurrence dealt more expressly with the premise of the Black opinion. “It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.” *Id.* at 23.
The principle of Griffin was extended in Douglas v. California, in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. “There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.”

From the beginning, Justice Harlan opposed reliance on the Equal Protection Clause at all, arguing that a due process analysis was the proper criterion to follow. “It is said that a State cannot discriminate between the ‘rich’ and the ‘poor’ in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.” A fee system neutral on its face was not a classification forbidden by the Equal Protection Clause. “[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against ‘indigents’ by name would be unconstitutional.”

As he protested in Douglas: “The States, of course, are prohibited by the Equal Protection Clause from discriminating between ‘rich’ and ‘poor’ as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.”

Due process furnished the standard, Justice Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system that merely recognized differences between and

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2135 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court’s “new fetish for indigency,” id. at 358, 359, and Justices Harlan and Stewart also dissented. Id. at 360.
2136 372 U.S. at 357–58.
among economic classes, which as in Douglas made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system that denied due process.2139

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents’ exercise of the right of appeal. “In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal.”2140

Criminal Procedure.—Criminal appeals “It is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”2141 “In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . .”2142 No state may condition the right to appeal2143 or the right to file a petition for habeas corpus2144 or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the states are not required to furnish full and complete transcripts of their trials to indigents when excerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.2145 This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases

2140 Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).
2145 Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge’s certification that “justice will thereby be promoted”); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge’s certification that the allegations of error were not “frivolous”); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). See also Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a
in which confinement is the penalty.2146 A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.2147 The right to counsel on appeal necessarily means the right to effective assistance of counsel.2148

But, deciding a point left unresolved in Douglas, the Court held that neither the Due Process nor the Equal Protection Clause requires a state to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the state's higher courts or in the United States Supreme Court. Due process does not require that, after an appeal has been provided, the state must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.2149 Not even death row inmates have a constitutional right

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2147 Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an Anders brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). But see Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an Anders brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).
2149 Ross v. Moffitt, 417 U.S. 600 (1974). See also Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse state for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).
to an attorney to prepare a petition for collateral relief in state court.\footnote{Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which “unit attorneys” assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).}

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a state may not deny prisoners legal assistance of another inmate\footnote{Johnson v. Avery, 393 U.S. 483 (1969).} and it must make available certain minimal legal materials.\footnote{Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).}

\textbf{The Criminal Sentence}.—A convicted defendant may not be imprisoned solely because of his indigency. \textit{Williams v. Illinois} held that it was a denial of equal protection for a state to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine that was also levied upon conviction. And \textit{Tate v. Short} held that, in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

\textbf{Voting and Ballot Access}.—Treatment of indigency in a civil type of “fundamental interest” analysis came in \textit{Harper v. Virginia Bd. of Elections}, in which it was held that “a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. “[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis

\footnote{399 U.S. 235 (1970).} of wealth as a basis for disqualification are a threat to the integrity of the electoral process, and, as such, may not be sustained.\footnote{401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is “$30 or 30 days” or some similar form where either confinement or a fine will satisfy the State’s penal policy.}

\footnote{383 U.S. 663, 666 (1966). The poll tax required to be paid as a condition of voting was $1.50 annually. Justices Black, Harlan, and Stewart dissented. Id. at 670, 680.}
of wealth or property, like those of race . . . are traditionally disfa-

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in Bullock v. Carter in which the setting of high filing fees for certain offices was struck down under a standard that was stricter than the traditional equal protection standard but apparently less strict than the compelling state interest standard. The Court held that the high filing fees were not rationally related to the state's interest in allowing only serious candidates on the ballot because some serious candidates could not pay the fees whereas some frivolous candidates could and that the state could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

Extending Bullock, the Court held it impermissible for a state to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A state must provide such persons a reasonable alternative for getting on the ballot. Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.

In Crawford v. Marion County Election Board, however, a Court plurality held that a state may require citizens to present a government-issued photo identification in order to vote. Although Justice Stevens' plurality opinion acknowledged "the burden imposed on voters who cannot afford . . . a birth certificate" (but added that it was "not possible to quantify . . . the magnitude of the burden on this narrow class of voters"), it noted that the state had not "required voters to pay a tax or a fee to obtain a new photo identification," and that "the photo-identification cards issued by Indiana's BMV are also free." Justice Stevens also noted that a burden on voting rights, "[h]owever slight . . . must be justified by relevant
and legitimate state interests ‘sufficiently weighty to justify the limitation,’“ and he found three state interests that were sufficiently weighty: election modernization (i.e., complying with federal statutes that require or permit the use of state motor vehicle driver’s license applications to serve various purposes connected with voter registration), deterring and detecting voter fraud, and safeguarding voter confidence. Justice Stevens’ opinion, therefore, rejected a facial challenge to the statute, finding that, even though it was “fair to infer that partisan considerations may have played a significant role in the decision to enact” the statute, the statute was “supported by valid neutral justifications.” Justice Scalia, in his concurring opinion, would not only have upheld the statute on its face, but would have ruled out as-applied challenges as well, on the ground that “[t]he Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation,” and, “without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.” Justice Souter, in his dissenting opinion, found the statute unconstitutional because “a State may not burden the right to vote merely by invoking abstract interests, be they legitimate or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. . . . The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old.”

Access to Courts.—In Boddie v. Connecticut, Justice Harlan carried a majority of the Court with him in using a due process analysis to evaluate the constitutionality of a state’s filing fees in divorce actions that a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that, when the state monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the state could terminate the marital status—then it denied due process by inflexibly imposing fees that kept some persons from using that avenue. Justice Harlan’s opinion averred that a facially

2162 128 S. Ct. at 1616.
2163 “A facial challenge must fail where the statute has a plainly legitimate sweep.” 128 S. Ct. at 1623 (internal quotation marks omitted).
2164 128 S. Ct. at 1624. “[A]ll of the Republicans in the [Indiana] General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it.” Id. at 1623.
2165 128 S. Ct. at 1625, 1626.
2166 128 S. Ct. 1627, 1643 (citations omitted).
neutral law or policy that did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The Boddie opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In United States v. Kras, the Court held that the imposition of filing fees that blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in Boddie was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as Kras, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appeal-
ing decisions of a state administrative agency reducing or terminating public assistance. The continuing vitality of Griffin v. Illinois, however, is seen in M.L.B. v. S.L.J.,2171 where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in Boddie, the state, Mississippi, had afforded the plaintiff a trial on the merits, and thus the “monopolization” of the avenues of relief alleged in Boddie was not at issue. As in Boddie, however, the Court focused on the substantive due process implications of the state’s limiting “[c]hoices about marriage, family life, and the upbringing of children,”2172 while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,2173 and that the forced dissolution of parental rights was “more substantial than mere loss of money,”2174 the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

Educational Opportunity.—Making even clearer its approach in de facto wealth classification cases, the Court in San Antonio School District v. Rodriguez2175 rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 states of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a de facto wealth classification that was “suspect” or that education was a “fundamental” right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the

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2170 Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in Kras. See also Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the Boddie principle do continue to arise. Little v. Streeter, 452 U.S. 1 (1981) (in paternity suit that State required complainant to initiate, indigent defendant entitled to have State pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of indigent parent to appointed counsel when state seeks to terminate parental status, but using balancing test to determine that right was not present in this case).
2174 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).
system must be judged by the traditional restrained standard, and that the system was rationally related to the state's interest in protecting and promoting local control of education.2176

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the “class of disadvantaged ‘poor’” in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. “The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniosity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.”2177 No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was at-

2176 411 U.S. at 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.

tacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.\footnote{2178}{411 U.S. at 29–39. But see id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).}

\textit{Rodriguez} clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a \textit{per se} suspect classification but it must be related to some interest that is fundamental, and \textit{Rodriguez} doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,\footnote{2179}{Cf. \textit{Plyler} v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.} the case remains strongly viable. Relying on \textit{Rodriguez} and distinguishing \textit{Plyler}, the Court in \textit{Kadrmas v. Dickinson Public Schools}\footnote{2180}{487 U.S. 450 (1988). This was a 5–4 decision, with Justice O’Connor’s opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.} rejected an indigent student’s equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either “strict” or “heightened” scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.\footnote{2181}{487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.}

\textbf{Abortion.}—\textit{Rodriguez} furnished the principal analytical basis for the Court’s subsequent decision in \textit{Maher v. Roe},\footnote{2182}{432 U.S. 464 (1977).} holding that a state’s refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in \textit{Rodriguez}, the Court held that the indigent are not a suspect class.\footnote{2183}{432 U.S. at 470–71.} Again, as in \textit{Rodriguez} and in \textit{Kras}, the Court held that, when the state has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental fail-
ure to offer assistance, while funding alternative actions, is not un-
due governmental interference with a fundamental right. Expansion of this area of the law of equal protection seems especially limited.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the 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.

Appendition of Representation

With the abolition of slavery by the Thirteenth Amendment, African-Americans, who formerly counted as three-fifths of a person, would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, and there appeared the prospect that the readmitted Southern states would gain a political advantage in Congress when combined with Democrats from the North. Because the South was adamantly opposed to African-American suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of African-Americans and proposals to this effect were voted on in both the House and the Senate, but only a few Northern states per-

2184 432 U.S. at 471–74. See also Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of Boddie and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. But see Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent’s argument that this should always be the same.
mitted African-Americans to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any state that discriminated against males in the franchise. 2185

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed. 2186 With subsequent constitutional amendments adopted and the use of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity. 2187

However, in *Richardson v. Ramirez*, 2188 the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the Equal Protection Clause was simply inapplicable.

Sections 3 and 4. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

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2185 See generally J. James, *The Framing of the Fourteenth Amendment* (1956).
2187 The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. *Compare Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (Justice Harlan concurring and dissenting), with id. at 229, 230 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court’s decision in Oregon v. Mitchell as well. It should also be noted that the provision relating to “Indians not taxed” is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att’y Gen. 518 (1940).
congress may by a vote of two thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

DISQUALIFICATION AND PUBLIC DEBT

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals. In 1872, the disabilities were removed, by a blanket act, from all persons “except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States.” Twenty-six years later, Congress enacted that “the disability imposed by section 3 . . . incurred heretofore, is hereby removed.”

Although § 4 “was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. . . . ‘[T]he validity of the public debt’ . . . [embraces] whatever concerns the integrity of the public obligations,” and applies to government bonds issued after as well as before adoption of the Amendment.

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2189 E.g., and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.
2190 Ch. 193, 17 Stat. 142.
2191 Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of § 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. Griffin’s Case, 11 Fed. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. 18 Op. Att’y Gen. 149 (1885). On the construction of “engaged in rebellion,” see United States v. Powell, 27 Fed. Cas. 605 (C.C.D.N.C. 1871) (No. 16,079).
2192 Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond “went beyond the congressional power.” On a Confederate bond problem, see Branch v. Haas, 16 F. 53
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally

In the aftermath of the Civil War, Congress, in addition to proposing to the states the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments. Several of these laws were general civil rights statutes that broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the states, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years. In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently. Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the Commerce Clause until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War amendments, which culminated in broad provisions against private interference with civil rights in the 1968 legislation.


2194 See generally R. CARS, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).


2196 The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.


“state action” doctrine in terms of its limitation on congressional powers;\(^{2199}\) lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

State Action

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,\(^ {2200}\) and to provide criminal\(^ {2201}\) and civil\(^ {2202}\) liability for state officials and agents\(^ {2203}\) or persons associated with them\(^ {2204}\) who violate protected rights. These statutory measures designed to eliminate discrimination “under color of law”\(^ {2205}\) present no problems of constitutional foundation, although there may well be other problems of application.\(^ {2206}\) But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875\(^ {2207}\) Congress had prescribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amuse-

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\(^{2199}\) On the “state action” doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, see discussion, supra.


\(^{2203}\) Ex parte Virginia, 100 U.S. 339 (1880).


\(^{2206}\) E.g., the problem of “specific intent” in Screws v. United States, 325 U.S. 91 (1945), and Williams v. United States, 341 U.S. 97 (1951), and the problem of what “right or privilege” is “secured” to a person by the Constitution and laws of the United States, which divided the Court in United States v. Williams, 341 U.S. 70 (1951), and which was resolved in United States v. Price, 383 U.S. 787 (1966).

\(^{2207}\) 18 Stat. 335, §§ 1, 2.
ment. The *Civil Rights Cases* found this enactment to be beyond Congress’s power to enforce the Fourteenth Amendment. The Court observed that §1 prohibited only state action and did not reach private conduct. Therefore, Congress’s power under §5 to enforce §1 by appropriate legislation was held to be similarly limited. “It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.”

The holding in this case had already been preceded by *United States v. Cruikshank* and by *United States v. Harris* in which the Federal Government had prosecuted individuals for killing and injuring African-Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the states themselves.

*Cruikshank* did, however, recognize a small category of federal rights that Congress could protect against private deprivation, rights that the Court viewed as deriving particularly from one’s status as a citizen of the United States and that Congress had a general police power to protect. These rights included the right to vote in federal elections, general and primary, the right to federal protection while in the custody of federal officers, and the right to

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2209 109 U.S. at 11. Justice Harlan’s dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function that satisfied the state action requirement in any event. Id. at 46–48, 56–57.

2210 92 U.S. 542 (1876). The action was pursuant to §6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. §241.


2213 United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights that the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

2214 *Ex parte Yarbrough*, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

2215 Logan v. United States, 144 U.S. 263 (1892).
inform federal officials of violations of federal law.\textsuperscript{2216} The right of interstate travel is a basic right derived from the Federal Constitution, which Congress may protect.\textsuperscript{2217} In \textit{United States v. Williams},\textsuperscript{2218} in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a “right or privilege secured . . . by the Constitution or laws of the United States” encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights “which Congress can beyond doubt constitutionally secure against interference by private individuals.” This issue was again reached in \textit{United States v. Price}\textsuperscript{2219} and \textit{United States v. Guest},\textsuperscript{2220} again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the Due Process and Equal Protection Clauses.

Because the Court found that both \textit{Price} and \textit{Guest} concerned sufficient state action, it did not then have to reach the question of § 241’s constitutionality when applied to private action that interfered with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently interpreted as language in the Court’s opinion construing Congress’s power under § 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress’s power was broader.\textsuperscript{2221} “Although the Fourteenth Amendment itself . . . ‘speaks to the State or to those acting under the color of its authority,’ legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes

\textsuperscript{2216} \textit{In re Quarles and Butler}, 158 U.S. 532 (1895). See also \textit{United States v. Waddell}, 112 U.S. 76 (1884) (right to homestead).


\textsuperscript{2218} 341 U.S. 70 (1951).

\textsuperscript{2219} 383 U.S. 787 (1966) (due process clause).


\textsuperscript{2221} Justice Brennan’s opinion, 383 U.S. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that “[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy,” id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that, because Justice Brennan had reached the issue, the three Justices were also of the view “that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights,” id. at 782. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress’s power under § 5. Id. at 755.
Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.”

The Justice throughout the opinion refers to “Fourteenth Amendment rights,” by which he meant rights that, in the words of 18 U.S.C. § 241, are “secured . . . by the Constitution,” i.e., by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the Equal Protection Clause commands that all “public facilities owned or operated by or on behalf of the State,” be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed “as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens.” Within this discretion is the “power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals” who would deny such access.

The Court, however, ultimately rejected this expansion of the powers of Congress in United States v. Morrison. In Morrison, the Court invalidated a provision of the Violence Against Women Act that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment, dismissing the dicta in Guest, and reaffirming the precedents of the Civil Rights Cases and United States v. Harris. The Court also rejected the assertion that the legislation was “corrective” of bias in the courts, as the suits are not directed at the state or any state actor, but rather at the individuals committing the criminal acts.

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2222 383 U.S. at 782.
2223 383 U.S. at 777–79, 784.
2226 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment “erects no shield against merely private conduct, however discriminatory or wrongful”).
2227 This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a “color of law” requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge,
Congressional Definition of Fourteenth Amendment Rights

In the *Civil Rights Cases*, the Court observed that “the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation,” that is, laws to counteract and overrule those state laws that § 1 forbids the states to adopt. The Court was quite clear that, under its responsibilities of judicial review, it was the body that would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1. But, in *United States v. Guest*, Justice Brennan protested that this view “attributes a far too limited objective to the Amendment's sponsors,” that in fact “the primary purpose of the Amendment was to augment the power of Congress, not the judiciary.”

In *Katzenbach v. Morgan*, Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965, the Court noted that

403 U.S. 88, 97 (1971) (although it might be “difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State”). What the unanimous Court held in *Griffin* was that an “intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress’s powers under § 5 of the 14th Amendment. Id. at 107.

The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). See, e.g., *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Great American Fed. S. & L. Ass'n v. Novotny*, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd, 442 U.S. 366 (1979); *Scott v. Moore*, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

2230 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).
2231 384 U.S. 641 (1966). Besides the ground of decision discussed here, Morgan also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the Equal Protection Clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the Equal Protection Clause under “necessary and proper” standards. Id. at 652–653. A similar “necessary and proper” approach underlay *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.
Act of 1965 barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." Because the Court had previously upheld an English literacy requirement under equal protection challenge, acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the state in defense of its law and might have concluded that, instead of being supported by acceptable reasons, the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations that might have led Congress to its conclusion; because Congress “brought a specially informed legislative competence” to an appraisal of voting requirements, “it was Congress’s prerogative to weigh” the considerations and the Court would sustain the conclusion if “we perceive a basis upon which Congress might predicate a judgment” that the requirements constituted invidious discrimination.

In dissent, Justice Harlan protested that “[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 ‘discretion’ by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.” Justice Brennan rejected this reasoning: “We emphasize that Congress’s power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.” Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on Morgan in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimina-

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2233 384 U.S. at 648.
2236 384 U.S. at 668. Justice Stewart joined this dissent.
tion;\textsuperscript{2238} on the other hand, it enacted provisions of law purporting to overrule the Court’s expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking Morgan.\textsuperscript{2239}

Congress’s power under Morgan returned to the Court’s consideration when several states challenged congressional legislation\textsuperscript{2240} lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that Morgan’s vitality was in some considerable doubt, at least with regard to the reach that many observers had previously seen.\textsuperscript{2241} Four Justices accepted Morgan in full,\textsuperscript{2242} while one Justice rejected it totally\textsuperscript{2243} and another would have limited it to racial cases.\textsuperscript{2244} The other three Justices seemingly restricted Morgan to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.\textsuperscript{2245}

More recent decisions read broadly Congress’s power to make determinations that appear to be substantive decisions with re-


\textsuperscript{2242} 400 U.S. at 229, 278–81 (Justices Brennan, White, and Marshall), id. at 135, 141–44 (Justice Douglas).

\textsuperscript{2243} 400 U.S. at 152, 204–09 (Justice Harlan).

\textsuperscript{2244} 400 U.S. at 119, 126–31 (Justice Black).

\textsuperscript{2245} The age reduction provision could be sustained “only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are ‘compelling.’ ” 400 U.S. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and Morgan did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that “Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State” without reaching an independent determination of their own that the requirements did in fact have that effect. Id. at 286.
spect to constitutional violations. Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that “result” in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments. Moreover, movements have been initiated in Congress by opponents of certain of the Court’s decisions, notably the abortion rulings, to use § 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.

City of Boerne v. Flores, however, illustrates that the Court will not always defer to Congress’s determination as to what legislation is appropriate to “enforce” the provisions of the Fourteenth Amendment. In Flores, the Court held that the Religious Freedom Restoration Act, which expressly overturned the Court’s narrowing of religious protections under Employment Division v. Smith, exceeded congressional power under § 5 of the Fourteenth Amendment. Although the Court allowed that Congress’s power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be “a congruence and proportionality” between the means adopted and the injury to be remedied. Unlike the pervasive suppression of the African-American vote in the South that led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an “egregious predicate” for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom

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2252 521 U.S. at 533.
Restoration Act contained no geographic restrictions or termination dates.\textsuperscript{2253}

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in \textit{Boerne}, as litigants precluded from arguing that a state’s sovereign immunity has been abrogated under Article I congressional powers\textsuperscript{2254} seek alternative legislative authority in § 5. For instance, in \textit{Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank},\textsuperscript{2255} a bank that had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state’s sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.\textsuperscript{2256}

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in \textit{Kimel v. Florida Bd. of Regents}\.\textsuperscript{2257} In determining that the Act did not meet the “congruence and proportionality” test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination.\textsuperscript{2258}

\textsuperscript{2253} 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was “so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” Id.


\textsuperscript{2255} 527 U.S. 627 (1999).

\textsuperscript{2256} 527 U.S. at 639–46. See also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act amendment to Lanham Act subjecting states to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor’s false advertising nor a more generalized right to be secure in one’s business interests qualifies as a “property” right protected by the Due Process Clause).

\textsuperscript{2257} 528 U.S. 62 (2000). Again, the issue of the Congress’s power under § 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the commerce clause.
crimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities and characteristics.\textsuperscript{2258} Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior.”\textsuperscript{2259}

Despite what was considered by many to be a better developed legislative record, the Court in Board of Trustees of Univ. of Ala. v. Garrett\textsuperscript{2260} also rejected the recovery of money damages against states, this time under of the Americans with Disabilities Act of 1990 (ADA).\textsuperscript{2261} Title I of the ADA prohibits employers, including states, from “discriminating against a qualified individual with a disability”\textsuperscript{2262} and requires employers to “make reasonable accommodations [for] . . . physical or mental limitations . . . unless [to do so] . . . would impose an undue hardship on the . . . business.”\textsuperscript{2263} Although the Court had previously overturned discriminatory legislative classifications based on disability in City of Cleburne v. Cleburne Living Center,\textsuperscript{2264} the Court had held that determinations of when states had violated the Equal Protection Clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind “reasonable accommodations” required under the ADA would not generally rise to the level of a violation of the Fourteenth Amendment, and instances of such failures did not qualify as a “history and pattern of unconstitutional employment discrimination.”\textsuperscript{2265} Thus, according the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,\textsuperscript{2266} but the requirements of the ADA would be out of proportion to the alleged offenses.

The Court’s more recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when

\textsuperscript{2260} 531 U.S. at 86, quoting City of Boerne, 521 U.S. at 532.
\textsuperscript{2261} 528 U.S. at 86, quoting City of Boerne, 521 U.S. at 532.
\textsuperscript{2262} 531 U.S. 356 (2001).
\textsuperscript{2263} 42 U.S.C. §§ 12111–12117.
\textsuperscript{2264} 42 U.S.C. § 12112(b)(5)(A).
\textsuperscript{2265} 42 U.S.C. § 12112(b)(5)(A).
\textsuperscript{2266} 473 U.S. 432 (1985).
\textsuperscript{2267} 531 U.S. at 368.
\textsuperscript{2268} As Justice Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.
the class being discriminated against is protected by heightened scrutiny of the government’s action. In *Nevada Department of Human Resources v. Hibbs*, the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid “family care” leave to care for a close relative with a serious health condition. Noting that § 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. “Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations.” Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the “state-sanctioned” gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act, this time to consider the Act’s “self care” (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Md.*, a four-Justice plurality, joined by concurring Justice Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration. According to the plurality, the self care provisions were intended to ameliorate discrimination based on illness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care leave to this state benefit might help some women suffering

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pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.\textsuperscript{2270}

The Court in \textit{Tennessee v. Lane}\textsuperscript{2271} held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,\textsuperscript{2272} but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of \textit{Garrett}.\textsuperscript{2273} Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.\textsuperscript{2274}

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of “a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”\textsuperscript{2275} However, as Justice Rehnquist pointed out in dissent, the deprivations the majority relied on were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.\textsuperscript{2276} Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.\textsuperscript{2277}

\textsuperscript{2270} Justice Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA’s leave provisions were not, in the dissent’s opinion, susceptible to being rent into separate pieces for analytical purposes.

\textsuperscript{2271} 541 U.S. 509 (2004).

\textsuperscript{2272} 42 USCS § 12132.

\textsuperscript{2273} 531 U.S. 356 (2001).

\textsuperscript{2274} \textit{See, e.g.,} \textit{Faretta v. California}, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

\textsuperscript{2275} 541 U.S. at 524.

\textsuperscript{2276} 541 U.S. at 541–42 (Rehnquist, J., dissenting).

\textsuperscript{2277} 541 U.S. at 524–25. Justice Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. \textit{id.} at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and that
Congress’s authority under § 5 of the Fourteenth Amendment to abrogate states’ Eleventh Amendment immunity is strongest when a state’s conduct at issue in a case is alleged to have actually violated a constitutional right. In United States v. Georgia, a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner’s claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.

the action of non-state actors had previously been considered in such pre-Boerne cases as South Carolina v. Katzenbach, 383 U.S. 301, 312–15 (1966).

“While the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for actual violations of those provisions.” 546 U.S. at 158 (citations omitted).