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LEGISLATIVE DEPARTMENT

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LEGISLATIVE DEPARTMENT

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEPARATION OF POWERS AND CHECKS AND BALANCES

The Constitution nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants, nor does it expressly enjoin maintenance of a system of checks and balances. Yet, it does grant to three separate branches the powers to legislate, to execute, and to adjudicate, and it provides throughout the document the means by which each of the branches could resist the blandishments and incursions of the others. The Framers drew up our basic charter against a background rich in the theorizing of scholars and statesmen regarding the proper ordering in a system of government of conferring sufficient power to govern while withholding the ability to abridge the liberties of the governed.[1]

The Theory Elaborated and Implemented

When the colonies separated from Great Britain following the Revolution, the framers of their constitutions were imbued with the profound tradition of separation of powers, and they freely and expressly embodied the principle in their charters.[2] The theory of checks and balances, however, was not favored, because it was drawn from Great Britain, and, as a consequence, violations of the separation-of-powers doctrine by the legislatures of the states were common-

[1] Among the best historical treatments are M. Vile, Constitutionalism and the Separation of Powers (1967), and W. Gwyn, The Meaning of the Separation of Powers (1965).

[2] Thus the Constitution of Virginia of 1776 provided: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]" Reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (W. S. Windler ed., 1979). *See also* 5 id. at 96, Art. XXX of Part First, Massachusetts Constitution of 1780: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

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place prior to the convening of the Convention.[3] Theory as much as experience guided the Framers in the summer of 1787.[4]

The doctrine of separation of powers, as implemented in drafting the Constitution, was based on several generally held principles: the separation of government into three branches, legislative, executive, and judicial; the conception that each branch performs unique and identifiable functions that are appropriate to each; and the limitation of the personnel of each branch to that branch, so that no one person or group should be able to serve in more than one branch simultaneously. To a great extent, the Constitution effectuated these principles, but critics objected to what they regarded as a curious intermixture of functions, in, for example, the veto power of the President over legislation and to the role of the Senate in the appointment of executive officers and judges and in the treaty-making process. It was to these objections that Madison turned in a powerful series of essays.[5]

Madison recurred to "the celebrated" Montesquieu, the "oracle who is always consulted," to disprove the contentions of the critics. "[T]his essential precaution in favor of liberty," that is, the separation of the three great functions of government, had been achieved, but the doctrine did not demand rigid separation. Montesquieu and other theorists "did not mean that these departments ought to have no *partial agency* in, or *control* over, the acts of each other," but rather liberty was endangered "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[6] That the doctrine did not demand absolute separation provided the basis for preservation of separation of powers in action. Neither sharply drawn demarcations of institutional boundaries nor appeals to the electorate were sufficient.[7] Instead, the security against concentration of powers "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Thus, "[a]mbition must be made to counteract ambi-

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[3] "In republican government the legislative authority, necessarily, predominates." THE FEDERALIST, No. 51 (J. Cooke ed. 1961), 350 (Madison). *See also* id. at No. 48, 332–334. This theme continues today to influence the Court's evaluation of congressional initiatives. *E.g.*, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273–74, 277 (1991). *But compare* id. at 286 n.3 (Justice White dissenting).

[4] The intellectual history through the state period and the Convention proceedings is detailed in G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969) (*see* index entries under "separation of powers").

[5] THE FEDERALIST Nos. 47–51 (J. Cooke ed. 1961), 323–353 (Madison).

[6] Id. at No. 47, 325–326 (emphasis in original).

[7] Id. at Nos. 47–49, 325–343.

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tion. The interest of the man must be connected with the constitutional rights of the place."[8]

Institutional devices to achieve these principles pervade the Constitution. Bicameralism reduces legislative predominance, while the presidential veto gives to the President a means of defending his priorities and preventing congressional overreaching. The Senate's role in appointments and treaties checks the President. The courts are assured independence through good-behavior tenure and security of compensation, and the judges through judicial review will check the other two branches. The impeachment power gives to Congress the authority to root out corruption and abuse of power in the other two branches. And so on.

Judicial Enforcement

Throughout much of our history, the "political branches" have contended between themselves in application of the separation-of-powers doctrine. Many notable political disputes turned on questions involving the doctrine. Because the doctrines of separation of powers and of checks and balances require both separation and intermixture,[9] the role of the Supreme Court in policing the maintenance of the two doctrines is problematic at best. Indeed, it is only in recent decades that cases involving the doctrines have regularly been decided by the Court. Previously, informed understandings of the principles have underlain judicial construction of particular clauses or guided formulation of constitutional common law. That is, the nondelegation doctrine was from the beginning suffused with a separation-of-powers premise,[10] and the effective demise of the doctrine as a judicially enforceable construct reflects the Court's inability to give any meaningful content to it.[11] On the other hand, periodically, the Court has taken a strong separation position on behalf of the President, sometimes unsuccessfully[12] and sometimes successfully.

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[8] Id. at No. 51, 349.

[9] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).

[10] *E.g.*, Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[11] *See* Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Justice Scalia dissenting).

[12] The principal example is Myers v. United States, 272 U.S. 52 (1926), written by Chief Justice Taft, himself a former President. The breadth of the holding was modified in considerable degree in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and the premise of the decision itself was recast and largely softened in Morrison v. Olson, 487 U.S. 654 (1988).

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Following a lengthy period of relative inattention to separation of powers issues, the Court since 1976[13] has recurred to the doctrine in numerous cases, and the result has been a substantial curtailing of congressional discretion to structure the National Government. Thus, the Court has interposed constitutional barriers to a congressional scheme to provide for a relatively automatic deficit-reduction process because of the critical involvement of an officer with significant legislative ties,[14] to the practice set out in more than 200 congressional enactments establishing a veto of executive actions,[15] and to the vesting of broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary.[16] On the other hand, the highly debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in a opinion that may presage a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.[17]

Important as the results were in this series of cases, the development of two separate and inconsistent doctrinal approaches to separation of powers issues occasioned the greatest amount of commentary. The existence of the two approaches, which could apparently be employed in the discretion of the Justices, made difficult the prediction of the outcomes of differences over proposals and alternatives in governmental policy. Significantly, however, it appeared that the Court most often used a more strict analysis in cases in which infringements of executive powers were alleged and a less strict analysis when the powers of the other two branches were concerned. The special prosecutor decision, followed by the decision sustaining the Sentencing Commission, may signal the adoption of a single analysis, the less strict analysis, for all separation of power cases or it may turn out to be but an exception to the Court's dual doctrinal approach.[18]

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[13] Beginning with Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), a relatively easy case, in which Congress had attempted to reserve to itself the power to appoint certain officers charged with enforcement of a law.

[14] Bowsher v. Synar, 478 U.S. 714 (1986).

[15] INS v. Chadha, 462 U.S. 919 (1983).

[16] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[17] Morrison v. Olson, 487 U.S. 654 (1988). *See also* Mistretta v. United States, 488 U.S. 361 (1989).

[18] The tenor of a later case, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991), was decidedly formalistic, but it involved a factual situation and a doctrinal predicate easily rationalized by the principles of *Morrison* and *Mistretta*, aggrandizement of its powers by Congress. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), reasserted the fundamental status of *Marathon*, again in a bankruptcy courts context, although the issue was

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Although the two doctrines have been variously characterized, the names generally attached to them have been "formalist," applied to the more strict line, and "functional," applied to the less strict. The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[19] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there is considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there is little significant risk of impairment of a core function or in the case of such a risk if there is a compelling reason for the action.[20]

Chadha used the formalist approach to invalidate the legislative veto device by which Congress could set aside a determination by the Attorney General, pursuant to a delegation from Congress, to suspend deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was legislative, because it had the purpose and effect of altering the legal

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the right to a jury trial under the Seventh Amendment rather than strictly speaking a separation-of-powers question. Freytag v. Commissioner, 501 U.S. 868 (1991), pursued a straightforward appointments-clause analysis, informed by a separation-of-powers analysis but not governed by it. Finally, in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 467 (1989) (concurring), Justice Kennedy would have followed the formalist approach, but he explicitly grounded it on the distinction between an express constitutional vesting of power as against implicit vestings. Separately, the Court has for some time viewed the standing requirement for access to judicial review as reflecting a separation-of-powers component—confining the courts to their proper sphere—Allen v. Wright, 468 U.S. 737, 752 (1984), but that view seemed largely superfluous to the conceptualization of standing rules. However, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992), the Court imported the take-care clause, obligating the President to see to the faithful execution of the laws, into standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions. It is not at all clear, however, that the effort, by Justice Scalia, enjoys the support of a majority of the Court. Id. at 579–81 (Justices Kennedy and Souter concurring). The cited cases seem to demonstrate that a strongly formalistic wing of the Court continues to exist.

[19] "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable." INS v. Chadha, 462 U.S. 919, 951 (1983). *See* id. at 944–51; Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–66 (1982) (plurality opinion); Bowsher v. Synar, 478 U.S. 714, 721–727 (1986).

[20] CFTC v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587, 589–93 (1985). The Court had first formulated this analysis in cases challenging alleged infringements on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 442–43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

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rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the bicameralism and presentment requirements of the Constitution.[21] Second, the Attorney General was performing an executive function in implementing the delegation from Congress, and the legislative veto was an impermissible interference in the execution of the laws. Congress could act only by legislating, by changing the terms of its delegation.[22] In *Bowsher*, the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress because to do so would enable Congress to play a role in the execution of the laws. Congress could act only by passing other laws.[23]

On the same day that *Bowsher* was decided through a formalist analysis, the Court in *Schor* used the less strict, functional approach in resolving a challenge to the power of a regulatory agency to adjudicate a state common-law issue—the very kind of issue that *Northern Pipeline*, in a formalist plurality opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court.[24] Sustaining the agency's power, the Court emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"[25] It held that, in evaluating such a separation of powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts and conversely the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts, the origin and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[26] *Bowsher*, the Court said, was not contrary, because, "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[27] The test was a balancing one—whether Congress had impermissi-

[21] INS v. Chadha, 462 U.S. 919, 952 (1983).

[22] 462 U.S. at 952.

[23] Bowsher v. Synar, 478 U.S. 714, 726–727, 733–734 (1986).

[24] Although the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipeline* was either an Article I court or an adjunct to an Article III court, the characterization of the entity is irrelevant and, in fact, the Court made nothing of the difference. The issue in each case was whether the judicial power of the United States could be conferred on an entity that was not an Article III court.

[25] CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587 (1985)).

[26] *Schor*, 478 U.S. at 851.

[27] 478 U.S. at 856.

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bly undermined the role of another branch without appreciable expansion of its own power.

Although the Court, in applying one or the other analysis in separation-of-powers cases, had never indicated its standards for choosing one analysis over the other, beyond implying that the formalist approach was proper when the Constitution fairly clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a determination must be made on the basis of the likelihood of impairment of the essential powers of a branch, the overall results had been a strenuous protection of executive powers and a concomitant relaxed view of the possible incursions into the powers of the other branches. It was thus a surprise when, in the independent counsel case, the Court, again without stating why it chose that analysis, used the functional standard to sustain the creation of the independent counsel.[28] The independent-counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not "impermissibly undermine" the powers of the Executive Branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[29] Acknowledging that the statute undeniably reduced executive control over what it had previously identified as a core executive function, the execution of the laws through criminal prosecution, through its appointment provisions and its assurance of independence by limitation of removal to a "good cause" standard, the Court nonetheless noticed the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions. A notably more pragmatic, functional analysis suffused the opinion of the Court when it upheld the constitutionality of the Sentencing

[28] To be sure, the Appointments Clause (Article II, § 2) specifically provides that Congress may vest in the courts the power to appoint inferior officers, Morrison v. Olson, 487 U.S. 654, 670–677 (1988), making possible the contention that, unlike *Chadha* and *Bowsher*, *Morrison* is a textual commitment case. But the Court's separate evaluation of the separation of powers issue does not appear to turn on that distinction. Id. at 685–96. Nevertheless, the existence of this possible distinction should make one wary about lightly reading *Morrison* as a rejection of formalism when executive powers are litigated.

[29] 487 U.S. at 695 (quoting, respectively, *Schor*, 478 U.S. at 856, and Nixon v. Administrator of General Services, 433 U.S. at 443).

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Commission.[30] Charged with promulgating guidelines binding on federal judges in sentencing convicted offenders, the seven-member Commission, three members of which had to be Article III judges, was made an independent entity in the judicial branch. The President appointed all seven members, the judges from a list compiled by the Judicial Conference, and he could remove from the Commission any member for cause. According to the Court, its separation-of-powers jurisprudence is always animated by the concerns of encroachment and aggrandizement. "Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[31] Thus, to each of the discrete questions, the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power, the Court carefully analyzed whether one branch had been given power it could not exercise or had enlarged its powers impermissibly and whether any branch would have its institutional integrity threatened by the structural arrangement.

Although it is possible, even likely, that *Morrison* and *Mistretta* represent a decision by the Court to adopt the functional analysis for all separation-of-powers cases, the history of adjudication since 1976 and the shift of approach between *Myers* and *Humphrey's Executor* suggest caution. Recurrences of the formalist approach have been noted. Additional decisions must be forthcoming before it can be decided that the Court has finally settled on the functional approach.

BICAMERALISM

By providing for a national legislature of two Houses, the Framers, deliberately or adventitiously, served several functions. Examples of both unicameralism and bicameralism abounded. Some of the ancient republics, to which the Framers often repaired for the learning of experience, had two-house legislatures, and the Parliament of Great Britain was based in two social orders, the hereditary aristocracy represented in the House of Lords and the freeholders of the land represented in the House of Commons. A number of state legislatures, following the Revolution, were created unicam-

[30] Mistretta v. United States, 488 U.S. 361 (1989). Significantly, the Court acknowledged reservations with respect to the placement of the Commission as an independent entity in the judicial branch. Id. at 384, 397, 407–08. As in *Morrison*, Justice Scalia was the lone dissenter, arguing for a fairly rigorous application of separation-of-powers principles. Id. at 413, 422–27.

[31] 488 U.S. at 382.

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eral, and the Continental Congress, limited in power as it was, consisted of one house.

From the beginning in the Convention, in the Virginia Plan, a two-house Congress was called for. The Great Compromise, one of the critical decisions leading to a successful completion of the Convention, resolved the dispute about the national legislature by providing for a House of Representatives apportioned on population and a Senate in which the states were equally represented. The first function served, thus, was federalism.[32] Coextensively important, however, was the separation-of-powers principle served. The legislative power, the Framers both knew and feared, was predominant in a society dependent upon the suffrage of the people, and it was important to have a precaution against the triumph of transient majorities. Hence, the Constitution's requirement that before lawmaking could be carried out bills must be deliberated in two Houses, their Members beholden to different constituencies, was in pursuit of this observation from experience.[33]

Events since 1787, of course, have altered both the separation-of-powers and the federalism bases of bicameralism, in particular the adoption of the Seventeenth Amendment resulting in the popular election of Senators, so that the differences between the two Chambers are today less pronounced.

ENUMERATED, IMPLIED, RESULTING, AND INHERENT POWERS

Two important doctrines of constitutional law—that the Federal Government is one of enumerated powers and that legislative powers may not be delegated—are derived in part from this section. The classic statement of the former is by Chief Justice Marshall in *McCulloch v. Maryland*: "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."[34] That, however, "the executive power" is not confined to those items expressly enumerated in Article II was asserted early in the history of the Constitution by both Madison and Hamilton and is

[32] THE FEDERALIST, No. 39 (J. Cooke ed. 1961), 250–257 (Madison).

[33] Id. at No. 51, 347–353 (Madison). The assurance of the safeguard is built into the presentment clause. Article I, § 7, cl. 2; *see also* id. at cl. 3. The structure is not often the subject of case law, but it was a foundational matter in INS v. Chadha, 462 U.S. 919, 944–951 (1983).

[34] 17 U.S. (4 Wheat.) 316, 405 (1819).

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found in decisions of the Court;[35] a similar latitudinarian conception of "the judicial power of the United States" was voiced in Justice Brewer's opinion for the Court in *Kansas v. Colorado*.[36] But, even when confined to "the legislative powers herein granted," the doctrine is severely strained by Chief Justice Marshall's broad conception of some of these powers, as he described them in *McCulloch v. Maryland*. He asserts that "[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government";[37] he characterizes "the power of making war, or levying taxes, or of regulating commerce" as "great substantive and independent power[s]";[38] and he declares that the power conferred by the "necessary and proper" clause embraces all legislative "means which are appropriate" to carry out the legitimate ends of the Constitution, unless inconsistent "with the letter and spirit of the constitution."[39]

Nine years later, Marshall introduced what Story in his *Commentaries* labels the concept of "resulting powers," which are those that "rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated."[40] Story's reference is to Marshall's opinion in *American Ins. Co. v. Canter*,[41] that "the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[42] And from the power to acquire territory, Marshall continues, arises, as "the inevitable consequence," the right to govern it.[43]

Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds that ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the "rights expressly given, and duties expressly enjoined" by the Constitution;[44] the power to impart to the paper currency of

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[35] *See* discussion under Article II, § 1, cl. 1, Executive Power: Theory of the Presidential Office, *infra*.

[36] 206 U.S. 46, 82 (1907).

[37] 17 U.S. (4 Wheat.) at 407.

[38] 17 U.S. at 411.

[39] 17 U.S. at 421.

[40] 2 J. Story, Commentaries on the Constitution of the United States 1256 (1833). *See also* id. at 1286 and 1330.

[41] 26 U.S. (1 Pet.) 511 (1828).

[42] 26 U.S. at 542.

[43] 26 U.S. at 543.

[44] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

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the government the quality of legal tender in the payment of debts;[45] the power to acquire territory by discovery;[46] the power to legislate for the Indian tribes wherever situated in the United States;[47] the power to exclude and deport aliens;[48] and to require that those who are admitted be registered and fingerprinted;[49] and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. Thus, in *United States v. Curtiss-Wright Export Corp.*,[50] decided in 1936, Justice Sutherland asserted the dichotomy of domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter virtually free of any such restraint. That doctrine has been the source of much scholarly and judicial controversy, but, although limited, it has not been repudiated.

Yet, for the most part, these holdings do not, as Justice Sutherland suggested, directly affect "the internal affairs" of the nation; they touch principally its peripheral relations, as it were. The most serious inroads on the doctrine of enumerated powers are, in fact, those that have taken place under cover of the doctrine—the vast expansion in recent years of national legislative power in the regulation of commerce among the states and in the expenditure of the national revenues. Marshall laid the ground for these developments in some of the language quoted above from *McCulloch v. Maryland*.

DELEGATION OF LEGISLATIVE POWER

The History of the Doctrine of Nondelegability

The Supreme Court has sometimes declared categorically that "the legislative power of Congress cannot be delegated,"[51] and on other occasions has recognized more forthrightly, as Chief Justice Marshall did in 1825, that, although Congress may not delegate powers that "are strictly and exclusively legislative," it may delegate "powers which [it] may rightfully exercise itself."[52] The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was

[45] Juilliard v. Greenman, 110 U.S. 421, 449–450 (1884). *See also* Justice Bradley's concurring opinion in Knox v. Lee, 79 U.S. (12 Wall.) 457, 565 (1871).

[46] United States v. Jones, 109 U.S. 513 (1883).

[47] United States v. Kagama, 118 U.S. 375 (1886).

[48] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[49] Hines v. Davidowitz, 312 U.S. 52 (1941).

[50] 299 U.S. 304 (1936).

[51] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Field v. Clark, 143 U.S. 649, 692 (1892).

[52] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

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made.[53] The Court has long recognized that administration of the law requires exercise of discretion,[54] and that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[55] The real issue is where to draw the line. Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[56] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

With the exception of a brief period in the 1930s when the Court was striking down New Deal legislation on a variety of grounds, the Court has consistently upheld grants of authority that have been challenged as invalid delegations of legislative power.

The modern doctrine may be traced to the 1928 case, *J. W. Hampton, Jr. & Co. v. United States*, in which the Court, speaking through Chief Justice Taft, upheld Congress's delegation to the President of the authority to set tariff rates that would equalize production costs in the United States and competing countries.[57] Although formally invoking the contingency theory, the Court's opinion also looked forward, emphasizing that in seeking the cooperation of another branch Congress was restrained only according to "common sense and the inherent necessities" of the situation.[58] This vague statement was elaborated somewhat in the statement that the Court would sustain delegations whenever Congress provided an "intelli-

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[53] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the FDA to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions that were backed by criminal penalties. It was "not open to reasonable dispute" that such a delegation was permissible to fill in details "impracticable for Congress to prescribe."

[54] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination").

[55] Mistretta v. United States, 488 U.S. 361, 372 (1989). *See also* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility").

[56] Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, *see* 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed., 1978); L. Jaffe, Judicial Control of Administrative Action ch. 2 (1965).

[57] 276 U.S. 394 (1928).

[58] 276 U.S. at 406.

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gible principle" to which the President or an agency must conform.[59]

As characterized by the Court, the delegations struck down in 1935 in *Panama Refining*[60] and *Schechter*[61] were not only broad but unprecedented. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of what was known as "hot oil"—oil produced in excess of quotas set by state law. The problem was that the Act provided no guidance to the President in determining whether or when to exercise this authority, and required no finding by the President as a condition of exercise of the authority. Congress "declared no policy, . . . established no standard, [and] laid down no rule," but rather "left the matter to the President without standard or rule, to be dealt with as he pleased."[62] At issue in *Schechter* was a delegation to the President of authority to promulgate codes of fair competition that could be drawn up by industry groups or prescribed by the President on his own initiative. The codes were required to implement the policies of the Act, but those policies were so general as to be nothing more than an endorsement of whatever might be thought to promote the recovery and expansion of the particular trade or industry. The President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards, and "virtually unfettered."[63] This broad delegation was "without precedent." The Act supplied "no standards" for any trade or industry group, and, unlike other broad delegations that had been upheld, did not set policies that could be implemented by an administrative agency required to follow "appropriate administrative procedure." "Instead of prescribing rules of conduct, [the Act] authorize[d] the making of codes to prescribe them."[64]

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[59] 276 U.S. at 409. The "intelligible principle" test of *Hampton* is the same as the "legislative standards" test of A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

[60] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[61] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[62] 293 U.S. at 430, 418, respectively. Similarly, the executive order exercising the authority contained no finding or other explanation by which the legality of the action could be tested. Id. at 431–33.

[63] 295 U.S. at 542.

[64] 295 U.S. at 541. Other concerns were that the industrial codes were backed by criminal sanction, and that regulatory power was delegated to private individuals. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

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Since 1935, the Court has not struck down a delegation to an administrative agency.[65] Rather, the Court has approved, "without deviation, Congress's ability to delegate power under broad standards."[66] The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime,[67] to determine "unfair and inequitable distribution of voting power" among securities holders,[68] to fix "fair and equitable" commodities prices,[69] to determine "just and reasonable" rates,[70] and to regulate broadcast licensing as the "public interest, convenience, or necessity require."[71] During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.[72] Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,[73] sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act,[74] and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA.[75] The Court has also relied on the constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.[76]

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[65] A year later, the Court invalidated the Bituminous Coal Conservation Act on delegation grounds, but that delegation was to private entities. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[66] Mistretta v. United States, 488 U.S. 361, 373 (1989).

[67] Lichter v. United States, 334 U.S. 742 (1948).

[68] American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[69] Yakus v. United States, 321 U.S. 414 (1944).

[70] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[71] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[72] Hampton v. Mow Sun Wong, 426 U.S. 88, 122 (1976) (Justice Rehnquist, dissenting).

[73] Mistretta v. United States, 488 U.S. 361, 373–79 (1989).

[74] *See*, *e.g.*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (the NIRA "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

[75] *See*, *e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944) (*Schechter* involved delegation "not to a public official . . . but to private individuals"; it suffices if Congress has sufficiently marked the field within which an administrator may act "so it may be known whether he has kept within it in compliance with the legislative will.")

[76] *See*, *e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an "understandable" quantification of risk); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("hurdles revealed in [*Schechter* and J. W. Hampton, Jr. & Co. v. United States] lead us to read the Act narrowly to avoid constitutional problems").

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Concerns in the scholarly literature with respect to the scope of the delegation doctrine[77] have been reflected in the opinions of some of the Justices.[78] Nonetheless, the Court's decisions continue to approve very broad delegations,[79] and the practice will likely remain settled.

The fact that the Court has gone so long without holding a statute to be an invalid delegation does not mean that the nondelegation doctrine is a dead letter. The long list of rejected challenges does suggest, however, that the doctrine applies only to standardless delegations of the most sweeping nature.

The Nature and Scope of Permissible Delegations

Application of two distinct constitutional principles contributed to the development of the nondelegation doctrine: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the executive branch.[80] In *J. W. Hampton, Jr. & Co. v. United States*,[81] Chief Justice Taft explained the doctrine's import in the delegation context. "The Federal Constitution . . . divide[s]

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[77] *E.g.*, *A Symposium on Administrative Law: Part I—Delegation of Powers to Administrative Agencies*, 36 Amer. U. L. Rev. 295 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Corn. L. Rev. 1 (1982).

[78] American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Chief Justice Burger dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (then-Justice Rehnquist concurring). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 675, 677 (1972) (Chief Justice Burger concurring, Justice Douglas dissenting); Arizona v. California, 373 U.S. 546, 625–26 (1963) (Justice Harlan dissenting in part). Occasionally, statutes are narrowly construed, purportedly to avoid constitutional problems with delegations. *E.g.*, *Industrial Union Dep't* , 448 U.S. at 645–46 (plurality opinion); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

[79] *E.g.*, Mistretta v. United States, 488 U.S. 361, 371–79 (1989). *See also* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 220–24 (1989); Touby v. United States, 500 U.S. 160, 164–68 (1991); Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001). While expressing considerable reservations about the scope of delegations, Justice Scalia, in *Mistretta*, 488 U.S. at 415–16, conceded both the inevitability of delegations and the inability of the courts to police them.

Notice Clinton v. City of New York, 524 U.S. 417 (1998), in which the Court struck down the Line Item Veto Act, intended by Congress to be a delegation to the President, finding that the authority conferred on the President was legislative power, not executive power, which failed because the presentment clause had not and could not have been complied with. The dissenting Justices argued that the law was properly treated as a delegation and was clearly constitutional. Id. at 453 (Justice Scalia concurring in part and dissenting in part), 469 (Justice Breyer dissenting).

[80] Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[81] 276 U.S. 394 (1928).

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the governmental power into three branches. . . . [I]n carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."[82]

In *Loving v. United States*,[83] the Court distinguished between its usual separation-of-powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch's ability to carry out its functions—and the delegation doctrine, "another branch of our separation of powers jurisdiction," which is informed not by the arrogation and impairment analyses but solely by the provision of standards.[84] This confirmed what had long been evident—that the delegation doctrine is unmoored to traditional separation-of-powers principles.

The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.[85]

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[82] 276 U.S. at 406. Chief Justice Taft traced the separation of powers doctrine to the maxim, *Delegata potestas non potest delegari* (a delegated power may not be delegated), 276 U.S. at 405, but the maxim does not help differentiate between permissible and impermissible delegations, and Court has not repeated this reference in later delegation cases.

[83] 517 U.S. 748 (1996).

[84] 517 U.S. at 758–59.

[85] Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936); Yakus v. United States, 321 U.S. 414, 424–25 (1944). Because the separation-of-powers doctrine is inapplicable to the states as a requirement of federal constitutional law, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), it is the Due Process Clause to which federal courts must look for authority to review delegations by state legislatures. *See*, *e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Embree v. Kansas City Road Dist., 240 U.S. 242 (1916).

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Two theories suggested themselves to the early Court to justify the results of sustaining delegations. The Chief Justice alluded to the first in *Wayman v. Southard*.[86] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation.[87]

Filling Up the Details.—In finding a power to "fill up the details," the Court in *Wayman v. Southard*[88] rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice.[89] Chief Justice Marshall agreed that the rulemaking power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts.[90]

Filling up the details of statutes has long been the standard. For example, the Court upheld a statute requiring the manufacturers of oleomargarine to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe," rejecting a contention that the prosecution was not for violation of law but for violation of a regulation.[91] "The criminal offence," said Chief Justice Fuller, "is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."[92] *Kollock* was not the first such case,[93] and it was followed by a multitude of delegations that the Court sustained. In one such case, for example, the Court upheld an act directing the Secretary of the Trea-

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[86] 23 U.S. (10 Wheat.) 1, 41 (1825).

[87] *The Brig Aurora*, 11 U.S. (7 Cr.) 382 (1813).

[88] 23 U.S. (10 Wheat.) 1 (1825).

[89] Act of May 8, 1792, § 2, 1 Stat. 275, 276.

[90] The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688. These authorities are now subsumed under 28 U.S.C. § 2072. In both instances Congress provided for submission of the rules to it, presumably reserving the power to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. *See*, *e.g.*, 82 Stat. 197 (1968), 18 U.S.C. §§ 3501–02 (admissibility of confessions in federal courts).

[91] *In re* Kollock, 165 U.S. 526 (1897).

[92] 165 U.S. at 533.

[93] United States v. Bailey, 34 U.S. (9 Pet.) 238 (1835); Caha v. United States, 152 U.S. 211 (1894).

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sury to promulgate minimum standards of quality and purity for tea imported into the United States.[94]

Contingent Legislation.—An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of "filling up the details" of a statute, authority for it must be sought under some other theory.

Contingent delegation was approved in an early case, *The Brig Aurora*,[95] upholding the revival of a law upon the issuance of a presidential proclamation. After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States. To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[96]

The theory was used again in *Field v. Clark*,[97] where the Tariff Act of 1890 was assailed as unconstitutional because it directed the President to suspend the free importation of enumerated commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions that "he may deem to be reciprocally unequal and unjust." In sustaining this statute the Court relied heavily upon two factors: (1) legislative precedents, which demonstrated that "in the judgment of the legislative branch of the government, it is often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations,"[98] and (2) that the act did "not, in any real sense, invest the

[94] Buttfield v. Stranahan, 192 U.S. 470 (1904). *See also* United States v. Grimaud, 220 U.S. 506 (1911) (upholding act authorizing executive officials to make rules governing use of forest reservations); ICC v. Goodrich Transit Co., 224 U.S. 194 (1912) (upholding delegation to prescribe methods of accounting for carriers in interstate commerce).

[95] 11 U.S. (7 Cr.) 382 (1813).

[96] 11 U.S. (7 Cr.) at 388.

[97] 143 U.S. 649 (1892).

[98] 143 U.S. at 691.

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President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered."[99] By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[100]

Standards.—Implicit in the concept of filling in the details is the idea that there is some intelligible guiding principle or framework to apply. Indeed, the requirement that Congress set forth "intelligible principles" or "standards" to guide as well as limit the agency or official in the performance of its assigned task has been critical to the Court's acceptance of legislative delegations. In theory, the requirement of standards serves two purposes: "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people . . . , [and] it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged."[101]

The only two instances in which the Court has found an unconstitutional delegation to a public entity have involved grants of discretion that the Court found to be unbounded, hence standardless. Thus, in *Panama Refining Co. v. Ryan*,[102] the President was authorized to prohibit the shipment in interstate commerce of "hot oil"—oil produced in excess of state quotas. Nowhere—not in the language conferring the authority, nor in the "declaration of policy," nor in any other provision—did the statute specify a policy to guide the President in determining when and under what circumstances to exercise the power.[103] Although the scope of granted authority in *Panama Refining* was narrow, the grant in *A. L. A. Schechter Poultry Corp. v. United States*[104] was sweeping. The National Indus-

[99] 143 U.S. at 692, 693.

[100] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[101] Arizona v. California, 373 U.S. 546, 626 (1963) (Justice Harlan, dissenting).

[102] 293 U.S. 388 (1935).

[103] The Court, in the view of many observers, was influenced heavily by the fact that the President's orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. *Cf.* E. Corwin, The President: Office and Powers 1787–1957 394–95 (4th ed. 1958). The result of the Government's discomfiture in Court was enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of Executive Orders and agency regulations in the daily Federal Register.

[104] 295 U.S. 495 (1935).

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trial Recovery Act devolved on the executive branch the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry. . . ."[105] Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was also concerned with the delegation's vast scope—the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country."[106]

Typically the Court looks to the entire statute to determine whether there is an intelligible standard to guide administrators, and a statute's declaration of policies or statement of purposes can provide the necessary guidance. If a statute's declared policies are not open-ended, then a delegation of authority to implement those policies can be upheld. For example, in *United States v. Rock Royal Co-operative, Inc.*,[107] the Court contrasted the National Industrial Recovery Act's statement of policy, "couched in most general terms" and found lacking in *Schechter*, with the narrower policy that an agricultural marketing law directed the Secretary of Agriculture to implement.[108] Similarly, the Court found ascertainable standards in the Emergency Price Control Act's conferral of authority to set prices for commodities if their prices had risen in a manner "inconsistent with the purposes of this Act."[109]

The Court has been notably successful in finding standards that are constitutionally adequate. Standards have been ascertained to exist in such formulations as "just and reasonable,"[110] "public inter-

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[105] 48 Stat. 195 (1933), Tit. I, § 1.

[106] 295 U.S. at 542. A delegation of narrower scope led to a different result in Fahey v. Mallonee, 332 U.S. 245, 250 (1947), the Court finding explicit standards unnecessary because "[t]he provisions are regulatory" and deal with but one enterprise, banking, the problems of which are well known and the authorized remedies as equally well known. "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." The Court has recently explained that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001) (Congress need not provide "any direction" to EPA in defining "country elevators," but "must provide substantial guidance on setting air standards that affect the entire national economy").

[107] 307 U.S. 533 (1939).

[108] 307 U.S. at 575. Other guidance in the marketing law limited the terms of implementing orders and specified the covered commodities.

[109] Yakus v. United States, 321 U.S. 414 (1944) (the principal purpose was to control wartime inflation, and the administrator was directed to give "due consideration" to a specified pre-war base period).

[110] Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930).

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est,"[111] "public convenience, interest, or necessity,"[112] "unfair methods of competition,"[113] and "requisite to protect the public health [with] an adequate margin of safety."[114] Thus, in *National Broadcasting Co. v. United States*,[115] the Court found that the discretion conferred on the Federal Communications Commission to license broadcasting stations to promote the "public interest, convenience, or necessity" conveyed a standard "as complete as the complicated factors for judgment in such a field of delegated authority permit."[116] Yet the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent.[117] When, in the Economic Stabilization Act of 1970, Congress authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries," and the President responded by imposing broad national controls, the lower court decision sustaining the action was not even appealed to the Supreme Court.[118] Explicit standards are not even required in all situations, the Court having found standards reasonably implicit in a delegation to the Federal Home Loan Bank Board to regulate banking associations.[119]

The Court has emphatically rejected the idea that administrative implementation of a congressional enactment may provide the intelligible standard necessary to uphold a delegation. The Court's decision in *Lichter v. United States*[120] could be read as approving of a bootstrap theory, the Court in that case having upheld the validity of a delegation of authority to recover "excessive profits" as applied to profits earned prior to Congress's incorporation into the statute of the administrative interpretation.[121] In *Whitman v. Ameri-*

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[111] New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

[112] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[113] FTC v. Gratz, 253 U.S. 421 (1920).

[114] Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001).

[115] 319 U.S. 190 (1943).

[116] 319 U.S. at 216.

[117] Similarly, the promulgation by the FCC of rules creating a "fairness doctrine" and a "right to reply" rule has been sustained, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), as well as a rule requiring the carrying of anti-smoking commercials. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

[118] Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The three-judge court relied principally on *Yakus*.

[119] Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (the Court explained that both the problems of the banking industry and the authorized remedies were well known).

[120] 334 U.S. 742 (1948).

[121] In upholding the delegation as applied to the pre-incorporation administrative definition, the Court explained that "[t]he statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render

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can Trucking Associations,[122] however, the Court asserted that *Lichter* mentioned agency regulations only "because a subsequent Congress had incorporated the regulations into a revised version of the statute."[123] "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute,"[124] the Court concluded.

Even in "sweeping regulatory schemes" that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[125] Thus Congress need not quantify how "imminent" is too imminent, how "necessary" is necessary enough, how "hazardous" is too hazardous, or how much profit is "excess." Rather, discretion to make such determinations may be conferred on administrative agencies.[126]

Although Congress must ordinarily provide some guidance that indicates broad policy objectives, there is no general prohibition on delegating authority that includes the exercise of policy judgment. In *Mistretta v. United States*,[127] the Court approved congressional delegations to the United States Sentencing Commission, an independent agency in the judicial branch, to develop and promulgate guidelines binding federal judges and cabining their discretion in sentencing criminal defendants. Although the Court enumerated the standards Congress had provided, it admitted that significant discretion existed with respect to making policy judgments about the relative severity of different crimes and the relative weight of the characteristics of offenders that are to be considered, and stated forthrightly that delegations may carry with them "the need to exercise judgment on matters of policy."[128] A number of cases illustrate the point. For example, the Court has upheld complex economic regulations of industries in instances in which the agencies had first denied possession of such power, had unsuccessfully sought authorization from Congress, and had finally acted without the requested congressional guidance.[129] The Court has also recognized that, when

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it constitutional." 334 U.S. at 783. The "excessive profits" standard, prior to definition, was contained in Tit. 8 of the Act of October 21, 1942, 56 Stat. 798, 982. The administrative definition was added by Tit. 7 of the Act of February 25, 1944, 58 Stat. 21, 78.

[122] 531 U.S. 547 (2001).

[123] 531 U.S. at 472.

[124] 531 U.S. at 472.

[125] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001).

[126] *Whitman*, 531 U.S. at 475–76.

[127] 488 U.S. 361 (1989).

[128] 488 U.S. at 378.

[129] *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967).

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Administrations change, new officials may have sufficient discretion under governing statutes to change or even reverse agency policies.[130]

It seems therefore reasonably clear that the Court does not require much in the way of standards from Congress. The minimum upon which the Court usually insists is that Congress use a delegation that "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[131] Where the congressional standards are combined with requirements of notice and hearing and statements of findings and considerations by the administrators, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.[132] This requirement may be met through the provisions of the Administrative Procedure Act,[133] but where that Act is inapplicable or where the Court sees the necessity for exceeding its provisions, due process can supply the safeguards of required hearing, notice, supporting statements, and the like.[134]

Preemptive Reach of Delegated Authority.—In exercising a delegated power the President or another officer may effectively suspend or rescind a law passed by Congress, or may preempt state law. A rule or regulation properly promulgated under authority received from Congress is *law*, and under the supremacy clause of

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[130] Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842–45, 865–66 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." Id. at 865). *See also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 42–44, 46–48, 51–57 (1983) (recognizing agency could have reversed its policy but finding reasons not supported on record).

[131] Yakus v. United States, 321 U.S. 414, 425 (1944).

[132] Yakus v. United States, 321 U.S. 414, 426; Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989); American Light & Power Co. v. SEC, 329 U.S. 90, 107, 108 (1946); Opp Cotton Mills v. Administrator, 312 U.S. 126, 144 (1941). It should be remembered that the Court has renounced strict review of economic regulation wholly through legislative enactment, forsaking substantive due process, so that review of the exercise of delegated power by the same relaxed standard forwards a consistent policy. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[133] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §§ 551–559. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), six Justices agreed that a Board proceeding had been in fact rule-making and not adjudication and that the APA should have been complied with. The Board won the particular case, however, because of a coalescence of divergent views of the Justices, but the Board has since reversed a policy of not resorting to formal rule-making.

[134] *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

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the Constitution can preempt state law.[135] Similarly, a valid regulation can supersede a federal statute. Early cases sustained contingency legislation giving the President power, upon the finding of certain facts, to revive or suspend a law,[136] and the President's power to raise or lower tariff rates equipped him to alter statutory law.[137] The Court in *Opp Cotton Mills v. Administrator*[138] upheld Congress's decision to delegate to the Wage and Hour Administrator of the Labor Department the authority to establish a minimum wage in particular industries greater than the statutory minimum but no higher than a prescribed figure. Congress has not often expressly addressed the issue of repeals or supersessions, but in authorizing the Supreme Court to promulgate rules of civil and criminal procedure and of evidence it directed that such rules supersede previously enacted statutes with which they conflict.[139]

Delegations to the President in Areas of Shared Authority

Foreign Affairs.—That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in *United States v. Curtiss-Wright Corporation*.[140] There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.[141] Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the Presi-

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[135] City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana PSC v. FCC, 476 U.S. 355, 368–69 (1986); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982).

[136] *E.g.*, *The Brig Aurora*, 11 U.S. (7 Cr.) 382 (1813).

[137] *E.g.*, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

[138] 312 U.S. 126 (1941).

[139] *See* 28 U.S.C. § 2072. In Davis v. United States, 411 U.S. 233, 241 (1973), the Court referred in passing to the supersession of statutes without evincing any doubts about the validity of the results. When Congress amended the Rules Enabling Acts in the 100th Congress, Pub. L. 100–702, 102 Stat. 4642, 4648, amending 28 U.S.C. § 2072, the House would have altered supersession, but the Senate disagreed, the House acquiesced, and the old provision remained. *See* H.R. 4807, H. Rep. No. 100–889, 100th Cong., 2d sess. (1988), 27–29; 134 Cong Rec. 23573–84 (1988), id. at 31051–52 (Sen. Heflin); id. at 31872 (Rep. Kastenmeier).

[140] 299 U.S. 304, 319–29 (1936).

[141] 299 U.S. at 319–22. For a particularly strong, recent assertion of the point, *see* Haig v. Agee, 453 U.S. 280, 291–92 (1981). This view also informs the Court's analysis in Dames & Moore v. Regan, 453 U.S. 654 (1981). *See also* United States v. Chemical Foundation, 272 U.S. 1 (1926) (Trading With Enemy Act delegation to dispose of seized enemy property).

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dent's authority over military justice.[142] Whether or not the President is the "sole organ of the nation" in its foreign relations, as asserted in *Curtiss-Wright*,[143] a lesser standard of delegation is applied in areas of power shared by the President and Congress.

Military.—Superintendence of the military is another area in which shared power with the President affects delegation doctrine. The Court in *Loving v. United States*[144] approved a virtually standardless delegation to the President.

Article 118 of the Uniform Code of Military Justice (UCMJ)[145] provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court's capital punishment jurisdiction, which requires the death sentence to be cabined by standards so that the sentencing authority must narrow the class of convicted persons to be so sentenced and must justify the individual imposition of the sentence.[146] However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.[147]

The Court in *Loving* held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty—Congress's power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed "such limits as the President may prescribe."[148] Acknowledging that a delegation must contain some "intelligible principle" to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander-in-Chief. "The same limitations on delegation do not apply" if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities as Commander-in-Chief require him to superintend the military, including the courts-martial, and

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[142] Loving v. United States, 517 U.S. 748, 772–73 (1996).
[143] 299 U.S. at 319.
[144] 517 U.S. 748 (1996).
[145] 10 U.S.C. §§ 918(1), (4).
[146] The Court assumed the applicability of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny, to the military, 517 U.S. at 755–56, a point on which Justice Thomas disagreed, id. at 777.
[147] Rule for Courts-Martial; *see* 517 U.S. at 754.
[148] 10 U.S.C. §§ 818, 836(a), 856.

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thus the delegated duty is interlinked with duties already assigned the President by the Constitution.[149]

Delegations to States and to Private Entities

Delegations to the States.—Beginning in the Nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[150] Challenges to the practice have been uniformly rejected. Although the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.[151] When, in the *Selective Draft Law Cases*,[152] the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state officers, the argument was rejected as "too wanting in merit to require further notice." Congress continues to empower state officers to act.[153] Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.[154]

Delegations to Private Entities.—The Court has upheld statutory delegations to private persons in the form of contingency legislation. It has upheld, for example, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected.[155] The Court's rationale has been

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[149] 517 U.S. at 771–74. *See also* United States v. Mazurie, 419 U.S. 544, 556–57 (1974) (limits on delegation are "less stringent" when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

[150] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938).

[151] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (duty to deliver fugitive slave); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) (holding that Congress could not compel a governor to extradite a fugitive). Doubts over Congress's power to compel extradition were not definitively removed until Puerto Rico v. Branstad, 483 U.S. 219 (1987), in which the Court overruled *Dennison*.

[152] 245 U.S. 366, 389 (1918).

[153] *E.g.*, Pub. L. 94–435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust *parens patriae* actions); Medical Waste Tracking Act, Pub. L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (states may impose civil and possibly criminal penalties against violators of the law).

[154] *See* 24 *Weekly Comp. of Pres. Docs.* 1418 (1988) (President Reagan). The only judicial challenge to such a practice resulted in a rebuff to the presidential argument. Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Council, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

[155] Currin v. Wallace, 306 U.S. 1 (1939); United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 577 (1939); Wickard v. Filburn, 317 U.S. 111, 115–116 (1942); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

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that such a provision does not involve any delegation of legislative authority, because Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.[156]

The Court has also upheld statutes that give private entities actual regulatory power, rather than that merely make regulation contingent on such entities' approval. The Court, for example, upheld a statute that delegated to the American Railway Association, a trade group, the authority to determine the standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission, which was required to accept it.[157] The Court simply cited *Buttfield v. Stranahan*,[158] in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case "completely in point" and resolving the issue without need of further consideration.[159] Similarly, the Court had enforced statutes that gave legal effect to local customs of miners with respect to claims on public lands.[160]

The Court has struck down delegations to private entities, but not solely because they were to private entities. In *Schechter*, it condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies, but the Court's principal objection was to the statute's lack of adequate standards.[161] In *Carter v. Carter Coal Co.*,[162] the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But the problem for the Court apparently was not so much that the statute delegated to private entities as that it delegated to private entities whose interests were adverse to the interests of those regulated, thereby denying the lat-

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[156] Currin v. Wallace, 306 U.S. 1, 15, 16 (1939).

[157] St. Louis, Iron Mt. & So. Ry. v. Taylor, 210 U.S. 281 (1908).

[158] 192 U.S. 470 (1904).

[159] 210 U.S. at 287.

[160] Jackson v. Roby, 109 U.S. 440 (1883); Erhardt v. Boaro, 113 U.S. 527 (1885); Butte City Water Co. v. Baker, 196 U.S. 119 (1905).

[161] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). In two subsequent cases, the Court referred to *Schechter* as having struck down a delegation for its lack of standards. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[162] 298 U.S. 238 (1936). *But compare* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (upholding a delegation in the Bituminous Coal Act of 1937).

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ter due process.[163] And several later cases have upheld delegations to private entities.[164]

Even though the Court has upheld some delegations to private entities by reference to cases involving delegations to public agencies, some uncertainty remains as to whether identical standards apply in the two situations. *Schechter* contrasted the National Industrial Recovery Act's broad and virtually standardless delegation to the President, assisted by private trade groups,[165] with other broad delegations of authority to administrative agencies, characterized by the Court as bodies of experts "required to act upon notice and hearing," and further limited by the requirement that binding orders must be "supported by findings of fact which in turn are sustained by evidence."[166] The absence of these procedural protections, designed to ensure fairness—as well as the possible absence of impartiality identified in *Carter Coal*—could be cited to support closer scrutiny of private delegations. Although the Court has emphasized the importance of administrative procedures in upholding broad delegations to administrative agencies,[167] it has not, since *Schechter* and *Carter Coal*, relied on the distinction to strike down a private delegation.

Particular Subjects or Concerns—Closer Scrutiny or Uniform Standard?

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. "[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[168] Holding that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges," the

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[163] "One person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

[164] *See*, *e.g.*, Schweiker v. McClure, 456 U.S. 188 (1992) (adjudication of Medicare claims, without right of appeal, by hearing officer appointed by private insurance carrier upheld under due process challenge); Association of Amer. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.) (three-judge court) (delegation to Professional Standards Review Organization), *aff'd per curiam*, 423 U.S. 975 (1975); Noblecraft Industries v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980) (Secretary authorized to adopt interim OSHA standards produced by private organization). Executive Branch objections to these kinds of delegations have involved appointments clause arguments rather than delegation issues per se.

[165] The Act conferred authority on the President to approve the codes of competition, either as proposed by the appropriate trade group, or with conditions that he added. Thus the principal delegation was to the President, with the private trade groups being delegated only recommendatory authority. 295 U.S. at 538–39.

[166] 295 U.S. at 539.

[167] *See*, *e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944).

[168] Lichter v. United States, 334 U.S. 742, 778–79 (1948).

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Court explained in *Skinner v. Mid-America Pipeline Company* [169] that there was "nothing in the placement of the Taxing Clause" in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.[170] Thus, the test in the taxing area is the same as for other areas—whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

This does not mean that Congress may delegate its power to determine whether taxes should be imposed. What was upheld in *Skinner* was delegation of authority to the Secretary of Transportation to collect "pipeline safety user fees" for users of natural gas and hazardous liquid pipelines. "Multiple restrictions" placed on the Secretary's discretion left no doubt that the constitutional requirement of an intelligible standard had been met. Cases involving the power to impose criminal penalties, described below, further illustrate the difference between delegating the underlying power to set basic policy—whether it be the decision to impose taxes or the decision to declare that certain activities are crimes—and the authority to exercise discretion in implementing the policy.

Crime and Punishment.—The Court has confessed that its "cases are not entirely clear as to whether more specific guidance is in fact required" for delegations relating to the imposition of criminal sanctions.[171] It is clear, however, that some essence of the power to define crimes and set a range of punishments is not delegable, but must be exercised by Congress. This conclusion derives in part from the time-honored principle that penal statutes are to be strictly construed, and that no one should be "subjected to a penalty un-

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[169] 490 U.S. 212, 223 (1989). In National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. It is difficult to discern how this view could have been held after the many cases sustaining delegations to fix tariff rates, which are in fact and in law taxes. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); *see also* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license "fees" on imports when necessary to protect national security). Nor should doubt exist respecting the appropriations power. *See* Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

[170] 490 U.S. at 221. Nor is there basis for distinguishing the other powers enumerated in § 8. *See*, *e.g.*, Loving v. United States, 517 U.S. 748 (1996). *But see* Touby v. United States, 500 U.S. 160, 166 (1991) (it is "unclear" whether a higher standard applies to delegations of authority to issue regulations that contemplate criminal sanctions), discussed in the next section.

[171] Touby v. United States, 500 U.S. 160, 166 (1991).

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less the words of the statute plainly impose it."[172] Both *Schechter*[173] and *Panama Refining*[174]—the only two cases in which the Court has invalidated delegations—involved broad delegations of power to "make federal crimes of acts that never had been such before."[175] Thus, Congress must provide by statute that violation of the statute's terms—or of valid regulations issued pursuant thereto—shall constitute a crime, and the statute must also specify a permissible range of penalties. Punishment in addition to that authorized in the statute may not be imposed by administrative action.[176]

However, once Congress has exercised its power to declare certain acts criminal, and has set a range of punishment for violations, authority to flesh out the details may be delegated. Congress may provide that violation of valid administrative regulations shall be punished as a crime.[177] For example, the Court has upheld a delegation of authority to classify drugs as "controlled substances," and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug's classification by the Attorney General.[178]

Congress may also confer on administrators authority to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress's conferral of "significant discretion" on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants.[179] Although the Commission was given significant discretionary authority "to determine the relative severity of federal crimes, . . . assess the relative weight of

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[172] Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 410 (1873).

[173] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[174] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[175] Fahey v. Mallonee, 332 U.S. 245, 249 (1947).

[176] L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute").

[177] United States v. Grimaud, 220 U.S. 506 (1911). The Forest Reserve Act at issue in *Grimaud* clearly provided for punishment for violation of "rules and regulations of the Secretary." The Court in *Grimaud* distinguished United States v. Eaton, 144 U.S. 677 (1892), which had held that authority to punish for violation of a regulation was lacking in more general language authorizing punishment for failure to do what was "required by law." 220 U.S. at 519. Extension of the principle that penal statutes should be strictly construed requires that the prohibited acts be clearly identified in the regulation. M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946). The Court summarized these cases in Loving v. United States, 517 U.S. 748 (1996), drawing the conclusion that "there is no absolute rule . . . against Congress's delegation of authority to define criminal punishments."

[178] Touby v. United States, 500 U.S. 160 (1991).

[179] Mistretta v. United States, 488 U.S. 361 (1989).

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the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar," Congress also gave the Commission extensive guidance in the Act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense.[180]

Delegation and Individual Liberties.—Some Justices have argued that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.[181] The only pronouncement in a majority opinion, however, is that, even with regard to the regulation of liberty, the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[182] The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.[183]

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the executive branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only those interests Congress charged it with promoting, and if the action could be justified by other interests, the office with responsibility for promoting those interests must take the action.[184]

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[180] 488 U.S. at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." Id. at 378 n.11.

[181] United States v. Robel, 389 U.S. 258, 269 (1967) (Justice Brennan concurring). The view was specifically rejected by Justices White and Harlan in dissent, id. at 288–89, and ignored by the majority.

[182] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[183] Kent v. Dulles, 357 U.S. 116 (1958); Schneider v. Smith, 390 U.S. 17 (1968); Greene v. McElroy, 360 U.S. 474, 506–08 (1959) (Court will not follow traditional principles of congressional acquiescence in administrative interpretation to infer a delegation of authority to impose an industrial security clearance program that lacks the safeguards of due process). More recently, the Court has eschewed even this limited mode of construction. Haig v. Agee, 453 U.S. 280 (1981).

[184] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (5-to-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), and sustained in Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).

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CONGRESSIONAL INVESTIGATIONS

Source of the Power to Investigate

No provision of the Constitution expressly authorizes either house of Congress to make investigations and exact testimony to the end that it may exercise its legislative functions effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution.[185] It was asserted by the House of Representatives as early as 1792 when it appointed a committee to investigate the defeat of General St. Clair and his army by the Indians in the Northwest and empowered it to "call for such persons, papers, and records, as may be necessary to assist their inquiries."[186]

The Court has long since accorded its agreement with Congress that the investigatory power is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. "We are of the opinion," wrote Justice Van Devanter for a unanimous Court, "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[187]

And, in a 1957 opinion generally hostile to the exercise of the investigatory power in the post-War years, Chief Justice Warren did

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[185] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159–166 (1926); M. Dimock, Congressional Investigating Committees ch. 2 (1929).

[186] 3 Annals of Congress 490–494 (1792); 3 A. Hinds' Precedents of the House of Representatives 1725 (1907).

[187] McGrain v. Daugherty, 273 U.S. 135, 174–175 (1927).

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not question the basic power. "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." [188] Justice Harlan summarized the matter in 1959. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." [189]

Broad as the power of inquiry is, it is not unlimited. The power of investigation may properly be employed only "in aid of the legislative function." [190] Its outermost boundaries are marked, then, by the outermost boundaries of the power to legislate. In principle, the Court is clear on the limitations, clear "that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by a judicial proceeding' it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse must be had to the resolution or order under which it is made." [191]

In practice, much of the litigated dispute has been about the reach of the power to inquire into the activities of private citizens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

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[188] Watkins v. United States, 354 U.S. 178, 187 (1957).

[189] Barenblatt v. United States, 360 U.S. 109, 111 (1959). *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503–07 (1975).

[190] Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

[191] McGrain v. Daugherty, 273 U.S. 135, 170 (1927). The internal quotations are from Kilbourn v. Thompson, 103 U.S. 168, 190, 193 (1881).

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Investigations of Conduct of Executive Department

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged.[192] During the controversy over renewal of the charter of the Bank of the United States, John Quincy Adams contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House.[193] Four years later the legislative power of investigation was challenged by the President. A committee appointed by the House of Representatives "with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, . . . "[194] called upon the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt "to invade the just rights of the Executive Departments," the President refused to comply and the majority of the committee acquiesced.[195] Nevertheless, congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown's raid upon the arsenal at Harper's Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness.[196] Notwithstanding this firmly established legislative practice, the Supreme Court took a narrow view of the power in *Kilbourn v. Thompson*.[197] It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court.[198] But nearly half a century later, in *McGrain v.*

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[192] In 1800, Secretary of the Treasury, Oliver Wolcott, Jr., addressed a letter to the House of Representatives advising them of his resignation from office and inviting an investigation of his office. Such an inquiry was made. 10 ANNALS OF CONGRESS 786–788 (1800).

[193] 8 CONG. DEB. 2160 (1832).

[194] 13 CONG. DEB. 1057–1067 (1836).

[195] H. R. REP. NO. 194, 24th Congress, 2d sess., 1, 12, 31 (1837).

[196] CONG. GLOBE, 36th Congress, 1st sess., 1100–1109 (1860).

[197] 103 U.S. 168 (1881).

[198] The Court held that inasmuch as the entire proceedings arising out of the bankruptcy were pending in court, as the authorizing resolution contained no suggestion of contemplated legislation, as in fact no valid legislation could be enacted on the subject, and as the only relief which the United States could seek was judi-

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Daugherty,[199] it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration.[200]

Investigations of Members of Congress

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus, the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it.[201] The decision in *Barry v. United States ex rel. Cunningham*[202] sanctioned the exercise of a similar power in investigating a senatorial election.

Investigations in Aid of Legislation

Purpose.—Beginning with the resolution adopted by the House of Representatives in 1827, which vested its Committee on Manufactures "with the power to send for persons and papers with a view to ascertain and report to this House in relation to a revision of the tariff duties on imported goods,"[203] the two Houses have asserted the right to collect information from private persons as well as from governmental agencies when necessary to enlighten their judgment on proposed legislation. The first case to review the assertion saw a narrow view of the power taken and the Court held that the purpose of the inquiry was to pry improperly into private affairs without any possibility of legislating on the basis of what might be learned and further that the inquiry overstepped the bounds of legislative jurisdiction and invaded the provinces of the judiciary.[204]

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cial relief in the bankruptcy proceeding, the House had exceeded its powers in authorizing the inquiry. *But see* Hutcheson v. United States, 369 U.S. 599 (1962).

[199] 273 U.S. 135, 177, 178 (1927).

[200] The topic of executive privilege, the claimed right of the President and at least some of his executive branch officers to withhold from Congress information desired by it or by one of its committees, is addressed in Article II, The Presidential Aegis: Demands for Papers. Although the issue has been one of contention between the two branches of Government since Washington's refusal in 1796 to submit certain correspondence to the House of Representatives relating to treaty negotiations, it has only relatively recently become a judicial issue.

[201] *In re* Chapman, 166 U.S. 661 (1897).

[202] 279 U.S. 597 (1929).

[203] 4 Cong. Deb. 862, 868, 888, 889 (1827).

[204] Kilbourn v. Thompson, 103 U.S. 168 (1881).

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Subsequent cases, however, have given Congress the benefit of a presumption that its object is legitimate and related to the possible enactment of legislation. Shortly after *Kilbourn*, the Court declared that "it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded" in order that the inquiry be under a lawful exercise of power.[205] Similarly, in *McGrain v. Daugherty*,[206] the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating. Then, in *Sinclair v. United States*,[207] on its facts presenting a close parallel to *Kilbourn*, the Court affirmed the right of the Senate to carry out investigations of fraudulent leases of government property after suit for recovery had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, asserting that the inquiry was not actually in aid of legislation. The Senate had prudently directed the investigating committee to ascertain what, if any, legislation might be advisable. Conceding "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[208]

Although *Sinclair* and *McGrain* involved inquiries into the activities and dealings of private persons, these activities and dealings were in connection with property belonging to the United States Government, so that it could hardly be said that the inquiries concerned the merely personal or private affairs of any individual.[209] But, where the business, and the conduct of individuals are subject to congressional regulation, there exists the power of inquiry,[210] and in practice the areas of any individual's life immune from inquiry are probably fairly limited. "In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also

[205] *In re* Chapman, 166 U.S. 661, 670 (1897).
[206] 273 U.S. 135, 178 (1927).
[207] 279 U.S. 263 (1929).
[208] 279 U.S. at 295.
[209] 279 U.S. at 294.
[210] The first case so holding is ICC v. Brimson, 154 U.S. 447 (1894), which asserts that, because Congress could itself have made the inquiry to appraise its regulatory activities, it could delegate the power of inquiry to the agency to which it had delegated the regulatory function.

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contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens."[211] Because Congress clearly has the power to legislate to protect the nation and its citizens from subversion, espionage, and sedition,[212] it also has the power to inquire into the existence of the dangers of domestic or foreign-based subversive activities in many areas of American life, including education,[213] labor and industry,[214] and political activity.[215] Because its powers to regulate interstate commerce afford Congress the power to regulate corruption in labor-management relations, congressional committees may inquire into the extent of corruption in labor unions.[216] Because of its powers to legislate to protect the civil rights of its citizens, Congress may investigate organizations which allegedly act to deny those civil rights.[217] It is difficult in fact to conceive of areas into which congressional inquiry might not be carried, which is not the same, of course, as saying that the exercise of the power is unlimited.

One limitation on the power of inquiry that the cases have discussed concerns the contention that congressional investigations often have no legislative purpose but rather are aimed at achieving results through "exposure" of disapproved persons and activities: "We have no doubt," wrote Chief Justice Warren, "that there is no congressional power to expose for the sake of exposure."[218] Although

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[211] Watkins v. United States, 354 U.S. 178, 195 (1957).

[212] *See* Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United States, 360 U.S. 109, 127 (1959); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[213] Barenblatt v. United States, 360 U.S. 109, 129–132 (1959); Deutch v. United States, 367 U.S. 456 (1961); *cf.* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state inquiry).

[214] Watkins v. United States, 354 U.S. 178 (1957); Flaxer v. United States, 358 U.S. 147 (1958); Wilkinson v. United States, 365 U.S. 399 (1961).

[215] McPhaul v. United States, 364 U.S. 372 (1960).

[216] Hutcheson v. United States, 369 U.S. 599 (1962).

[217] Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[218] Watkins v. United States, 354 U.S. 178, 200 (1957). The Chief Justice, however, noted: "We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id. at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." Id. at 200 n.33.

In his book, Wilson continued, following the sentence quoted by the Chief Justice: "The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. . . . It would be hard to conceive of there being too much talk about the practical concerns . . . of government." CONGRESSIONAL GOVERNMENT (1885), 303–304. For contrasting views of the reach of this statement, *compare* United States v. Rumely,

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some Justices, always in dissent, have attempted to assert limitations in practice based upon this concept, the majority of Justices have adhered to the traditional precept that courts will not inquire into legislators' motives but will look [219] only to the question of power.[220] "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." [221]

Protection of Witnesses; Pertinency and Related Matters.—A witness appearing before a congressional committee is entitled to require of the committee a demonstration of its authority to inquire into his activities and a showing that the questions asked of him are pertinent to the committee's area of inquiry. A congressional committee possesses only those powers delegated to it by its parent body. The enabling resolution that has given it life also contains the grant and limitations of the committee's power.[222] In *Watkins v. United States*,[223] Chief Justice Warren cautioned that "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent house of Congress." Speaking directly of the authorizing resolution, which created the House Un-American Activities Committee,[224] the Chief Justice thought it "difficult to imagine a less explicit authorizing resolution." [225] But the far-reaching implications of these remarks were circumscribed by *Barenblatt v. United States*,[226] in which the Court, "[g]ranting the vagueness of the Rule," noted that Congress had long since put upon it a persuasive gloss

345 U.S. 41, 43 (1953), *with* Russell v. United States, 369 U.S. 749, 777–778 (1962) (Justice Douglas dissenting).

[219] Barenblatt v. United States, 360 U.S. 109, 153–162, 166 (1959); Wilkinson v. United States, 365 U.S. 399, 415, 423 (1961); Braden v. United States, 365 U.S. 431, 446 (1961); *but see* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) (a state investigative case).

[220] "Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindicative motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies." Tenney v. Brandhove, 341 U.S. 367, 377–378 (1951). For a statement of the traditional unwillingness to inquire into congressional motives in the judging of legislation, *see* United States v. O'Brien, 391 U.S. 367, 382–386 (1968). But note that in Jenkins v. McKeithen, 395 U.S. 411 (1969), in which the legislation establishing a state crime investigating commission clearly authorized the commission to designate individuals as law violators, due process was violated by denying witnesses the rights existing in adversary criminal proceedings.

[221] Barenblatt v. United States, 360 U.S. 109, 132 (1959).

[222] United States v. Rumely, 345 U.S. 41, 44 (1953).

[223] 354 U.S. 178, 201 (1957).

[224] The Committee has since been abolished.

[225] Watkins v. United States, 354 U.S. 178, 202 (1957).

[226] 360 U.S. 109 (1959).

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of legislative history through practice and interpretation, which, read with the enabling resolution, showed that "the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country." [227] "[W]e must conclude that [the Committee's] authority to conduct the inquiry presently under consideration is unassailable, and that . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness." [228]

Because of the usual precision with which authorizing resolutions have generally been drafted, few controversies have arisen about whether a committee has projected its inquiry into an area not sanctioned by the parent body.[229] But in *United States v. Rumely*,[230] the Court held that the House of Representatives, in authorizing a select committee to investigate lobbying activities devoted to the promotion or defeat of legislation, did not thereby intend to empower the committee to probe activities of a lobbyist that were unconnected with his representations directly to Congress but rather designed to influence public opinion by distribution of literature. Consequently the committee was without authority to compel the representative of a private organization to disclose the names of all who had purchased such literature in quantity.[231]

Still another example of lack of proper authority is *Gojack v. United States*,[232] in which the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry.

Watkins v. United States,[233] remains the leading case on pertinency, although it has not the influence on congressional investigations that some hoped and some feared in the wake of its announcement. When questioned by a Subcommittee of the House Un-

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[227] 360 U.S. at 117–18.

[228] 360 U.S. at 122–23. But note that in Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970), the court ordered to trial a civil suit contesting the constitutionality of the Rule establishing the Committee on allegations of overbreadth and overbroad application, holding that *Barenblatt* did not foreclose the contention.

[229] *But see* Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

[230] 345 U.S. 41 (1953).

[231] The Court intimated that if the authorizing resolution did confer such power upon the committee, the validity of the resolution would be subject to doubt on First Amendment principles. Justices Black and Douglas would have construed the resolution as granting the authority and would have voided it under the First Amendment. 345 U.S. at 48 (concurring opinion).

[232] 384 U.S. 702 (1966).

[233] 354 U.S. 178 (1957).

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American Activities Committee, Watkins refused to supply the names of past associates, who, to his knowledge, had terminated their membership in the Communist Party and supported his noncompliance by, *inter alia*, contending that the questions were unrelated to the work of the Committee. Sustaining the witness, the Court emphasized that inasmuch as a witness by his refusal exposes himself to a criminal prosecution for contempt, he is entitled to be informed of the relation of the question to the subject of the investigation with the same precision as the Due Process Clause requires of statutes defining crimes.[234]

For ascertainment of the subject matter of an investigation, the witness might look, noted the Court, to several sources, including (1) the authorizing resolution, (2) the resolution by which the full committee authorized the subcommittee to proceed, (3) the introductory remarks of the chairman or other members, (4) the nature of the proceedings, (5) the chairman's response to the witness when the witness objects to the line of question on grounds of pertinency.[235] Whether a precise delineation of the subject matter of the investigation in but one of these sources would satisfy the requirements of due process was left unresolved, since the Court ruled that in this case all of them were deficient in providing Watkins with the guidance to which he was entitled. The sources had informed Watkins that the questions were asked in a course of investigation of something that ranged from a narrow inquiry into Communist infiltration into the labor movement to a vague and unlimited inquiry into "subversion and subversive propaganda."[236]

By and large, the subsequent cases demonstrated that *Watkins* did not represent a determination by the Justices to restrain broadly the course of congressional investigations, though several contempt citations were reversed on narrow holdings. But with regard to pertinency, the implications of *Watkins* were held in check and, without amending its rules or its authorizing resolution, the Un-American Activities Committee was successful in convincing a majority of the Court that its subsequent investigations were authorized and

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[234] 354 U.S. at 208–09.

[235] 354 U.S. at 209–15.

[236] Id. *See also* Sacher v. United States, 356 U.S. 576 (1958), a *per curiam* reversal of a contempt conviction on the ground that the questions did not relate to a subject "within the subcommittee's scope of inquiry," arising out of a hearing pertaining to a recantation of testimony by a witness in which the inquiry drifted into a discussion of legislation barring Communists from practice at the federal bar, the unanswered questions being asked then; and Flaxer v. United States, 358 U.S. 147 (1958), a reversal for refusal to produce membership lists because of an ambiguity in the committee's ruling on the time of performance; and Scull v. Virginia ex rel. Committee, 359 U.S. 344 (1959), a reversal on a contempt citation before a state legislative investigating committee on pertinency grounds.

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that the questions asked of recalcitrant witnesses were pertinent to the inquiries.[237]

Thus, in *Barenblatt v. United States*,[238] the Court concluded that the history of the Un-American Activities Committee's activities, viewed in conjunction with the Rule establishing it, evinced clear investigatory authority to inquire into Communist infiltration in the field of education, an authority with which the witness had shown familiarity. Additionally, the opening statement of the chairman had pinpointed that subject as the nature of the inquiry that day and the opening witness had testified on the subject and had named Barenblatt as a member of the Communist Party at the University of Michigan. Thus, pertinency and the witness' knowledge of the pertinency of the questions asked him was shown. Similarly, in *Wilkinson v. United States*,[239] the Court held that, when the witness was apprised at the hearing that the Committee was empowered to investigate Communist infiltration of the textile industry in the South, that it was gathering information with a view to ascertaining the manner of administration and need to amend various laws directed at subversive activities, that Congress hitherto had enacted many of its recommendations in this field, and that it was possessed of information about his Party membership, he was notified effec-

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[237] Notice should be taken, however, of two cases that, though decided four and five years after *Watkins*, involved persons who were witnesses before the Un-American Activities Committee either shortly prior to or shortly following Watkins' appearance and who were cited for contempt before the Supreme Court decided *Watkins*.

In Deutch v. United States, 367 U.S. 456 (1961), involving an otherwise cooperative witness who had refused to identify certain persons with whom he had been associated at Cornell in Communist Party activities, the Court agreed that Deutch had refused on grounds of moral scruples to answer the questions and had not challenged them as not pertinent to the inquiry, but the majority ruled that the government had failed to establish at trial the pertinency of the questions, thus vitiating the conviction. Justices Frankfurter, Clark, Harlan, and Whittaker dissented, arguing that any argument on pertinency had been waived but in any event thinking it had been established. Id. at 472, 475.

In Russell v. United States, 369 U.S. 749 (1962), the Court struck down contempt convictions for insufficiency of the indictments. Indictments, which merely set forth the offense in the words of the contempt statute, the Court asserted, in alleging that the unanswered questions were pertinent to the subject under inquiry but not identifying the subject in detail, are defective because they do not inform defendants what they must be prepared to meet and do not enable courts to decide whether the facts alleged are sufficient to support convictions. Justice Stewart for the Court noted that the indicia of subject matter under inquiry were varied and contradictory, thus necessitating a precise governmental statement of particulars. Justices Harlan and Clark in dissent contended that it was sufficient for the government to establish pertinency at trial and noted that no objections relating to pertinency had been made at the hearings. Id. at 781, 789–793. *Russell* was cited in the *per curiam* reversals in Grumman v. United States, 370 U.S. 288 (1962), and Silber v. United States, 370 U.S. 717 (1962).

[238] 360 U.S. 109 (1959).

[239] 365 U.S. 399 (1961).

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tively that a question about that affiliation was relevant to a valid inquiry. A companion case was held to be controlled by *Wilkinson*,[240] and in both cases the majority rejected the contention that the Committee inquiry was invalid because both Wilkinson and Braden, when they were called, were engaged in organizing activities against the Committee.[241]

Related to the cases discussed in this section are cases requiring that congressional committees observe strictly their own rules. Thus, in *Yellin v. United States*,[242] a contempt conviction was reversed because the Committee had failed to observe its rule providing for a closed session if a majority of the Committee believed that a witness' appearance in public session might unjustly injure his reputation. The Court ruled that the Committee had ignored the rule when it subpoenaed the witness for a public hearing and then in failing to consider as a Committee his request for a closed session.[243]

The Court has blown hot and cold on the issue of a quorum as a prerequisite to a valid contempt citation, and no firm statement of a rule is possible, although it seems probable that no quorum is ordinarily necessary.[244]

Protection of Witnesses; Constitutional Guarantees.—"[T]he Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the

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[240] Braden v. United States, 365 U.S. 431 (1961).

[241] The majority denied that the witness' participation in a lawful and protected course of action, such as petitioning Congress to abolish the Committee, limited the Committee's right of inquiry. "[W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. The subcommittee had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As *Barenblatt* makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the government's overbalancing interest." Wilkinson v. United States, 365 U.S. 399, 414 (1961). In both cases, the dissenters, Chief Justice Warren and Justices Black, Douglas, and Brennan argued that the Committee action was invalid because it was intended to harass persons who had publicly criticized committee activities. Id. at 415, 423, 429.

[242] 374 U.S. 109 (1963).

[243] Failure to follow its own rules was again an issue in Gojack v. United States, 384 U.S. 702 (1966), in which the Court noted that, although a committee rule required the approval of a majority of the Committee before a "major" investigation was initiated, such approval had not been sought before a Subcommittee proceeded.

[244] In Christoffel v. United States, 338 U.S. 84 (1949), the Court held that a witness can be found guilty of perjury only where a quorum of the committee is present at the time the perjury is committed; it is not enough to prove that a quorum was present when the hearing began. But, in United States v. Bryan, 339 U.S. 323 (1950), the Court ruled that a quorum was not required under the statute punishing refusal to honor a valid subpoena issued by an authorized committee.

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Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights."[245] Just as the Constitution places limitations on Congress's power to legislate, so it limits the power to investigate. This section addresses the limitations the Bill of Rights places on the scope and nature of the congressional power to inquire.

The most extensive amount of litigation in this area has involved the privilege against self-incrimination guaranteed against governmental abridgment by the Fifth Amendment. Observance of the privilege by congressional committees has been so uniform that no court has ever held that it must be observed, though dicta are plentiful.[246] Thus, the cases have explored not the issue of the right to rely on the privilege but rather the manner and extent of its application.

There is no prescribed form in which one must plead the privilege. When a witness refused to answer a question about Communist Party affiliations and based his refusal upon the assertion by a prior witness of "the first amendment supplemented by the fifth," the Court held that he had sufficiently invoked the privilege, at least in the absence of committee inquiry seeking to force him to adopt a more precise stand.[247] If the committee suspected that the witness was being purposely vague, in order perhaps to avoid the stigma attached to a forthright claim of the privilege, it should have requested him to state specifically the ground of his refusal to testify. Another witness, who was threatened with prosecution for his Communist activities, could claim the privilege even to some questions the answers to which he might have been able to explain away as unrelated to criminal conduct; if an answer might tend to be incriminatory, the witness is not deprived of the privilege merely because he might have been able to refute inferences of guilt.[248] In still another case, the Court held that the committee had not clearly overruled the claim of privilege and directed an answer.[249]

The privilege against self-incrimination is not available as a defense to an organizational officer who refuses to turn over organization documents and records to an investigating committee.[250]

In *Hutcheson v. United States*,[251] the Court rejected a challenge to a Senate committee inquiry into union corruption on the

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[245] Barenblatt v. United States, 360 U.S. 109, 112 (1959).

[246] 360 U.S. at 126; Watkins v. United States, 354 U.S. 178, 196 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955).

[247] Quinn v. United States, 349 U.S. 155 (1955).

[248] Emspak v. United States, 349 U.S. 190 (1955).

[249] Bart v. United States, 349 U.S. 219 (1955).

[250] McPhaul v. United States, 364 U.S. 372 (1960).

[251] 369 U.S. 599 (1962).

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part of a witness who was under indictment in state court on charges relating to the same matters about which the committee sought to interrogate him. The witness did not plead his privilege against self-incrimination but contended that, by questioning him about matters that would aid the state prosecutor, the committee had denied him due process. The plurality opinion of the Court rejected his ground for refusing to answer, noting that, if the committee's public hearings rendered the witness' state trial unfair, then he could properly raise that issue on review of his state conviction.[252]

Claims relating to the First Amendment have been frequently asserted and as frequently denied. It is not that the First Amendment is inapplicable to congressional investigations, it is that, under the prevailing Court interpretation, the First Amendment does not bar all legislative restrictions of the rights guaranteed by it.[253] "[T]he protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." [254]

Thus, the Court has declined to rule that under the circumstances of the cases investigating committees are precluded from making inquiries simply because the subject area was education [255] or because the witnesses at the time they were called were engaged in protected activities such as petitioning Congress to abol-

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[252] Justice Harlan wrote the opinion of the Court which Justices Clark and Stewart joined. Justice Brennan concurred solely because the witness had not claimed the privilege against self-incrimination but he would have voted to reverse the conviction had there been a claim. Chief Justice Warren and Justice Douglas dissented on due process grounds. Justices Black, Frankfurter, and White did not participate. At the time of the decision, the Self-incrimination Clause did not restrain the states through the Fourteenth Amendment, so that it was no violation of the clause for either the Federal Government or the states to compel testimony which would incriminate the witness in the other jurisdiction. *Cf.* United States v. Murdock, 284 U.S. 141 (1931); Knapp v. Schweitzer, 357 U.S. 371 (1958). The Court has since reversed itself, Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), thus leaving the vitality of *Hutcheson* doubtful.

[253] The matter is discussed fully in the section on the First Amendment but a good statement of the balancing rule may be found in Younger v. Harris, 401 U.S. 37, 51 (1971), by Justice Black, supposedly an absolutist on the subject: "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

[254] Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[255] Barenblatt v. United States, 360 U.S. 109 (1959).

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ish the inquiring committee.[256] However, in an earlier case, the Court intimated that it was taking a narrow view of the committee's authority because a determination that authority existed would raise a serious First Amendment issue.[257] And in a state legislative investigating committee case, the majority of the Court held that an inquiry seeking the membership lists of the National Association for the Advancement of Colored People was so lacking in a "nexus" between the organization and the Communist Party that the inquiry infringed the First Amendment.[258]

Dicta in the Court's opinions acknowledge that the Fourth Amendment guarantees against unreasonable searches and seizures are applicable to congressional committees.[259] The issue would most often arise in the context of subpoenas, inasmuch as that procedure is the usual way by which committees obtain documentary material and inasmuch as Fourth Amendment standards apply to subpoenas as well as to search warrants.[260] But there are no cases in which a holding turns on this issue.[261]

Other constitutional rights of witnesses have been asserted at various times, but without success or even substantial minority support.

Sanctions of the Investigatory Power: Contempt

Explicit judicial recognition of the right of either house of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from *McGrain v. Daugherty*.[262] But the principle there applied had its roots in an early case, *Anderson v. Dunn*,[263] which stated in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority.[264] The right to punish a

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[256] Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[257] United States v. Rumely, 345 U.S. 41 (1953).

[258] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). *See also* DeGregory v. Attorney General, 383 U.S. 825 (1966).

[259] Watkins v. United States, 354 U.S. 178, 188 (1957).

[260] *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and cases cited.

[261] *Cf.* McPhaul v. United States, 364 U.S. 372 (1960).

[262] 273 U.S. 135 (1927).

[263] 19 U.S. (6 Wheat.) 204 (1821).

[264] The contempt consisted of an alleged attempt to bribe a Member of the House for his assistance in passing a claims bill. The case was a civil suit brought by Anderson against the Sergeant at Arms of the House for assault and battery and false imprisonment. *Cf.* Kilbourn v. Thompson, 103 U.S. 168 (1881). The power of a legislative body to punish for contempt one who disrupts legislative business was reaffirmed in Groppi v. Leslie, 404 U.S. 496 (1972), but a unanimous Court there held that due process required a legislative body to give a contemnor notice and an op-

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contumacious witness was conceded in *Marshall v. Gordon*,[265] although the Court there held that the implied power to deal with contempt did not extend to the arrest of a person who published matter defamatory of the House.

The cases emphasize that the power to punish for contempt rests upon the right of self-preservation. That is, in the words of Chief Justice White, "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed" necessitates the contempt power.[266] Thus, in *Jurney v. MacCracken*,[267] the Court turned aside an argument that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena. The punishment would not be efficacious in obtaining the papers in this particular case, but the power to punish for a past contempt is an appropriate means of vindicating "the established and essential privilege of requiring the production of evidence."[268]

Under the rule laid down by *Anderson v. Dunn*,[269] imprisonment by one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it. Because of this limitation and because contempt trials before the bar of the House charging were time-consuming, in 1857 Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress.[270]

The Supreme Court has held that the purpose of this statute is merely supplementary of the power retained by Congress, and all constitutional objections to it were overruled. "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved."[271]

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portunity to be heard prior to conviction and sentencing. Although this case dealt with a state legislature, there is no question it would apply to Congress as well.

[265] 243 U.S. 521 (1917).

[266] 243 U.S. at 542.

[267] 294 U.S. 125 (1935).

[268] 294 U.S. at 150.

[269] 19 U.S. (6 Wheat.) 204 (1821).

[270] Act of January 24, 1857, 11 Stat. 155. With minor modification, this statute is now 2 U.S.C. § 192.

[271] *In re* Chapman, 166 U.S. 661, 671–672 (1897).

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Because Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the consequence, the Court has asserted numerous times, is that the duty has been conferred upon the federal courts to accord a person prosecuted for his statutory offense every safeguard that the law accords in all other federal criminal cases,[272] and the discussion in previous sections of many reversals of contempt convictions bears witness to the assertion in practice. What constitutional protections ordinarily necessitated by due process requirements, such as notice, right to counsel, confrontation, and the like, prevail in a contempt trial before the bar of one House or the other is an open question.[273]

It has long been settled that the courts may not intervene directly to restrain the carrying out of an investigation or the manner of an investigation, and that a witness who believes the inquiry to be illegal or otherwise invalid in order to raise the issue must place himself in contempt and raise his beliefs as affirmative defenses on his criminal prosecution. This understanding was sharply reinforced when the Court held that the speech-or-debate clause utterly foreclosed judicial interference with the conduct of a congressional investigation, through review of the propriety of subpoenas or otherwise.[274] It is only with regard to the trial of contempts that the courts may review the carrying out of congressional investigations and may impose constitutional and other constraints.

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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[272] Sinclair v. United States, 279 U.S. 263, 296–297 (1929); Watkins v. United States, 354 U.S. 178, 207 (1957); Sacher v. United States, 356 U.S. 576, 577 (1958); Flaxer v. United States, 358 U.S. 147, 151 (1958); Deutch v. United States, 367 U.S. 456, 471 (1961); 858 v. United States, 369 U.S. 749, 755 (1962). Protesting the Court's reversal of several contempt convictions over a period of years, Justice Clark was moved to suggest that "[t]his continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to 'its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected].'" Id. at 781; *Watkins*, 354 U.S. at 225.

[273] *Cf.* Groppi v. Leslie, 404 U.S. 496 (1972).

[274] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

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CONGRESSIONAL DISTRICTING

A major innovation in constitutional law in recent years has been the development of a requirement that election districts in each state be structured so that each elected representative represents substantially equal populations. Although this requirement has generally been gleaned from the Equal Protection Clause of the Fourteenth Amendment,[275] in *Wesberry v. Sanders*,[276] the Court held that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[277]

Court involvement in this issue developed slowly. In our early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting[278] and later added a provision for equally populated districts[279] the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws.[280] The first series of cases did not reach the Supreme Court, in fact, until the states began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[281] In the late 1940s and the early 1950s, the Court used the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position changed in *Baker v. Carr*.[282]

For the Court in *Wesberry*,[283] Justice Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in the election of Members of the House of Representatives.[284] Justice Harlan in dissent argued that the statements on which the majority relied had

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[275] Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment and districting); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (local governmental units).

[276] 376 U.S. 1 (1964). *See also* Martin v. Bush, 376 U.S. 222 (1964).

[277] 376 U.S. at 7–8.

[278] Act of June 25, 1842, 5 Stat. 491.

[279] Act of February 2, 1872, 17 Stat. 28.

[280] The House uniformly refused to grant any such relief. 1 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 310 (1907). *See* L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 135–138 (1941).

[281] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932); Mahan v. Hume, 287 U.S. 575 (1932).

[282] 369 U.S. 186 (1962).

[283] Wesberry v. Sanders, 376 U.S. 1 (1964).

[284] 376 U.S. at 7–18.

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uniformly been in the context of the Great Compromise—Senate representation of the states with Members elected by the state legislatures, House representation according to the population of the states, qualified by the guarantee of at least one Member per state and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally populated districts.[285]

The most important issue, of course, was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of *de minimis* rule with a requirement that the State present a principled justification for the deviations from equality which any districting plan presented.[286] But in *Kirkpatrick v. Preisler*,[287] a sharply divided Court announced the rule that a state must make a "good-faith effort to achieve precise mathematical equality."[288] Therefore, "[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the state must justify each variance, no matter how small."[289] The strictness of the test was revealed not only by the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the state had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests,[290] (2) the requirements of legislative compromise,[291] (3) a desire to maintain the integrity of political subdivision lines,[292] (4) the exclusion from total population figures of certain military personnel and students not residents of the areas in which they were found,[293] (5) an attempt to compensate for population shifts

[285] 376 U.S. at 20–49.

[286] Kirkpatrick v. Preisler, 385 U.S. 450 (1967), and Duddleston v. Grills, 385 U.S. 455 (1967), relying on the rule set out in Swann v. Adams, 385 U.S. 440 (1967), a state legislative case.

[287] 394 U.S. 526 (1969). *See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

[288] Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

[289] 394 U.S. at 531.

[290] 394 U.S. at 533. People vote as individuals, Justice Brennan said for the Court, and it is the equality of individual voters that is protected.

[291] Id. Political "practicality" may not interfere with a rule of "practicable" equality.

[292] 394 U.S. at 533–34. The argument is not "legally acceptable."

[293] 394 U.S. at 534–35. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

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since the last census,[294] or (6) an effort to achieve geographical compactness.[295]

Illustrating the strictness of the standard, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[296] Adhering to the principle of strict population equality in a subsequent case, the Court refused to find a plan valid simply because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population between the most and least populous districts being 3,674 people, in a state in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has."[297]

Attacks on partisan gerrymandering have proceeded under equal-protection analysis, and, although the Court has held claims of denial of effective representation to be justiciable, the standards are so high that neither voters nor minority parties have yet benefitted from the development.[298]

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[294] 394 U.S. at 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

[295] 394 U.S. at 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

[296] White v. Weiser, 412 U.S. 783 (1973). The Court did set aside the district court's own plan for districting, instructing that court to adhere more closely to the legislature's own plan insofar as it reflected permissible goals of the legislators, reflecting an ongoing deference to legislatures in this area to the extent possible.

[297] Karcher v. Daggett, 462 U.S. 725, 733 (1983). Illustrating the point about computer-generated plans containing absolute population equality is Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court), in which the court adopted a congressional-districting plan in which 18 of the 20 districts had 571,530 people each and each of the other two had 571,531 people.

[298] The principal case was Davis v. Bandemer, 478 U.S. 109 (1986), a legislative apportionment case, but congressional districting is also covered. *See* Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court) (adjudicating partisan gerrymandering claim as to congressional districts but deciding against plaintiffs on merits), *aff'd*, 488 U.S. 1024 (1988); Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court) (same), *aff'd*, 506 U.S. 801 (1992); Vieth v. Jubelirer, 541 U.S. 267 (2004) (same); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) (same). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

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ELECTOR QUALIFICATIONS

It was the original constitutional scheme to vest the determination of qualifications for electors in congressional elections [299] solely in the discretion of the states, save only for the express requirement that the states could prescribe no qualifications other than those provided for voters for the more numerous branch of the legislature.[300] This language has never been expressly changed, but the discretion of the states—and not only with regard to the qualifications of congressional electors—has long been circumscribed by express constitutional limitations [301] and by judicial decisions.[302] Further, beyond the limitation of discretion on the part of the states, Congress has assumed the power, with judicial acquiescence, to legislate to provide qualifications at least with regard to some elections.[303] Thus, in the Voting Rights Act of 1965 [304] Congress legislated changes of a limited nature in the literacy laws of some of the States,[305] and in the Voting Rights Act Amendments of 1970 [306] Congress successfully lowered the minimum voting age in federal elections [307] and prescribed residency qualifications for presidential elections,[308] the Court striking down an attempt to lower the minimum voting age for all elections.[309] These developments greatly limited the discretion granted in Article I, § 2, cl. 1, and are more fully dealt with in the treatment of § 5 of the Fourteenth Amendment.

Notwithstanding the vesting of discretion to prescribe voting qualifications in the states, conceptually the right to vote for United States

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[299] The clause refers only to elections to the House of Representatives, of course, and, inasmuch as Senators were originally chosen by state legislatures and presidential electors as the States would provide, it was only with the qualifications for these voters with which the Constitution was originally concerned.

[300] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1875); Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *See* 2 J. Story, Commentaries on the Constitution of the United States 576–585 (1833).

[301] The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments limited the States in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

[302] The Supreme Court's interpretation of the equal protection clause has excluded certain qualifications. *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.

[303] The power has been held to exist under § 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).

[304] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

[305] Upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966).

[306] Titles 2 and 3, 84 Stat. 314, 42 U.S.C. § 1973bb.

[307] Oregon v. Mitchell, 400 U.S. 112, 119–131, 135–144, 239–281 (1970).

[308] Oregon v. Mitchell, 400 U.S. 112, 134, 147–150, 236–239, 285–292 (1970).

[309] Oregon v. Mitchell, 400 U.S. 112, 119–131, 152–213, 293–296 (1970).

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Representatives is derived from the Federal Constitution,[310] and Congress has had the power under Article I, § 4, to legislate to protect that right against both official[311] and private denial.[312]

Clause 2. No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

QUALIFICATIONS OF MEMBERS OF CONGRESS

When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. Although the language of the clause expressly makes residency in the state a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn.[313] Thus, persons elected to either the House of Representatives or the Senate before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[314]

Exclusivity of Constitutional Qualifications

Congressional Additions.—Writing in *The Federalist* with reference to the election of Members of Congress, Hamilton firmly stated that "[t]he qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by

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[310] "The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884). *See also* Wiley v. Sinkler, 179 U.S. 58, 62 (1900); Swafford v. Templeton, 185 U.S. 487, 492 (1902); United States v. Classic, 313 U.S. 299, 315, 321 (1941).

[311] United States v. Mosley, 238 U.S. 383 (1915).

[312] United States v. Classic, 313 U.S. 299, 315 (1941).

[313] *See* S. Rep. No. 904, 74th Congress, 1st sess. (1935), reprinted in 79 Cong. Rec. 9651–9653 (1935).

[314] 1 Hinds' Precedents of the House of Representatives § 418 (1907); 79 Cong. Rec. 9841–9842 (1935); *cf.* Hinds' Precedents, *supra* § 429.

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the legislature."[315] Until the Civil War, the issue was not raised, the only actions taken by either House conforming to the idea that the qualifications for membership could not be enlarged by statute or practice.[316] But in the passions aroused by the fratricidal conflict, Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government.[317] Several persons were refused seats by both Houses because of charges of disloyalty,[318] and thereafter House practice, and Senate practice as well, was erratic.[319] But in *Powell v. McCormack*,[320] it was conclusively established that the qualifications listed in clause 2 are exclusive[321] and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.[322]

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency.[323] The Court determination that he had been wrongfully excluded proceeded in the main from the Court's

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[315] No. 60 (J. Cooke ed. 1961), 409. *See also* 2 J. Story, Commentaries on the Constitution of the United States §§ 623–627 (1833) (relating to the power of the States to add qualifications).

[316] All the instances appear to be, however, cases in which the contest arose out of a claimed additional state qualification.

[317] Act of July 2, 1862, 12 Stat. 502. Note also the disqualification written into § 3 of the Fourteenth Amendment.

[318] 1 Hinds' Precedents of the House of Representatives §§ 451, 449, 457 (1907).

[319] In 1870, the House excluded a Member-elect who had been re-elected after resigning earlier in the same Congress when expulsion proceedings were instituted against him for selling appointments to the Military Academy. Id. at § 464. A Member-elect was excluded in 1899 because of his practice of polygamy, id. at 474–80, but the Senate refused, after adopting a rule requiring a two-thirds vote, to exclude a Member-elect on those grounds. Id. at §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 Cannon's Precedents of the House of Representatives §§ 56–58 (1935). *See also* S. Rep. No. 1010, 77th Congress, 2d sess. (1942), and R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960*, S. Doc. No. 71, 87th Congress, 2d sess. (1962), 140 (dealing with the effort to exclude Senator Langer of North Dakota).

[320] 395 U.S. 486 (1969). The Court divided eight to one, Justice Stewart dissenting on the ground that the case was moot. *Powell's* continuing validity was affirmed in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), both by the Court in its holding that the qualifications set out in the Constitution are exclusive and may not be added to by either Congress or the states, id. at 787–98, and by the dissenters, who would hold that Congress, for different reasons could not add to qualifications, although the states could. Id. at 875–76.

[321] The Court declined to reach the question whether the Constitution in fact does impose other qualifications. 395 U.S. at 520 n.41 (possibly Article I, § 3, cl. 7, disqualifying persons impeached, Article I, § 6, cl. 2, incompatible offices, and § 3 of the Fourteenth Amendment). It is also possible that the oath provision of Article VI, cl. 3, could be considered a qualification. *See* Bond v. Floyd, 385 U.S. 116, 129–131 (1966).

[322] 395 U.S. at 550.

[323] H. Rep. No. 27, 90th Congress, 1st sess. (1967); 395 U.S. at 489–493.

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analysis of historical developments, the Convention debates, and textual considerations. This process led the Court to conclude that Congress's power under Article I, § 5 to judge the qualifications of its Members was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution.[324] The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualification,[325] because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation,[326] and because both Hamilton and Madison in the *Federalist Papers* and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.[327]

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear, and later practice was mixed.[328] Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 *Elliot's Debates* 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress's own post-Civil War exclusion cases, against 'vesting an improper and dangerous power in the Legislature.' 2 Farrand 249."[329] Thus, the Court appears to say, to allow the House to exclude Powell on this basis of qualifications of its own choosing would impinge

[324] Powell v. McCormack, 395 U.S. 486, 518–47 (1969).
[325] 395 U.S. at 522–31.
[326] 395 U.S. at 532–39.
[327] 395 U.S. at 539–41.
[328] 395 U.S. at 541–47.
[329] 395 U.S. at 547–48.

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on the interests of his constituents in effective participation in the electoral process, an interest which could be protected by a narrow interpretation of Congressional power.[330]

The result in *Powell* had been foreshadowed when the Court held that the exclusion of a Member-elect by a state legislature because of objections he had uttered to certain national policies constituted a violation of the First Amendment and was void.[331] In the course of that decision, the Court denied state legislators the power to look behind the willingness of any legislator to take the oath to support the Constitution of the United States, prescribed by Article VI, cl. 3, to test his sincerity in taking it.[332] The unanimous Court noted the views of Madison and Hamilton on the exclusivity of the qualifications set out in the Constitution and alluded to Madison's view that the unfettered discretion of the legislative branch to exclude members could be abused in behalf of political, religious or other orthodoxies.[333] The First Amendment holding and the holding with regard to testing the sincerity with which the oath of office is taken is no doubt as applicable to the United States Congress as to state legislatures.

State Additions.—However much Congress may have deviated from the principle that the qualifications listed in the Constitution are exclusive when the issue has been congressional enlargement of those qualifications, it has been uniform in rejecting efforts by the states to enlarge the qualifications. Thus, the House in 1807 seated a Member-elect who was challenged as not being in compliance with a state law imposing a twelve-month residency requirement in the district, rather than the federal requirement of being an inhabitant of the state at the time of election; the state requirement, the House resolved, was unconstitutional.[334] Similarly, both the House and Senate have seated other Members-elect who did not meet additional state qualifications or who suffered particular state disqualifications on eligibility, such as running for Congress while holding particular state offices.

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[330] The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, *Ex parte* Yarbrough, 110 U.S. 651 (1884), and in primary elections, United States v. Classic, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of unequally populated districts, Wesberry v. Sanders, 376 U.S. 1 (1964), and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot. Williams v. Rhodes, 393 U.S. 23 (1968).

[331] Bond v. Floyd, 385 U.S. 116 (1966).

[332] 385 U.S. at 129–31, 132, 135.

[333] 385 U.S. at 135 n.13.

[334] 1 Hinds' Precedents of the House of Representatives § 414 (1907).

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The Supreme Court reached the same conclusion as to state power, albeit by a surprisingly close 5–4 vote, in *U.S. Term Limits, Inc. v. Thornton*.[335] Arkansas, along with twenty-two other states, all but two by citizen initiatives, had limited the number of terms that Members of Congress may serve. In striking down the Arkansas term limits, the Court determined that the Constitution's qualifications clauses[336] establish exclusive qualifications for Members that may not be added to either by Congress or the states.[337] Six years later, the Court relied on *Thornton* to invalidate a Missouri law requiring that labels be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[338]

Both majority and dissenting opinions in *Thornton* were richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the states in the nation's early years,[339] and these differences over text, creation, and practice derived from disagreement about the fundamental principle underlying the Constitution's adoption.

In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate states to create the National Government. The conclusion to be drawn from this was that the peoples in the states agreed to surrender only those powers expressly forbidden them and those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retain them. Thus, "[w]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."[340] The Constitution's silence as to authority to impose additional qualifications meant that this power resides in the states.

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[335] 514 U.S. 779 (1995). The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia. Id. at 845.

[336] Article I, § 2, cl. 2, provides that a person may qualify as a Representative if she is at least 25 years old, has been a United States citizen for at least 7 years, and is an inhabitant, at the time of the election, of the state in which she is chosen. The qualifications established for Senators, Article I, § 3, cl. 3, are an age of 30 years, nine years' citizenship, and being an inhabitant of the state at the time of election.

[337] The four-Justice dissent argued that while Congress has no power to increase qualifications, the States do. 514 U.S. at 845.

[338] Cook v. Gralike, 531 U.S. 510 (2001).

[339] *See* Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78 (1995).

[340] 514 U.S. at 848 (Justice Thomas dissenting). *See generally* id. at 846–65.

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The majority's views were radically different. After the adoption of the Constitution, the states had two kinds of powers: reserved powers that they had before the founding and that were not surrendered to the Federal Government, and those powers delegated to them by the Constitution. It followed that the states could have no reserved powers with respect to the Federal Government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[341] The states could not before the founding have possessed powers to legislate respecting the Federal Government, and, because the Constitution did not delegate to the states the power to prescribe qualifications for Members of Congress, the states did not have any such power.[342]

Evidently, the opinions in this case reflect more than a decision on this particular dispute. They rather represent conflicting philosophies within the Court respecting the scope of national power in relation to the states, an issue at the core of many controversies today.

Clause 3. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons].[343] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they

[341] 514 U.S. at 802.

[342] 514 U.S. at 798–805. *See also* id. at 838–45 (Justice Kennedy concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, no authority to regulate these offices could have preceded the Constitution and been reserved to the states, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections. See discussion under Legislation Protecting Electoral Process, *infra*.

[343] The part of this clause relating to the mode of apportionment of representatives among the several States was changed by the Fourteenth Amendment, § 2 and as to taxes on incomes without apportionment, by the Sixteenth Amendment.

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shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut, five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

APPORTIONMENT OF SEATS IN THE HOUSE

The Census Requirement

The Census Clause "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the states, would determine the manner of conducting the census."[344] These determinations "all suggest a strong constitutional interest in accuracy."[345]

The language employed—"actual enumeration"—requires an actual count, but gives Congress wide discretion in determining the methodology of that count. The word "enumeration" refers to a counting process without describing the count's methodological details. The word "actual" merely refers to the enumeration to be used for apportioning the Third Congress, and thereby distinguishes "a deliberately taken count" from the conjectural approach that had been used for the First Congress. Finally, the conferral of authority on Congress to "direct" the "manner" of enumeration underscores "the breadth of congressional methodological authority." Thus, the Court held in *Utah v. Evans*, "hot deck imputation," a method used to fill in missing data by imputing to an address the number of persons found at a nearby address or unit of the same type, does not run afoul of the "actual enumeration" requirement.[346] The Court distinguished imputation from statistical sampling, and indicated that its holding was relatively narrow. Imputation was permissible "where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where

[344] Utah v. Evans, 536 U.S. 452, 476 (2002).
[345] Id.
[346] Utah v. Evans, 536 U.S. 452 (2002).

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that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely."[347]

Although the Census Clause expressly provides for an enumeration of persons, Congress has expanded the scope of the census by including not only the free persons in the states, but also those in the territories, and by requiring all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court,[348] and is one of the methods whereby the national legislature exercises its inherent power to obtain the information necessary for intelligent legislative action.

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the states after the census is taken.[349] It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the act of June 18, 1929,[350] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called "method of major fractions," which had been earlier employed in the apportionment of 1911, and which has now been replaced with the "method of equal proportions." Following the 1990 census, a state that had lost a House seat as a result of the use of this formula sued, alleging a violation of the "one person, one vote" rule derived from Article I, § 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportion-

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[347] *See also* Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute; and Franklin v. Massachusetts, 505 U.S. 788 (1992), upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the states of last residence. The mandate of an enumeration of "their respective numbers" was complied with, it having been the practice since the first enumeration to allocate persons to the place of their "usual residence," and to construe both this term and the word "inhabitant" broadly to include people temporarily absent.

[348] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457, 536 (1971) ("Who questions the power to do this?").

[349] For an extensive history of the subject, *see* L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT (1941).

[350] 46 Stat. 26, 22, as amended by 55 Stat. 761 (1941), 2 U.S.C. § 2a.

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ment.[351] The goal of absolute population equality among districts "is realistic and appropriate" within a single state, but the constitutional guarantee of one Representative for each state constrains application to districts in different states, and makes the goal "illusory for the Nation as a whole."[352]

Although requiring the election of Representatives by districts, Congress has left it to the states to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*,[353] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several states produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[354]

Clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

IN GENERAL

The Supreme Court has not interpreted this clause.

Clause 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

IN GENERAL

See analysis of Impeachment under Article II, section 4.

SECTION 3. Clause 1. [The Senate of the United States shall be composed of two Senators from each State, chosen by the leg-

[351] U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).

[352] 503 U.S. at 463 ("[T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50").

[353] 241 U.S. 565 (1916).

[354] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

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islature thereof, for six Years; and each Senator shall have one vote].[355]

Clause 2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year,[356] [and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].[357]

IN GENERAL

Clause 1 has been completely superseded by the Seventeenth Amendment, and Clause 2 has been partially superseded.

Clause 3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Clause 4. The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

Clause 5. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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[355] *See* Seventeenth Amendment.
[356] *See* Seventeenth Amendment.
[357] *See* Seventeenth Amendment.

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IN GENERAL

The Supreme Court has not interpreted these clauses.

Clause 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

IN GENERAL

See analysis of impeachment under Article II, sec. 4.

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

REGULATION BY CONGRESS

By its terms, Art. I, § 4, cl. 1 empowers both Congress and state legislatures to regulate the "times, places and manner of holding elections for Senators and Representatives." Not until 1842, when it passed a law requiring the election of Representatives by districts,[358] did Congress undertake to exercise this power. In subsequent years, Congress expanded on the requirements, successively adding contiguity, compactness, and substantial equality of popula-

[358] 5 Stat. 491 (1842). The requirement was omitted in 1850, 9 Stat. 428, but was adopted again in 1862. 12 Stat. 572.

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tion to the districting requirements.[359] However, no challenge to the seating of Members-elect selected in violation of these requirements was ever successful,[360] and Congress deleted the standards from the 1929 apportionment act.[361]

In 1866, Congress was more successful in legislating to remedy a situation under which deadlocks in state legislatures over the election of Senators were creating vacancies in the office. The act required the two houses of each legislature to meet in joint session on a specified day and to meet every day thereafter until a Senator was selected.[362]

The first comprehensive federal statute dealing with elections was adopted in 1870 as a means of enforcing the Fifteenth Amendment's guarantee against racial discrimination in granting suffrage rights.[363] Under the Enforcement Act of 1870, and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law were made federal offenses.[364] Provi-

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[359] The 1872 Act, 17 Stat. 28, provided that districts should contain "as nearly as practicable" equal numbers of inhabitants, a provision thereafter retained. In 1901, 31 Stat. 733, a requirement that districts be composed of "compact territory" was added. These provisions were repeated in the next Act, 37 Stat. 13 (1911), there was no apportionment following the 1920 Census, and the permanent 1929 Act omitted the requirements. 46 Stat. 13. *Cf.* Wood v. Broom, 287 U.S. 1 (1932).

[360] The first challenge was made in 1843. The committee appointed to inquire into the matter divided, the majority resolving that Congress had no power to bind the States in regard to their manner of districting, the minority contending to the contrary. H. Rep. No. 60, 28th Congress, 1st sess. (1843). The basis of the majority view was that while Article I, § 4 might give Congress the power to create the districts itself, the clause did not authorize Congress to tell the state legislatures how to do it if the legislatures were left the task of drawing the lines. L. Schmeckebier, Congressional Apportionment 135–138 (1941). This argument would not appear to be maintainable in light of the language in *Ex parte* Siebold, 100 U.S. 371, 383–86 (1880).

[361] 46 Stat. 13 (1929). In 1967, Congress restored the single-member district requirement. 81 Stat. 581, 2 U.S.C. § 2c.

[362] 14 Stat. 243 (1866). Still another such regulation was the congressional specification of a common day for the election of Representatives in all the states. 17 Stat. 28 (1872), 2 U.S.C. § 7.

[363] Article I, § 4, and the Fifteenth Amendment have had quite different applications. The Court insisted that under the latter, while Congress could legislate to protect the suffrage in all elections, it could do so only against state interference based on race, color, or previous condition of servitude, James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876), whereas under the former it could also legislate against private interference for whatever motive, but only in federal elections. *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[364] The Enforcement Act of May 31, 1870, 16 Stat. 140; The Force Act of February 28, 1871, 16 Stat. 433; The Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The text of these and other laws and the history of the enactments and subsequent developments are set out in R. Carr, Federal Protection of Civil Rights: Quest for a Sword (1947).

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sion was made for the appointment by federal judges of persons to attend at places of registration and at elections with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election talley sheets.[365] When the Democratic Party regained control of Congress, these pieces of Reconstruction legislation dealing specifically with elections were repealed,[366] but other statutes prohibiting interference with civil rights generally were retained and these were used in later years. More recently, Congress has enacted, in 1957, 1960, 1964, 1965, 1968, 1970, 1975, 1980, and 1982, legislation to protect the right to vote in all elections, federal, state, and local, through the assignment of federal registrars and poll watchers, suspension of literacy and other tests, and the broad proscription of intimidation and reprisal, whether with or without state action.[367]

Another chapter was begun in 1907 when Congress passed the Tillman Act, prohibiting national banks and corporations from making contributions in federal elections.[368] The Corrupt Practices Act, first enacted in 1910 and replaced by another law in 1925, extended federal regulation of campaign contributions and expenditures in federal elections,[369] and other acts have similarly provided other regulations.[370]

As noted above, although § 2, cl. 1, of this Article vests in the states the responsibility, now limited, to establish voter qualifications for congressional elections, the Court has held that the right to vote for Members of Congress is derived from the Federal Con-

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[365] The constitutionality of sections pertaining to federal elections was sustained in *Ex parte* Siebold, 100 U.S. 371 (1880), and *Ex parte* Yarbrough, 110 U.S. 651 (1884). The legislation pertaining to all elections was struck down as going beyond Congress's power to enforce the Fifteenth Amendment. United States v. Reese, 92 U.S. 214 (1876).

[366] 28 Stat. 144 (1894).

[367] Pub. L. 85–315, Part IV, § 131, 71 Stat. 634, 637 (1957); Pub. L. 86–449, Title III, § 301, Title VI, 601, 74 Stat. 86, 88, 90 (1960); Pub. L. 88–352, Title I, § 101, 78 Stat. 241 (1964); Pub. L. 89–110, 79 Stat. 437 (1965); Pub. L. 90–284, Title I, § 101, 82 Stat. 73 (1968); Pub. L. 91–285, 84 Stat. 314 (1970); Pub. L. 94–73, 89 Stat. 400 (1975); Pub. L. 97–205, 96 Stat. 131 (1982). Most of these statutes are codified in 42 U.S.C. §§ 1971 *et seq*. The penal statutes are in 18 U.S.C. §§ 241–245.

[368] Act of January 26, 1907, 34 Stat. 864, repealed by Pub. L. 94–283, Title II, § 201(a), 90 Stat. 496 (1976). Current law on the subject is codified at 2 U.S.C. § 441b.

[369] Act of February 28, 1925, 43 Stat. 1070, 2 U.S.C. §§ 241–256. Comprehensive regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[370] *E.g.*, the Hatch Act, relating principally to federal employees and state and local governmental employees engaged in programs at least partially financed with federal funds, 5 U.S.C. §§ 7324–7327.

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stitution,[371] and that Congress therefore may legislate under this section of the Article to protect the integrity of this right. Congress may protect the right of suffrage against both official and private abridgment.[372] Where a primary election is an integral part of the procedure of choice, the right to vote in that primary election is subject to congressional protection.[373] The right embraces, of course, the opportunity to cast a ballot and to have it counted honestly.[374] Freedom from personal violence and intimidation may be secured.[375] The integrity of the process may be safeguarded against a failure to count ballots lawfully cast[376] or the dilution of their value by the stuffing of the ballot box with fraudulent ballots.[377] But the bribery of voters, although within reach of congressional power under other clauses of the Constitution, has been held not to be an interference with the rights guaranteed by this section to other qualified voters.[378]

To accomplish the ends under this clause, Congress may adopt the statutes of the states and enforce them by its own sanctions.[379] It may punish a state election officer for violating his duty under a state law governing congressional elections.[380] It may, in short, use its power under this clause, combined with the Necessary and Proper Clause, to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process; it may not, however, under this clause, provide different qualifications for electors than those provided by the states.[381]

REGULATION BY THE STATE LEGISLATURE

By its terms, Article I, Section 4, Clause 1, also contemplates the times, places, and manner of holding elections being "pre-

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[371] United States v. Classic, 313 U.S. 299, 314–15 (1941), and cases cited.

[372] 313 U.S. at 315; Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976).

[373] United States v. Classic, 313 U.S. 299, 315–321 (1941). The authority of Newberry v. United States, 256 U.S. 232 (1921), to the contrary has been vitiated. *Cf.* United States v. Wurzbach, 280 U.S. 396 (1930).

[374] United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385, 387 (1944).

[375] *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[376] United States v. Mosley, 238 U.S. 383 (1915).

[377] United States v. Saylor, 322 U.S. 385 (1944).

[378] United States v. Bathgate, 246 U.S. 220 (1918); United States v. Gradwell, 243 U.S. 476 (1917).

[379] *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Clarke, 100 U.S. 399 (1880); United States v. Gale, 109 U.S. 65 (1883); *In re* Coy, 127 U.S. 731 (1888).

[380] *Ex parte* Siebold, 100 U.S. 371 (1880).

[381] In Oregon v. Mitchell, 400 U.S. 112 (1970), however, Justice Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. Id. at 119–35. Four Justices specifically rejected this construction, id. at 209–12, 288–92, and the other four implicitly rejected it by relying on totally different sections of the Constitution in coming to the same conclusions as did Justice Black.

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scribed in each State by the Legislature thereof," subject to alteration by Congress (except as to the place of choosing Senators). However, the Court did not have occasion to address what constitutes regulation by a state "Legislature" for purposes of the Elections Clause until its 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[382] There, the Court rejected the Arizona legislature's challenge to the validity of the Arizona Independent Redistricting Commission (AIRC) and AIRC's 2012 map of congressional districts.[383] The Commission had been established by a 2000 ballot initiative, which removed redistricting authority from the legislature and vested it in the AIRC.[384] The legislature asserted that this arrangement violated the Elections Clause because the Clause contemplates regulation by a state "Legislature" and "Legislature" means the state's representative assembly.[385]

The Court disagreed and held that Arizona's use of an independent commission to establish congressional districts is permissible because the Elections Clause uses the word "Legislature" to describe "the power that makes laws," a term that is broad enough to encompass the power provided by the Arizona constitution for the people to make laws through ballot initiatives.[386] In so finding, the Court noted that the word "Legislature" has been construed in various ways depending upon the constitutional provision in which it is used, and its meaning depends upon the function that the entity denominated as the "Legislature" is called upon to exercise in a specific context.[387] Here, in the context of the Elections Clause, the Court found that the function of the "Legislature" was lawmaking and that this function could be performed by the people of Arizona via an initiative consistent with state law.[388] The Court also pointed to dictionary definitions from the time of the Framers;[389] the Framers' intent in adopting the Elections Clause;[390] the "harmony" between the initiative process and the Constitution's "conception of the people

[382] 576 U.S. ___, No. 13–1314, slip op. (2015).

[383] *Id.* at 2–3.

[384] *Id.*

[385] *Id.* at 2.

[386] *Id.* at 18. The Court also found that the use of the commission was permissible under 2 U.S.C. § 2a(c), a statutory provision that the Court construed as safeguarding to "each state full authority to employ in the creation of congressional districts its own laws and regulations." *Id.* at 19.

[387] *Id.* at 18.

[388] *Id.*

[389] *Id.* at 24 (noting that "dictionaries, even those in circulation during the founding era, capaciously define the word 'legislature'" to include as "[t]he power that makes laws" and "the Authority of making laws").

[390] *Id.* at 25 ("The dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation. . . . [T]he Clause 'was the Framers' insurance against the possibility that

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as the font of governmental power;"[391] and the practical consequences of invalidating the Arizona initiative.[392]

State authority to regulate the times, places, and manner of holding congressional elections has been described by the Court as "embrac[ing] authority to provide a complete code for congressional elections . . . ; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental rights involved."[393] The Court has upheld a variety of state laws designed to ensure that elections—including federal elections—are fair and honest and orderly.[394] But the Court distinguished state laws that go beyond "protection of the integrity and regularity of the election process," and instead operate to disadvantage a particular class of candidates.[395] Term limits, viewed as serving the dual purposes of "disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause," crossed this line,[396] as did ballot labels identifying candidates who disregarded voters' instructions on term limits or declined to pledge support for them.[397] "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[398]

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a State would refuse to provide for the election of representatives to the Federal Congress.'").

[391] *Id.* at 30 ("The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.").

[392] *Id.* at 31, 33 (noting that it would be "perverse" to interpret the term "Legislature" to exclude the initiative, because the initiative is intended to check legislators' ability to determine the boundaries of the districts in which they run, and that a contrary ruling would invalidate a number of other state provisions regarding initiatives and referendums).

[393] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[394] *See*, *e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (restrictions on independent candidacies requiring early commitment prior to party primaries); Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (recount for Senatorial election); and Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (requirement that minor party candidate demonstrate substantial support—1% of votes cast in the primary election—before being placed on ballot for general election).

[395] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995).

[396] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[397] Cook v. Gralike, 531 U.S. 510 (2001).

[398] *Thornton*, 514 U.S. at 833–34.

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Clause 2. [The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by law appoint a different Day].[399]

IN GENERAL

This Clause was superseded by the Twentieth Amendment.

SECTION 5. Clause 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Clause 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Clause 3. Each House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Clause 4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

POWERS AND DUTIES OF THE HOUSES

Power To Judge Elections

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of wit-

[399] See Twentieth Amendment.

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nesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[400] It may punish perjury committed in testifying before a notary public upon a contested election.[401] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[402] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[403] Nor does such refusal unlawfully deprive the state that elected such person of its equal suffrage in the Senate.[404]

"A Quorum To Do Business"

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum.[405] The Supreme Court upheld this rule in *United States v. Ballin*,[406] saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact."[407] The rules of the Senate provide for the ascertainment of a quorum only by a roll call,[408] but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.[409]

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[400] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 616 (1929).

[401] *In re* Loney, 134 U.S. 372 (1890).

[402] 6 Cannon's Precedents of the House of Representatives §§ 72–74, 180 (1936). *Cf.* Newberry v. United States, 256 U.S. 232, 258 (1921).

[403] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

[404] 279 U.S. at 615. The existence of this power in both houses of Congress does not prevent a state from conducting a recount of ballots cast in such an election any more than it prevents the initial counting by a state. Roudebush v. Hartke, 405 U.S. 15 (1972).

[405] Hinds' Precedents of the House of Representatives §§ 2895–2905 (1907).

[406] 144 U.S. 1 (1892).

[407] 144 U.S. at 5–6.

[408] Rule V.

[409] 4 Hinds' Precedents of the House of Representatives §§ 2910–2915 (1907); 6 Cannon's Precedents of the House of Representatives §§ 645, 646 (1936).

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Rules of Proceedings

In the exercise of their constitutional power to determine their rules of proceedings, the Houses of Congress may not "ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house. . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[410] If a rule affects private rights, its construction becomes a judicial question. In *United States v. Smith*,[411] the Court held that the Senate's reconsideration of a presidential nominee for chairman of the Federal Power Commission, after it had confirmed him and he had taken the oath of office, was not warranted by its rules and did not deprive the appointee of his title to the office. In *Christoffel v. United States*,[412] a sharply divided Court upset a conviction for perjury in a federal district court of a witness who had denied under oath before a House committee any affiliation with Communist programs. The reversal was on the ground that, because a quorum of the committee, although present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a "competent tribunal" within the sense of the District of Columbia Code.[413] Four Justices, in an opinion by Justice Jackson, dissented, arguing that, under the rules and practices of the House, "a quorum once established is presumed to continue unless and until a point of no quorum is raised" and that the Court was, in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered."[414]

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ."[415] The

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[410] United States v. Ballin, 144 U.S. 1, 5 (1892). The Senate is "a continuing body." McGrain v. Daugherty, 273 U.S. 135, 181–82 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress.

[411] 286 U.S. 6 (1932).

[412] 338 U.S. 84 (1949).

[413] 338 U.S. at 87–90.

[414] 338 U.S. at 92–95.

[415] Art. II, § 2, cl. 2.

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Constitution provides that "Each House may determine the Rules of its Proceedings,"[416] and the Senate has enacted a cloture rule[417] requiring a supermajority vote (60 votes) to close debate on any matter pending before the Senate. Absent the invocation of cloture or some other means of ending debate, matters can remain before the Senate indefinitely. The practice of preventing closure is known as a filibuster. Although no provision of the Constitution expressly requires that the Senate or House act by majority vote in enacting legislation or in exercising their other constitutional powers, the framers of the Constitution were committed to a majority rule as a general principle.[418] These facts have given rise to disagreement as to the constitutionality of the filibuster as applied to judicial nominees—disagreement over whether the "Advice and Consent" of the Senate means the majority of the Senate and not a super-majority. The constitutionality of the filibuster has been challenged in court several times, but those cases have never reached the merits of the issue.[419] More recently, the Senate interpreted its rules to require only a simple majority to invoke cloture on most nominations.[420]

Powers of the Houses Over Members

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members.[421] In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that "the right to expel extends to all cases where the offence is such as in the judgment of the Senate is incon-

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[416] Art. I, § 5, cl. 2.

[417] Rule XXII, par. 2.

[418] *See*, *e.g.*, Federalist No. 58, p. 397 (Cooke ed.; Wesleyan Univ. Press: 1961) (Madison, responding to objections that the Constitution should have required "more than a majority . . . for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision," asserted that such requirements would be inconsistent with majority rule, which is "the fundamental principle of free government"); id., No. 22, p. 138–39 (Hamilton observed that "equal suffrage among the States under the Articles of Confederation contradicts that fundamental maxim of republican government which requires that the sense of the majority should prevail").

[419] *See, e.g.*, Common Cause v. Biden, 748 F.3d 1280 (D.C. Cir. 2014); Judicial Watch, Inc. v. United States Senate, 432 F.3d 359 (D.C. Cir. 2005); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998). The constitutionality of the filibuster has been a subject of debate for legal scholars. *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, *Debate, Is the Filibuster Constitutional?*, 158 U. Pa L. Rev. PENNumbra 245 (2010).

[420] 159 Cong. Rec. S8416–S8418 (daily ed. Nov. 21, 2013).

[421] Burton v. United States, 202 U.S. 344 (1906).

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sistent with the trust and duty of a Member."[422] It cited with apparent approval the action of the Senate in expelling William Blount in 1797 for attempting to seduce from his duty an American agent among the Indians and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a "statutable offense" and which was not committed in his official character, nor during the session of Congress nor at the seat of government.[423]

In *Powell v. McCormack*,[424] a suit challenging the exclusion of a Member-elect from the House of Representatives, it was argued that, because the vote to exclude was actually in excess of two-thirds of the Members, it should be treated simply as an expulsion. The Court rejected the argument, noting that House precedents were to the effect that the House had no power to expel for misconduct occurring prior to the Congress in which the expulsion is proposed, as was the case of Mr. Powell's alleged misconduct. The Court based its rejection on its inability to conclude that, if the Members of the House had been voting to expel, they would still have cast an affirmative vote in excess of two-thirds.[425]

Duty To Keep a Journal

The object of the clause requiring the keeping of a Journal is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[426] When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[427] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act

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[422] *In re* Chapman, 166 U.S. 661 (1897).

[423] 166 U.S. at 669–70. *See* 2 J. Story, Commentaries on the Constitution of the United States § 836 (1833).

[424] 395 U.S. 486 (1969).

[425] 395 U.S. at 506–12.

[426] 2 J. Story, Commentaries on the Constitution of the United States § 840 (1833), quoted with approval in Field v. Clark, 143 U.S. 649, 670 (1892).

[427] United States v. Ballin, 144 U.S. 1, 4 (1892).

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so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[428]

SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

COMPENSATION AND IMMUNITIES OF MEMBERS

Congressional Pay

With the surprise ratification of the Twenty-Seventh Amendment,[429] it is now the rule that congressional legislation "varying"—decreasing or increasing—the level of legislators' pay may not take effect until an intervening election has occurred. The only real controversy likely to arise in the interpretation of the new rule is whether pay increases that result from automatic alterations in pay are subject to the same requirement or whether it is only the initial enactment of the automatic device that is covered. That is, from the founding to 1967, congressional pay was determined directly by Congress in specific legislation setting specific rates of pay. In 1967, a law was passed that created a quadrennial commission with the responsibility to propose to the President salary levels for top officials of the Government, including Members of Congress.[430] In 1975, Congress legislated to bring Members of Congress within a separate commission system authorizing the President to recommend annual increases for civil servants to maintain pay comparability with private-sector employees.[431] These devices were attacked by dissent-

[428] Field v. Clark, 143 U.S. 649 (1892); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911). *See* the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n.4 (1990), and id. at 408 (Justice Scalia concurring in the judgment). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. Leser v. Garnett, 258 U.S. 130, 137 (1922); *see also* Coleman v. Miller, 307 U.S. 433 (1939).

[429] *See* discussion under Twenty-Seventh Amendment, infra.

[430] Pub. L. 90–206, § 225, 81 Stat. 642 (1967), as amended, Pub. L. 95–19, § 401, 91 Stat. 45 (1977), as amended, Pub. L. 99–190, § 135(e), 99 Stat. 1322 (1985).

[431] Pub. L. 94–82, § 204(a), 89 Stat. 421.

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ing Members of Congress as violating the mandate of clause 1 that compensation be "ascertained by Law." However, these challenges were rejected.[432] Thereafter, prior to ratification of the Amendment, Congress, in the Ethics Reform Act of 1989,[433] altered both the pay-increase and the cost-of-living-increase provisions of law, making quadrennial pay increases effective only after an intervening congressional election and making cost-of-living increases dependent upon a specific congressional vote. A federal court of appeals panel ruled that the cost-of-living-increase provision did not violate the Twenty-Seventh Amendment, and that a challenge to the quadrennial pay raise provision was not ripe.[434]

Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.[435] It does not apply to service of process in either civil[436] or criminal cases.[437] Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[438]

Privilege of Speech or Debate

Members.—This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."[439] So Justice Harlan explained the significance of the Speech or Debate Clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689[440] and the history of which traces back almost to

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[432] Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), *aff'd summarily*, 434 U.S. 1028 (1978); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

[433] Pub. L. 101–194, 103 Stat. 1716, 2 U.S.C. § 31(2), 5 U.S.C. § 5318 note, and 2 U.S.C. §§ 351–363.

[434] Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994).

[435] Long v. Ansell, 293 U.S. 76 (1934).

[436] 293 U.S. at 83.

[437] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800).

[438] Williamson v. United States, 207 U.S. 425, 446 (1908).

[439] United States v. Johnson, 383 U.S. 169, 178 (1966).

[440] "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

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the beginning of the development of Parliament as an independent force.[441] "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."[442] "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[443]

The protection of this clause is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'"[444] Thus, so long as legislators are "acting in the sphere of legitimate legislative activity," they are "protected not only from the consequence of litigation's results but also from the burden of defending themselves."[445] But the scope of the meaning of "legislative activity" has its limits. "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[446] Immunity from civil suit, both in law and equity, and from criminal action based on the performance of legislative duties flows from a determination that a challenged act is within the definition of legislative activity, but the Court in the more recent cases appears to have narrowed the concept somewhat.

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[441] United States v. Johnson, 383 U.S. 169, 177–79, 180–83 (1966); Powell v. McCormack, 395 U.S. 486, 502 (1969).

[442] United States v. Johnson, 383 U.S. 169, 178 (1966).

[443] United States v. Brewster, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from Coffin v. Coffin, 4 Mass. 1, 28 (1808), in Kilbourn v. Thompson, 103 U.S. 168, 203 (1881).

[444] Powell v. McCormack, 395 U.S. 486, 502 (1969), quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[445] Tenney v. Brandhove, 341 U.S. 367, 376–377 (1972); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Powell v. McCormack, 395 U.S. 486, 505 (1969); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

[446] Gravel v. United States, 408 U.S. 606, 625 (1972). The critical nature of the clause is shown by the holding in Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), that when a Member is sued under the Fifth Amendment for employment discrimination on the basis of gender, only the clause could shield such an employment decision, and not the separation of powers doctrine or emanations from it. Whether the clause would be a shield the Court had no occasion to decide and the case was settled on remand without a decision being reached.

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In *Kilbourn v. Thompson*,[447] Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court found that the contempt was wrongly voted. *Kilbourn* was relied on in *Powell v. McCormack*,[448] in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House. Because the power of inquiry is so vital to performance of the legislative function, the Court held that the clause precluded suit against the Chairman and Members of a Senate subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress's power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the subcommittee's actions prior to the possible institution of contempt actions in the courts.[449] And in *Dombrowski v. Eastland*,[450] the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiff.

Through an inquiry into the nature of the "legislative acts" performed by Members and staff, the Court held that the clause did not defeat a suit to enjoin the public dissemination of legislative materials outside the halls of Congress.[451] A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report that the House of Representatives routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner, and their parents sued various committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was de-

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[447] 103 U.S. 168 (1881). *But see* Gravel v. United States, 408 U.S. 606, 618–19 (1972).

[448] 395 U.S. 486 (1969). The Court found sufficient the presence of other defendants to enable it to review Powell's exclusion but reserved the question whether in the absence of someone the clause would still preclude suit. Id. at 506 n.26. *See also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[449] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[450] 387 U.S. 82 (1967). *But see* the reinterpretation of this case in Gravel v. United States, 408 U.S. 606, 619–20 (1972). *See also* McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted, sub nom.* McAdams v. McSurely, 438 U.S. 189 (1978).

[451] Doe v. McMillan, 412 U.S. 306 (1973).

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leted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and those acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.[452]

Bifurcation of the legislative process in this way resulted in holding unprotected the republication by a Member of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases.[453] The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[454] Press releases and newsletters are "[v]aluable and desirable" in "inform[ing] the public and other Members," but neither are essential to the deliberations of the legislative body nor part of the deliberative process.[455]

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[452] It is difficult to assess the effect of the decision because the Justices in the majority adopted mutually inconsistent stands, 412 U.S. at 325 (concurring opinion), and four Justices dissented. Id. at 331, 332, 338. The case also leaves unresolved the propriety of injunctive relief. *Compare* id. at 330 (Justice Douglas concurring), *with* id. at 343–45 (three dissenters arguing that separation of powers doctrine forbade injunctive relief). *And compare* Davis v. Passman, 442 U.S. 228, 245, 246 n.24 (1979), *with* id. at 250–51 (Chief Justice Burger dissenting).

[453] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[454] 443 U.S. at 126, quoting Gravel v. United States, 408 U.S. 606, 625 (1972).

[455] Hutchinson v. Proxmire, 443 U.S. 111, 130, 132–33 (1979). The Court distinguished between the more important "informing" function of Congress, *i.e.*, its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function of acquainting the public about its activities. The latter function the Court did not find an integral part of the legislative process. *See also* Doe v. McMillan, 412 U.S. 306, 314–17 (1973). *But compare* id. at 325 (concurring). For consideration of the "informing" function in its different guises in the context of legislative investigations, *see* Watkins v. United States, 354 U.S. 178, 200 (1957);

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Parallel developments may be discerned with respect to the application of a general criminal statute to call into question the legislative conduct and motivation of a Member. Thus, in *United States v. Johnson*,[456] the Court voided the conviction of a Member for conspiracy to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at a trial. It was this examination into the context of the speech—its authorship, motivation, and content—that the Court found foreclosed by the Speech or Debate Clause.[457]

However, in *United States v. Brewster*,[458] while continuing to assert that the clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch,"[459] the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member, which charged that he accepted a bribe to be "influenced in his performance of official acts in respect to his action, vote, and decision" on legislation, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch."[460] In other words, it is the fact of having taken a bribe, not the act the bribe is intended to influence, which is the subject of the pros-

United States v. Rumely, 345 U.S. 41, 43 (1953); Russell v. United States, 369 U.S. 749, 777–78 (1962) (Justice Douglas dissenting).

[456] 383 U.S. 169 (1966).

[457] Reserved was the question whether a prosecution that entailed inquiry into legislative acts or motivation could be founded upon "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185. The question was similarly reserved in United States v. Brewster, 408 U.S. 501, 529 n.18 (1972), although Justices Brennan and Douglas would have answered in the negative. Id. at 529, 540.

[458] 408 U.S. 501 (1972).

[459] 408 U.S. at 516.

[460] 408 U.S. at 526.

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ecution, and the Speech or Debate Clause interposes no obstacle to this type of prosecution.[461]

Applying in the criminal context the distinction developed in the civil cases between protected "legislative activity" and unprotected conduct prior to or subsequent to engaging in "legislative activity," the Court in *Gravel v. United States*,[462] held that a grand jury could validly inquire into the processes by which the Member obtained classified government documents and into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."[463]

Congressional Employees.—Until recently, the Court distinguished between Members of Congress, who were immune from suit arising out of their legislative activities, and legislative employees who participate in the same activities under the direction of a Member.[464] Thus, in *Kilbourn v. Thompson*,[465] the sergeant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski v. Eastland*[466] held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And, in *Powell v. McCormack*,[467] the Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the fed-

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[461] The holding was reaffirmed in United States v. Helstoski, 442 U.S. 477 (1979). On the other hand, the Court did hold that the protection of the clause is so fundamental that, assuming a Member may waive it, a waiver could be found only after explicit and unequivocal renunciation, rather than by failure to assert it at any particular point. Similarly, Helstoski v. Meanor, 442 U.S. 500 (1979), held that since the clause properly applied is intended to protect a Member from even having to defend himself, he may appeal immediately from a judicial ruling of nonapplicability rather than wait to appeal after conviction.

[462] 408 U.S. 606 (1972).

[463] 408 U.S. at 626.

[464] Language in some of the Court's earlier opinions had indicated that the privilege "is less absolute, although applicable," when a legislative aide is sued, without elaboration of what was meant. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Tenney v. Brandhove, 341 U.S. 367, 378 (1951). In Wheeldin v. Wheeler, 373 U.S. 647 (1963), the Court had imposed substantial obstacles to the possibility of recovery in appropriate situations by holding that a federal cause of action was lacking and remitting litigants to state courts and state law grounds. The case is probably no longer viable, however, after Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[465] 103 U.S. 168 (1881).

[466] 387 U.S. 82 (1967).

[467] 395 U.S. 486 (1969).

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eral courts jurisdiction to review the propriety of the plaintiff's exclusion from office by vote of the House.

Upon full consideration of the question, however, the Court, in *Gravel v. United States*,[468] accepted a series of contentions urged upon it not only by the individual Senator but by the Senate itself appearing by counsel as amicus: "that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated."[469] Therefore, the Court held "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[470]

The *Gravel* holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court said, the legislators in *Kilbourn* were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention—was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it.[471] *Dombrowski* was interpreted as having held that no evidence implicated the Senator involved, whereas the committee counsel had been accused of "conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize."[472] And *Powell* was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. "None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. . . . [N]o prior case has held that Mem-

[468] 408 U.S. 606 (1972).
[469] 408 U.S. at 616–17.
[470] 408 U.S. at 618.
[471] 408 U.S. at 618–19.
[472] 408 U.S. at 619–20.

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bers of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances."[473]

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

DISABILITIES OF MEMBERS

Appointment to Executive Office

"The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only 'during the time, for which he was elected'; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination."[474] As might be expected, there is no judicial interpretation of the language of the clause and indeed it has seldom surfaced as an issue.

In 1909, after having increased the salary of the Secretary of State,[475] Congress reduced it to the former figure so that a Member of the Senate at the time the increase was voted would be eligible for that office.[476] The clause became a subject of discussion in 1937, when Justice Black was appointed to the Court, because Congress had recently increased the amount of pension available to Jus-

[473] 408 U.S. at 620–21.

[474] 2 J. Story, Commentaries on the Constituiton of the United States § 864 (1833).

[475] 34 Stat. 948 (1907).

[476] 35 Stat. 626 (1909). Congress followed this precedent when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its previous level. 87 Stat. 697 (1973). *See also* 89 Stat. 1108 (1975) (reducing the salary of a member of the Federal Maritime Commission in order to qualify a Representative).

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tices retiring at seventy and Black's Senate term had still some time to run. The appointment was defended, however, with the argument that, because Black was only fifty-one at the time, he would be ineligible for the "increased emolument" for nineteen years and it was not as to him an increased emolument.[477] In 1969, it was briefly questioned whether a Member of the House of Representatives could be appointed Secretary of Defense because, under a salary bill enacted in the previous Congress, the President would propose a salary increase, including that of cabinet officers, early in the new Congress, which would take effect if Congress did not disapprove it. The Attorney General ruled that, as the clause would not apply if the increase were proposed and approved subsequent to the appointment, it similarly would not apply in a situation in which it was uncertain whether the increase would be approved.[478]

Incompatible Offices

This second part of the second clause elicited little discussion at the Convention and was universally understood to be a safeguard against executive influence on Members of Congress and the prevention of the corruption of the separation of powers.[479] Congress has at various times confronted the issue in regard to seating or expelling persons who have or obtain office in another branch. Thus, it has determined that visitors to academies, regents, directors, and trustees of public institutions, and members of temporary commissions who receive no compensation as members are not officers within the constitutional inhibition.[480] Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress.[481]

One of the more recurrent problems which Congress has had with this clause is the compatibility of congressional office with service as an officer of some military organization—militia, reserves, and the like.[482] Members have been unseated for accepting appoint-

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[477] The matter gave rise to a case, *Ex parte* Albert Levitt, 302 U.S. 633 (1937), in which the Court declined to pass upon the validity of Justice Black's appointment. The Court denied the complainant standing, but strangely it did not advert to the fact that it was being asked to assume original jurisdiction contrary to Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[478] 42 Op. Atty. Gen. 381 (Jan. 3, 1969).

[479] THE FEDERALIST, No. 76 (Hamilton) (J. Cooke ed. 1961), 514; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 866–869 (1833).

[480] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493 (1907); 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 63–64 (1936).

[481] Hinds', *supra* §§ 496–499.

[482] *Cf.* RIGHT OF A REPRESENTATIVE IN CONGRESS TO HOLD COMMISSION IN NATIONAL GUARD, H. REP. NO. 885, 64th Cong., 1st sess. (1916).

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ment to military office during their terms of congressional office,[483] but there are apparently no instances in which a Member-elect has been excluded for this reason. Because of the difficulty of successfully claiming standing, the issue has never been a litigable matter.[484]

SECTION 7. Clause 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Clause 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Clause 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be nec-

[483] HINDS', supra §§ 486–492, 494; CANNON'S, supra §§ 60–62.

[484] An effort to sustain standing was rebuffed in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

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essary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.

THE LEGISLATIVE PROCESS

Revenue Bills

Insertion of this clause was another of the devices sanctioned by the Framers to preserve and enforce the separation of powers.[485] It applies, in the context of the permissibility of Senate amendments to a House-passed bill, to all bills for collecting revenue—revenue decreasing as well as revenue increasing—rather than simply to just those bills that increase revenue.[486]

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase "all bills for raising revenue"; bills for other purposes, which incidentally create revenue, are not included.[487] Thus, a Senate-initiated bill that provided for a monetary "special assessment" to pay into a crime victims fund did not violate the clause, because it was a statute that created and raised revenue to support a particular governmental program and was not a law raising revenue to support Government generally.[488] An act providing a national currency secured by a pledge of bonds of the United States, which, "in the furtherance of that object, and also to meet the expenses attending the execution of the act," imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives.[489] Neither was a bill that provided that the District of Columbia should raise by taxation and pay to designated railroad companies a speci-

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[485] THE FEDERALIST, No. 58 (J. Cooke ed. 1961), 392–395 (Madison). *See* United States v. Munoz-Flores, 495 U.S. 385, 393–395 (1990).

[486] The issue of coverage is sometimes important, as in the case of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324, in which the House passed a bill that provided for a net loss in revenue and the Senate amended the bill to provide a revenue increase of more than $98 billion over three years. Attacks on the law as a violation of the origination clause failed before assertions of political question, standing, and other doctrines. *E.g.*, Texas Ass'n of Concerned Taxpayers v. United States, 772 F.2d 163 (5th Cir. 1985); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

[487] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (1833).

[488] United States v. Munoz-Flores, 495 U.S. 385 (1990).

[489] Twin City Bank v. Nebeker, 167 U.S. 196 (1897).

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fied sum for the elimination of grade crossings and the construction of a railway station.[490] The substitution of a corporation tax for an inheritance tax,[491] and the addition of a section imposing an excise tax upon the use of foreign-built pleasure yachts,[492] have been held to be within the Senate's constitutional power to propose amendments.

Approval by the President

The President is not restricted to signing a bill on a day when Congress is in session.[493] He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress.[494] His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word "approved" nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[495] A bill becomes a law on the date of its approval by the President.[496] When no time is fixed by the act it is effective from the date of its approval,[497] which usually is taken to be the first moment of the day, fractions of a day being disregarded.[498]

The Veto Power

The veto provisions, the Supreme Court has told us, serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return."[499] At the same time, the sections ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes."[500] The Court asserted that "[w]e should

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[490] Millard v. Roberts, 202 U.S. 429 (1906).
[491] Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911).
[492] Rainey v. United States, 232 U.S. 310 (1914).
[493] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).
[494] Edwards v. United States, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it 23 days after the adjournment of Congress. Schmeckebier, *Approval of Bills After Adjournment of Congress*, 33 Am. Pol. Sci. Rev. 52–53 (1939).
[495] Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868).
[496] 73 U.S. at 504. *See also* Burgess v. Salmon, 97 U.S. 381, 383 (1878).
[497] Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822).
[498] Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).
[499] Wright v. United States, 302 U.S. 583 (1938).
[500] 302 U.S. at 596.

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not adopt a construction which would frustrate either of these purposes."[501]

In one major respect, however, the President's actual desires may be frustrated by the presentation to him of omnibus bills or of bills containing extraneous riders. During the 1980s, on several occasions, Congress lumped all the appropriations for the operation of the government into one gargantuan bill. But the President must sign or veto the entire bill; doing the former may mean he has to accept provisions he would not sign standing alone, and doing the latter may have other adverse consequences. Numerous Presidents from Grant on have unsuccessfully sought by constitutional amendment a "line-item veto" by which individual items in an appropriations bill or a substantive bill could be extracted and vetoed. More recently, beginning in the FDR Administration, it has been debated whether Congress could by statute authorize a form of the line-item veto, but, again, nothing passed.[502]

That the interpretation of the provisions has not been entirely consistent is evident from a review of the only two Supreme Court decisions construing them. In *The Pocket Veto Case*,[503] the Court held that the return of a bill to the Senate, where it originated, had been prevented when the Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. The word "adjournment" was seen to have been used in the Constitution not in the sense of final adjournments but to any occasion on which a house of Congress is not in session. "We think that under the constitutional provision the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[504] Because neither House was in session to receive the bill, the President was prevented from returning it. It had been argued to the Court that the return may be validly accomplished to a proper agent of the house of origin for consideration when that body convenes. After first noting that Congress had never

[501] 302 U.S. at 596.

[502] *See Line Item Veto: Hearing Before the Senate Committee on Rules and Administration*, 99th Cong., 1st sess. (1985), esp. 10–20 (CRS memoranda detailing the issues). Some publicists have even contended, through a strained interpretation of clause 3, actually from its intended purpose to prevent Congress from subverting the veto power by calling a bill by some other name, that the President already possesses the line-item veto, but no President could be brought to test the thesis. *See Pork Barrels and Principles: The Politics of the Presidential Veto* (National Legal Center for the Public Interest, 1988) (essays).

[503] 279 U.S. 655 (1929).

[504] 279 U.S. at 680.

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authorized an agent to receive bills during adjournment, the Court opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."[505]

However, in *Wright v. United States*,[506] the Court held that the President's return of a bill to the Secretary of the Senate on the tenth day after presentment, during a three-day adjournment by the originating House only, was an effective return. In the first place, the Court thought, the pocket veto clause referred only to an adjournment of "the Congress," and here only the Senate, the originating body, had adjourned. The President can return the bill to the originating House if that body be in an intrasession adjournment, because there is no "practical difficulty" in effectuating the return. "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill."[507] Such a procedure complied with the constitutional provisions. "The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return."[508] The concerns activating the Court in *The Pocket Veto Case* were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over."[509]

The tension between the two cases, even though at a certain level of generality they are consistent because of factual differences, has existed without the Supreme Court yet having occasion to review the issue again. But, in *Kennedy v. Sampson*,[510] an appel-

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[505] 279 U.S. at 684.

[506] 302 U.S. 583 (1938).

[507] 302 U.S. at 589–90.

[508] 302 U.S. at 589.

[509] 302 U.S. at 595.

[510] 511 F.2d 430 (D.C. Cir. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32-day recess and one during the period in which Congress had adjourned sine die from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, Kennedy v. Jones, 412 F. Supp. 353 (D.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session. President Reagan repudiated this agreement and vetoed a bill during an intersession adjournment. Although the lower court

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late court held that a return is not prevented by an intra-session adjournment of any length by one or both Houses of Congress, so long as the originating House arranged for receipt of veto messages. The court stressed that the absence of the evils deemed to bottom the Court's premises in *The Pocket Veto Case*—long delay and public uncertainty—made possible the result.

The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum.[511] After a bill becomes law, of course, the President has no authority to repeal it. Asserting this truism, the Court in *The Confiscation Cases*[512] held that the immunity proclamation issued by the President in 1868 did not require reversal of a decree condemning property seized under the Confiscation Act of 1862.[513]

Presentation of Resolutions

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[514] Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause—that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override.[515] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final pas-

applied Kennedy v. Sampson to strike down the exercise of the power, but the case was mooted prior to Supreme Court review. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated and remanded to dismiss sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

[511] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).

[512] 87 U.S. (20 Wall.) 92 (1874).

[513] 12 Stat. 589 (1862).

[514] *See* 2 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937), 301–302, 304–305; 2 Joseph Story, Commentaries on the Constitution of the United States § 889, at 335 (1833).

[515] Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005).

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sage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[516]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, has been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[517] in which the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[518]

The Legislative Veto.—Beginning in the 1930s, the concurrent resolution (as well as the simple resolution) was put to a new use—serving as the instrument to terminate powers delegated to the Chief Executive or to disapprove particular exercises of power by him or his agents. The "legislative veto" or "congressional veto" was first developed in context of the delegation to the Executive of power to reorganize governmental agencies,[519] and was really furthered by the necessities of providing for national security and foreign affairs immediately prior to and during World War II.[520] The proliferation of "congressional veto" provisions in legislation over the years raised a series of interrelated constitutional questions.[521] Con-

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[516] S. Rep. No. 1335, 54th Congress, 2d Sess.; 4 Hinds' Precedents of the House of Representatives § 3483 (1907).

[517] 3 U.S. (3 Dall.) 378 (1798).

[518] Although *Hollingsworth* did not necessarily so hold (*see* Tillman, *supra*), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment").

[519] Act of June 30, 1932, § 407, 47 Stat. 414.

[520] *See*, *e.g.*, Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

[521] From 1932 to 1983, by one count, nearly 300 separate provisions giving Congress power to halt or overturn executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing was included in *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 96–398, 96th Congress, 2d Sess. (1981), 731–922. A more up-to-date listing, in light of the Supreme Court's ruling, is contained in H. Doc. No. 101–256, 101st Cong., 2d sess. (1991), 907–1054. Justice White's dissent in INS v. Chadha, 462 U.S. 919, 968–974, 1003–1013 (1983), describes and lists many kinds of such vetoes. The types of provisions varied widely. Many required congressional

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gress until relatively recently had applied the veto provisions to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—then began expanding the device to give itself a negative over regulations issued by executive branch agencies, and proposals were made to give Congress a negative over all regulations issued by executive branch independent agencies.[522]

In *INS v. Chadha*,[523] the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and the presentment provisions of § 7, cl. 2 and 3. The provision in question was § 244(c)(2) of the Immigration and Nationality Act, which authorized either house of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court's analysis of the presentment issue made clear, however, that two-House veto provisions, despite their compliance with bicameralism, and committee veto provisions suffer the same constitutional infirmity.[524] In the words of dissenting Justice White, the Court in *Chadha* "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"[525]

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the

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approval before an executive action took effect, but more commonly they provided for a negative upon executive action, by concurrent resolution of both Houses, by resolution of only one House, or even by a committee of one House.

[522] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d sess. *See* H. Rep. No. 94–1014, 94th Congress, 2d sess. (1976), and 122 Cong. Rec. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills were not adopted. *See Regulatory Reform and Congressional Review of Agency Rules: Hearings Before the Subcommittee on Rules of the House of the House Rules Committee*, 96th Congress, 1st sess. (1979); *Regulatory Reform Legislation: Hearings Before the Senate Committee on Governmental Affairs*, 96th Congress, 1st sess. (1979).

[523] 462 U.S. 919 (1983).

[524] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983). Prior to *Chadha*, an appellate court in AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982), had voided a form of committee veto, a provision prohibiting the availability of certain funds for a particular purpose without the prior approval of the Committees on Appropriations.

[525] *Chadha*, 462 U.S. at 967. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on "the broader question of whether legislative vetoes are invalid under the Presentment Clauses." Id. at 959.

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general standard. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here . . . was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and *Chadha*, all outside the legislative branch."[526]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment, to advise and consent to executive appointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters," *e.g.*, judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President."[527]

The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher v. Synar*.[528] Among that case's rationales for holding the Deficit Control Act unconstitutional was that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[529] Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

That *Chadha* does not spell the end of some forms of the legislative veto is evident from events since 1983, which have seen the enactment of various devices, such as "report and wait" provisions and requirements for various consultative steps before action may

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[526] 462 U.S. at 952 (citation omitted).

[527] 462 U.S. at 955–56.

[528] 478 U.S. 714 (1986). *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[529] Bowsher v. Synar, 478 U.S. 714, 733 (1986). This position was developed at greater length in the concurring opinion of Justice Stevens. Id. at 736.

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be undertaken. But the decision has stymied the efforts in Congress to confine the discretion it confers through delegation by giving it a method of reviewing and if necessary voiding actions and rules promulgated after delegations.

The Line Item Veto.—For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items—to veto "line items" of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act.[530] The law empowered the President, within five days of signing a bill, to "cancel in whole" spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[531] In *Clinton v. City of New York*,[532] the Court held the Act unconstitutional because it did not comply with the Presentment Clause.

Although Congress in passing the Act considered itself to have been delegating power,[533] and although the dissenting Justices would have upheld the Act as a valid delegation,[534] the Court instead analyzed the statute under the Presentment Clause. In the Court's view, the two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the Presentment Clause's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[535] In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[536]

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[530] Pub. L. 104–130, 110 Stat. 1200, codified in part at 2 U.S.C. §§ 691–92.

[531] Id. at § 691(a)(A).

[532] 524 U.S. 417(1998).

[533] E.g., H.R. Conf. Rep. No. 104–491, 104th Cong., 2d Sess. 15 (1996) (stating that the proposed law "delegates limited authority to the President").

[534] 524 U.S. at 453 (Justice Scalia concurring in part and dissenting in part); id. at 469 (Justice Breyer dissenting).

[535] 524 U.S. at 438–39 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[536] 524 U.S. at 439.

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SECTION 8. Clause 1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

By the terms of the Constitution, the power of Congress to levy taxes is subject to but one exception and two qualifications. Articles exported from any State may not be taxed at all. Direct taxes must be levied by the rule of apportionment and indirect taxes by the rule of uniformity. The Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"[537] that it is "exhaustive"[538] or that it "embraces every conceivable power of taxation."[539] Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

Decline of the Forbidden Subject Matter Test.—The Supreme Court has restored to Congress the power to tax most of the subject matter which had previously been withdrawn from its reach by judicial decision. The holding of *Evans v. Gore*[540] and *Miles v. Graham*[541] that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance in office was repudiated in *O'Malley v. Woodrough*.[542] The specific ruling of *Collector v. Day*[543] that the salary of a state officer is immune to federal income taxation also has been overruled.[544] But the principle under-

[537] *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).
[538] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).
[539] 240 U.S. at 12.
[540] 253 U.S. 245 (1920).
[541] 268 U.S. 501 (1925).
[542] 307 U.S. 277 (1939).
[543] 78 U.S. (11 Wall.) 113 (1871).
[544] Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). Collector v. Day was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in Helvering v. Gerhardt, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the states, but the

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lying that decision—that Congress may not lay a tax that would impair the sovereignty of the states—is still recognized as retaining some vitality.[545]

Federal Taxation of State Interests.—In 1903 a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and not to substance, in disregard of the mandate of *Brown v. Maryland*,[546] a closely divided Court declined to "regard it as a tax upon the municipality, though it might operate incidentally to reduce the bequest by the amount of the tax."[547] When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.[548]

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,[549] in which the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a state of its reserved power to create corporate franchises

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fact that the taxing power had recently been used with destructive effect upon notes issued by the state banks, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the states themselves. Two years later, the Court took the logical step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments. United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1873). A far-reaching extension of private immunity was granted in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), where interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. (Though relegated to virtual desuetude, *Pollock* was not expressly overruled until South Carolina v. Baker, 485 U.S. 505 (1988)). As the apprehension of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the states to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of dual federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force. Indian Motorcycle v. United States, 283 U.S. 570 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).

[545] At least, if the various opinions in New York v. United States, 326 U.S. 572 (1946), retain force, and they may in view of (a later) New York v. United States, 505 U.S. 144 (1992), a Commerce Clause case rather than a tax case.

[546] 25 U.S. (12 Wheat.) 419, 444 (1827).

[547] Snyder v. Bettman, 190 U.S. 249, 254 (1903).

[548] South Carolina v. United States, 199 U.S. 437 (1905). *See also* Ohio v. Helvering, 292 U.S. 360 (1934).

[549] 220 U.S. 107 (1911).

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was rejected, partly because of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent that it allowed interest on state bonds to be included in measuring the tax on the corporation.

Subsequent cases have sustained an estate tax on the net estate of a decedent, including state bonds,[550] excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[551] on the importation of scientific apparatus by a state university,[552] on admissions to athletic contests sponsored by a state institution, the net proceeds of which were used to further its educational program,[553] and on admissions to recreational facilities operated on a nonprofit basis by a municipal corporation.[554] Income derived by independent engineering contractors from the performance of state functions,[555] the compensation of trustees appointed to manage a street railway taken over and operated by a state,[556] profits derived from the sale of state bonds,[557] or from oil produced by lessees of state lands,[558] have all been held to be subject to federal taxation despite a possible economic burden on the state.

In finally overruling *Pollock*, the Court stated that *Pollock* had "merely represented one application of the more general rule that neither the federal nor the state governments could tax income an individual directly derived from *any* contract with another government."[559] That rule, the Court observed, had already been rejected in numerous decisions involving intergovernmental immunity. "We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on States by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract."[560]

Scope of State Immunity From Federal Taxation.—Although there have been sharp differences of opinion among mem-

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[550] Greiner v. Lewellyn, 258 U.S. 384 (1922).
[551] Wheeler Lumber Co. v. United States, 281 U.S. 572 (1930).
[552] Board of Trustees v. United States, 289 U.S. 48 (1933).
[553] Allen v. Regents, 304 U.S. 439 (1938).
[554] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949).
[555] Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).
[556] Helvering v. Powers, 293 U.S. 214 (1934).
[557] Willcuts v. Bunn, 282 U.S. 216 (1931).
[558] Helvering v. Producers Corp., 303 U.S. 376 (1938), overruling Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).
[559] South Carolina v. Baker, 485 U.S. 505, 517 (1988).
[560] 485 U.S. at 524–25.

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bers of the Supreme Court in cases dealing with the tax immunity of state functions and instrumentalities, the Court has stated that "all agree that not all of the former immunity is gone."[561] Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority to concur with any single opinion in the latter case leaves the question very much in doubt. In *Helvering v. Gerhardt*,[562] where, without overruling *Collector v. Day*, it narrowed the immunity of salaries of state officers from federal income taxation, the Court announced "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons."[563]

The second attempt to formulate a general doctrine was made in *New York v. United States*,[564] where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the states. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against state activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."[565] In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier

[561] New York v. United States, 326 U.S. 572, 584 (1946) (concurring opinion of Justice Rutledge).

[562] 304 U.S. 405 (1938).

[563] 304 U.S. at 419–20.

[564] 326 U.S. 572 (1946).

[565] 326 U.S. at 584.

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case to the effect that "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."[566] Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution."[567] In a later case dealing with state immunity the Court sustained the tax on the second ground mentioned in *Helvering v. Gerhardt*—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction.[568]

Articulation of the current approach may be found in *South Carolina v. Baker*.[569] The rules are "essentially the same" for federal immunity from state taxation and for state immunity from federal taxation, except that some state activities may be subject to direct federal taxation, while states may "never" tax the United States directly. Either government may tax private parties doing business with the other government, "even though the financial burden falls on the [other government], as long as the tax does not discriminate against the [other government] or those with which it deals."[570] Thus, "the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State."[571]

Uniformity Requirement.—Whether a tax is to be apportioned among the states according to the census taken pursuant to Article I, § 2, or imposed uniformly throughout the United States depends upon its classification as direct or indirect.[572] The rule of uniformity for indirect taxes is easy to obey. It requires only that the subject matter of a levy be taxed at the same rate wherever found in the United States; or, as it is sometimes phrased, the uni-

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[566] 326 U.S. at 589–90.

[567] 326 U.S. at 596.

[568] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949). *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).

[569] 485 U.S. 505 (1988).

[570] 485 U.S. at 523.

[571] 485 U.S. at 524 n.14.

[572] *See also* Article I, § 9, cl. 4.

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formity required is "geographical," not "intrinsic."[573] Even the geographical limitation is a loose one, at least if one follows *United States v. Ptasynski*,[574] in which the Court upheld an exemption from a crude-oil windfall-profits tax of "Alaskan oil," defined geographically to include oil produced in Alaska (or elsewhere) north of the Arctic Circle. What is prohibited, the Court said, is favoritism to particular states in the absence of valid bases of classification. Because Congress could have achieved the same result, allowing for severe climactic difficulties, through a classification tailored to the "disproportionate costs and difficulties . . . associated with extracting oil from this region,"[575] the fact that Congress described the exemption in geographic terms did not condemn the provision.

The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation.[576] A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in state laws.[577] A federal estate tax law that permitted deduction for a like tax paid to a state was not rendered invalid by the fact that one state levied no such tax.[578] The term "United States" in this clause refers only to the states of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories.[579] Indeed, in *Binns v. United States*,[580] the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

PURPOSES OF TAXATION

Regulation by Taxation

Congress has broad discretion in methods of taxation, and may, under the Necessary and Proper Clause, regulate business within

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[573] LaBelle Iron Works v. United States, 256 U.S. 377 (1921); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916); *Head Money Cases*, 112 U.S. 580 (1884).

[574] 462 U.S. 74 (1983).

[575] 462 U.S. at 85.

[576] Knowlton v. Moore, 178 U.S. 41 (1900).

[577] Fernandez v. Wiener, 326 U.S. 340 (1945); Riggs v. Del Drago, 317 U.S. 95 (1942); Phillips v. Commissioner, 283 U.S. 589 (1931); Poe v. Seaborn, 282 U.S. 101, 117 (1930).

[578] Florida v. Mellon, 273 U.S. 12 (1927).

[579] Downes v. Bidwell, 182 U.S. 244 (1901).

[580] 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.

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a state in order to tax it more effectively. For instance, the Court has sustained regulations regarding the packaging of taxed articles such as tobacco[581] and oleomargarine,[582] which were ostensibly designed to prevent fraud in the collection of the tax. It has also upheld measures taxing drugs[583] and firearms,[584] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification.[585]

Even where a tax is coupled with regulations that have no possible relation to the efficient collection of the tax, and no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[586] "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary. . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in *Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.'"[587]

In some cases, however, the structure of a taxation scheme is such as to suggest that the Congress actually intends to regulate under a separate constitutional authority. As long as such separate authority is available to Congress, the imposition of a tax as a pen-

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[581] Felsenheld v. United States, 186 U.S. 126 (1902).

[582] *In re* Kollock, 165 U.S. 526 (1897).

[583] United States v. Doremus, 249 U.S. 86 (1919). *Cf.* Nigro v. United States, 276 U.S. 332 (1928).

[584] Sonzinsky v. United States, 300 U.S. 506 (1937).

[585] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *Kahriger*, *Lewis*, *Doremus*, *Sonzinsky*, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969).

[586] McCray v. United States, 195 U.S. 27 (1904).

[587] United States v. Sanchez, 340 U.S. 42, 45 (1950). *See also* Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

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alty for such regulation is valid.[588] On the other hand, where Congress had levied a heavy tax upon liquor dealers who operated in violation of state law, the Court held that this tax was unenforceable after the repeal of the Eighteenth Amendment, because the National Government had no power to impose an additional penalty for infractions of state law.[589]

Discerning whether Congress, in passing a regulation that purports to be under the taxing authority, intends to exercise a separate constitutional authority, requires evaluation of a number of factors.[590] Under the *Child Labor Tax Case*,[591] decided in 1922, the Court, which had previously rejected a federal prohibition of child labor laws as being outside of the Commerce Clause,[592] also rejected a tax on companies using such labor. First, the Court noted that the law in question set forth a specific and detailed regulatory scheme—including the ages, industry, and number of hours allowed—establishing when employment of underage youth would incur taxation. Second, the taxation in question functioned as a penalty, in that it was set at one-tenth of net income per year, regardless of the nature or degree of the infraction. Third, the tax had a scienter requirement, so that the employer had to know that the child was below a specified age in order to incur taxation. Fourth, the statute made the businesses subject to inspection by officers of the Secretary of Labor, positions not traditionally charged with the enforcement and collection of taxes.

More recently, in *National Federation of Independent Business (NFIB) v. Sebelius*,[593] the Court upheld as an exercise of the taxing authority a requirement under the Patient Protection and Affordable Care Act (ACA)[594] that mandates certain individuals to maintain a minimum level of health insurance. Failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code. Chief Justice Roberts, in a majority holding,[595] used a functional approach in evaluating the authority for the requirement, so that the use of the term "penalty" in the ACA[596] to describe the enforcement mechanism for the individual mandate

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[588] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940). *See also Head Money Cases*, 112 U.S. 580, 596 (1884).

[589] United States v. Constantine, 296 U.S. 287 (1935).

[590] Hill v. Wallace, 259 U.S. 44 (1922); Helwig v. United States, 188 U.S. 605 (1903).

[591] Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922).

[592] Hammer v. Dagenhart, 247 U.S. 251 (1918).

[593] 567 U.S. ___, No. 11–393, slip op. (2012).

[594] Pub. L. 111–148, as amended.

[595] For this portion of the opinion, Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

[596] 26 U.S.C. §§ 5000A(c), (g)(1).

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was found not to be determinative. The Court also found that the latter three factors identified in the *Child Labor Tax Case* (penal intent, scienter, enforcement by regulatory agency) were not present with respect to the individual mandate. Unlike the child labor taxation scheme, the tax level under the ACA is established based on traditional tax variables such as taxable income, number of dependents and joint filing status; there is no requirement of a knowing violation; and the tax is collected by the Internal Revenue Service.

The majority, however, did not appear to have addressed the first *Child Labor Case* factor: whether the ACA set forth a specific and detailed course of conduct and imposed an exaction on those who transgress its standard. The Court did note that the law did not bear characteristics of a regulatory penalty, as the cost of the tax was far outweighed by the cost of obtaining health insurance, making the payment of the tax a reasonable financial decision.[597] Still, the majority's discussion suggests that, for constitutional purposes, the prominence of regulatory motivations for tax provisions may become less important than the nature of the exactions imposed and the manner in which they are administered.

In those areas where activities are subject to both taxation and regulation, the taxing authority is not limited from reaching activities otherwise prohibited. For instance, Congress may tax an activity, such as the business of accepting wagers,[598] regardless of whether it is permitted or prohibited by the laws of the United States[599] or by those of a state.[600] However, Congress's authority to regulate using the taxing power "reaches only existing subjects."[601] Thus, so-called federal "licenses," so far as they relate to topics outside Congress's constitutional authority, merely express, "the purpose of the government not to interfere . . . with the trade nominally licensed, if the required taxes are paid." In those instance, whether the "licensed" trade shall be permitted at all is a question that remains a decision by the state.[602]

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[597] 567 U.S. ___, No. 11–393, slip op. at 35–36 (2012).

[598] United States v. Kahriger, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the States. Justices Jackson and Douglas noted partial agreement with this conclusion. *See also* Lewis v. United States, 348 U.S. 419 (1955).

[599] United States v. Yuginovich, 256 U.S. 450 (1921).

[600] United States v. Constantine, 296 U.S. 287, 293 (1935).

[601] *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).

[602] *License Tax Cases*, 72 U.S. at 471 (1867).

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Promotion of Business: Protective Tariff

The earliest examples of taxes levied with a view to promoting desired economic objectives in addition to raising revenue were, of course, import duties. The second statute adopted by the first Congress was a tariff act reciting that "it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported."[603] After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the Supreme Court's unanimous decision in *J. W. Hampton, Jr. & Co. v. United States*, which rejected a contention "that the only power of Congress in the levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising."[604]

Chief Justice Taft, writing for the Court in *Hampton*, observed that the first Congress in 1789 had enacted a protective tariff. "In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. . . . The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history. . . . Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate Congressional action."[605]

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

The grant of power to "provide . . . for the general welfare" raises a two-fold question: how may Congress provide for "the general welfare" and what is "the general welfare" that it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his opinion on the Bank as follows: "[T]he laying of taxes is the power, and the general welfare the purpose for which the power

[603] 1 Stat. 24 (1789).
[604] 276 U.S. 394, 411 (1928).
[605] 276 U.S. at 412.

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is to be exercised. They [Congress] are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose."[606] The clause, in short, is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted,[607] Congress has not acted upon it and the Court has had no occasion to adjudicate the point.

With respect to the meaning of "the general welfare" the pages of *The Federalist* itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal, broad meaning of the clause;[608] Madison contended that the powers of taxation and appropriation of the proposed government should be regarded as merely instrumental to its remaining powers; in other words, as little more than a power of self-support.[609] From early times, Congress has acted upon Hamilton's interpretation. Appropriations for subsidies[610] and for an ever-increasing variety of "internal improvements"[611] constructed by the Federal Government, had their beginnings in the administrations of Washington and Jefferson.[612] Since 1914, federal grants-in-aid, which are sums of money apportioned among the states for particular uses, often conditioned upon the duplication of the sums by the recipient state, and upon observance of stipulated restrictions as to their use, have become commonplace.

The scope of the national spending power came before the Supreme Court at least five times prior to 1936, but the Court disposed of four of the suits without construing the "general welfare" clause. In the *Pacific Railway Cases*[613] and *Smith v. Kansas City*

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[606] 3 Writings of Thomas Jefferson 147–149 (Library Edition, 1904).

[607] *See* W. Crosskey, Politics and the Constitution in the History of the United States (1953).

[608] The Federalist, Nos. 30 and 34 (J. Cooke ed. 1961) 187–193, 209–215.

[609] Id. at No. 41, 268–78.

[610] 1 Stat. 229 (1792).

[611] 2 Stat. 357 (1806).

[612] In an advisory opinion, which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. *See* Albertsworth, *Advisory Functions in the Supreme Court*, 23 Geo. L. J. 643, 644–647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. *See* his *Views of the President of the United States on the Subject of Internal Improvements*, of May 4, 1822, 2 Messages and Papers of the Presidents 713–752 (Richardson ed., 1906).

[613] California v. Pacific R.R., 127 U.S. 1 (188).

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Title & Trust Co.,[614] it affirmed the power of Congress to construct internal improvements, and to charter and purchase the capital stock of federal land banks, by reference to its powers over commerce, post roads, and fiscal operations, and to its war powers. Decisions on the merits were withheld in two other cases, *Massachusetts v. Mellon* and *Frothingham v. Mellon*,[615] on the ground that neither a state nor an individual citizen is entitled to a remedy in the courts against an alleged unconstitutional appropriation of national funds. In *United States v. Gettysburg Electric Ry.*,[616] however, the Court invoked "the great power of taxation to be exercised for the common defence and general welfare"[617] to sustain the right of the Federal Government to acquire land within a state for use as a national park.

Finally, in *United States v. Butler*,[618] the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Justice Roberts wrote for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the

[614] 255 U.S. 180 (1921).

[615] 262 U.S. 447 (1923). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). These cases were limited by Flast v. Cohen, 392 U.S. 83 (1968).

[616] 160 U.S. 668 (1896).

[617] 160 U.S. at 681.

[618] 297 U.S. 1 (1936). *See also* Cleveland v. United States, 323 U.S. 329 (1945).

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clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[619]

By and large, it is for Congress to determine what constitutes the "general welfare." The Court accords great deference to Congress's decision that a spending program advances the general welfare,[620] and has even questioned whether the restriction is judicially enforceable.[621] Dispute, such as it is, turns on the conditioning of funds.

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[622] Congress's failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."[623]

Social Security Act Cases.—Although the Court in *Butler* held that the spending power is not limited by the specific grants of power contained in Article I, § 8, the Court found, nevertheless, that the spending power was qualified by the Tenth Amendment, and on this ground ruled that Congress could not use moneys raised by taxation to "purchase compliance" with regulations "of matters of state concern with respect to which Congress has no authority to interfere."[624] Within little more than a year this decision was narrowed

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[619] United States v. Butler, 297 U.S. 1, 65–66 (1936). So settled had the issue become that 1970s attacks on federal grants-in-aid omitted any challenge on the broad level and relied on specific prohibitions, *i.e.*, the religion clauses of the First Amendment. Flast v. Cohen, 392 U.S. 83 (1968); Tilton v. Richardson, 403 U.S. 672 (1971).

[620] Id. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).

[621] Buckley v. Valeo, 424 U.S. 1, 90–91 (1976); South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987).

[622] Sabri v. United States, 541 U.S. 600, 605 (2004).

[623] 541 U.S. at 606.

[624] United States v. Butler, 297 U.S. 1, 70 (1936). Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the general welfare to see to it that the

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by *Steward Machine Co. v. Davis*,[625] which sustained the tax imposed on employers to provide unemployment benefits, and the credit allowed for similar taxes paid to a state. To the argument that the tax and credit in combination were "weapons of coercion, destroying or impairing the autonomy of the states," the Court replied that relief of unemployment was a legitimate object of federal expenditure under the "general welfare" clause, that the Social Security Act represented a legitimate attempt to solve the problem by the cooperation of state and Federal Governments, and that the credit allowed for state taxes bore a reasonable relation "to the fiscal need subserved by the tax in its normal operation,"[626] because state unemployment compensation payments would relieve the burden for direct relief borne by the national treasury. The Court reserved judgment as to the validity of a tax "if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power."[627]

Conditional Grants-in-Aid.—It was not until 1947 that the right of Congress to impose conditions upon grants-in-aid over the objection of a state was squarely presented.[628] The Court upheld Congress's power to do so in *Oklahoma v. Civil Service Commission*.[629] The state objected to the enforcement of a provision of the Hatch Act that reduced its allotment of federal highway funds because of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. The Court denied relief on the ground that, "[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed. . . . The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have

country got its money's worth, and that the challenged provisions served that end. United States v. Butler, 297 U.S. 1, 84–86 (1936).

[625] 301 U.S. 548 (1937).

[626] 301 U.S. at 586, 591.

[627] 301 U.S. at 590. *See also* Buckley v. Valeo, 424 U.S. 1, 90–92 (1976); Fullilove v. Klutznick, 448 U.S. 448, 473–475 (1980); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

[628] In Steward Machine Company v. Davis, it was a taxpayer who complained of the invasion of state sovereignty, and the Court put great emphasis on the fact that the state was a willing partner in the plan of cooperation embodied in the Social Security Act. 301 U.S. 548, 589, 590 (1937).

[629] 330 U.S. 127 (1947).

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effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid."[630]

The general principle is firmly established. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."[631]

The Court has set forth several standards purporting to channel Congress's discretion in attaching grant conditions.[632] To date only one statute, discussed below, has been struck down as violating these standards, although several statutes have been interpreted so as to conform to the guiding principles. First, the conditions, like the spending itself, must advance the general welfare, but the determination of what constitutes the general welfare rests largely if not wholly with Congress.[633] Second, because a grant is "much in the nature of a contract" offer that the states may accept or reject,[634] Congress must set out the conditions unambiguously, so that the states may make an informed decision.[635] Third, the Court continues to state that the conditions must be related to the federal interest for which the funds are expended,[636] but it has never

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[630] 330 U.S. 127, 143 (1947). This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 541 U.S. 600 (2004).

[631] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (Chief Justice Burger's opinion for the Court cited five cases to document the assertion: California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619 (1937); and Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[632] *See* South Dakota v. Dole, 483 U.S. 203, 207–12 (1987).

[633] 483 U.S. at 207 (1987). *See* discussion under Scope of the Power, *supra*.

[634] Barnes v. Gorman, 536 U.S. 181, 186 (2002) (holding that neither the Americans With Disabilities Act of 1990 nor section 504 of the Rehabilitation Act of 1973 subjected states to punitive damages in private actions).

[635] South Dakota v. Dole, 483 U.S. at 207. The requirement appeared in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (Rehabilitation Act does not clearly signal states that participation in programs funded by Act constitutes waiver of immunity from suit in federal court); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (no private right of action was created by the Family Educational Rights and Privacy Act); Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

[636] South Dakota v. Dole, 483 U.S. at 207–08. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

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found a spending condition deficient under this part of the test.[637] Fourth, the power to condition funds may not be used to induce the states to engage in activities that would themselves be unconstitutional.[638] Fifth, the Court has suggested that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[639] Certain federalism restraints on other federal powers seem not to be relevant to spending conditions.[640]

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA),[641] which established a comprehensive health care system for the United States. As part of this new system, the Act expanded which persons were eligible for Medicaid, which is financed jointly by the federal and state governments. Failure of a state to implement such expansion could, in theory, have resulted in the withholding of all Medicaid reimbursements, including payments for persons previously covered by the Medicaid program. In *National Federation of Independent Business (NFIB) v. Sebelius*,[642] seven Justices (in two separate opinions) held that the requirement that states either comply with the requirements of the Medicaid expansion under the ACA or lose all Medicaid funds violated the Tenth Amendment.[643] The Court held, however, that withholding of just the funds associated with that expansion raised no significant constitutional concerns, essentially making the Medicaid expansion voluntary.

Chief Justice Roberts' controlling opinion[644] in *NFIB* held that the ACA Medicaid expansion created a "new" and "independent" pro-

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[637] The relationship in South Dakota v. Dole, 483 U.S. at 208–09, in which Congress conditioned access to certain highway funds on establishing a 21-years-of-age drinking qualification was that the purpose of both funds and condition was safe interstate travel. The federal interest in Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143 (1947), as we have noted, was assuring proper administration of federal highway funds.

[638] South Dakota v. Dole, 483 U.S. at 210–11.

[639] Steward Machine Co. v. Davis, 301 U.S. 548, 589–90 (1937); South Dakota v. Dole, 483 U.S. 203, 211–12. *See* North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff'd* 435 U.S. 962 (1978).

[640] South Dakota v. Dole, 483 U.S. at 210 (referring to the Tenth Amendment: "the 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly").

[641] Pub. L. 111–148, as amended.

[642] 567 U.S. ___, No. 11–393, slip op. (2012).

[643] Chief Justice Robert's opinion was joined by Justices Breyer and Kagan on this point, while Justices Scalia, Kennedy, Thomas and Alito made a similar point in a joint dissenting opinion. The authoring Justices of the two opinions, however, did not join in either the reasoning or judgment of the other opinion.

[644] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed

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gram.[645] As Congress's power to direct state activities under the Spending Clause is in the nature of a contract, Justice Robert's opinion suggests that the only changes that could be made to Medicaid would be those that could be reasonably anticipated by the states as they entered the original program, when only four categories of persons in financial need were covered: the disabled, the blind, the elderly, and needy families with dependent children. The Medicaid expansion arguably changed the nature of the program by requiring recipient states, as part of a universal health care system, to meet the health care needs of the entire nonelderly population with income below 133% of the poverty level.[646] Thus, the Medicaid expansion "accomplishe[d] a shift in kind, not merely degree."[647]

Once Justice Roberts established that the Medicaid expansion was a "new" and "independent" program, he then turned to whether withdrawal of existing Medicaid funds for failure to implement the expansion was coercive. Justice Roberts noted that the threatened loss of Medicaid funds was "over 10 percent of most State's total revenue," which he characterized as a form of "economic dragooning" which put a "gun to the head" of the states.[648] Justice Roberts contrasted this amount with the amount of federal transportation funds threatened to be withheld from South Dakota in *Dole*, which he characterized as less than half of one percent of South Dakota's budget. How courts are to consider grant withdrawals between 10 percent and one-half of 1 percent, however, is not addressed by the

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as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted). Justice Roberts opinion is arguably narrower than the dissent, because, as discussed below, his opinion found a constitutional violation based on the presence of both a "new" "independent" program and a coercive loss of funds, while the dissenting opinion would have found the coercive loss of funds sufficient. *NFIB*, 567 U.S. ___, slip op. at 38–42 (Justices Scalia, Kennedy, Thomas and Alito dissenting).

[645] 567 U.S. ___, slip op. at 50, 53–54. It might be argued that the Roberts' opinion, with its emphasis on "new" and "independent" programs, is implicitly addressing the "relatedness" inquiry of South Dakota v. Dole. Justice Roberts' opinion, however, does not explicitly discuss the issue, and an argument can be made that there is a significant difference between the two inquiries. As noted, the "relatedness inquiry" in *Dole* was identified as a limitation on the Spending Clause, while the *NFIB* discussion of "new" and "independent programs" emphasized the concerns of the Tenth Amendment. Second, under *Dole*, the "relatedness" and "coercion" inquiries appear to be disjunctive, in that failure to comply with either of these factors would mean that the statute was unconstitutional. Under *NFIB*, however, the "new" and "independent" program inquiry and the "coercion" inquiry appear to be conjunctive, so that a grant condition must apparently fail both tests to be found unconstitutional.

[646] Justice Roberts also noted that Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion, and mandated that newly eligible persons would receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.

[647] 567 U.S. ___, slip op. at 53.

[648] 567 U.S. ___, slip op. at 10, 51–52.

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Roberts' opinion, and Justice Roberts declined to speculate where such a line would be drawn.

If a state accepts federal funds on conditions and then fails to follow the requirements, the usual remedy is federal administrative action to terminate the funding and to recoup funds the state has already received.[649] Although the Court has allowed beneficiaries of conditional grant programs to sue to compel states to comply with the federal conditions,[650] more recently the Court has required that any such susceptibility to suit be clearly spelled out so that states will be informed of potential consequences of accepting aid. Finally, it should be noted that Congress has enacted a range of laws forbidding discrimination in federal assistance programs,[651] and some of these laws are enforceable against the states.[652]

Earmarked Funds.—The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.[653] In *Helvering v. Davis*,[654] the excise tax on employers—the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers—was upheld under the "general welfare" clause, the Tenth Amendment's being found inapplicable.

Debts of the United States.—The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice.[655] The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of Philip-

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[649] Bell v. New Jersey, 461 U.S. 773 (1983); Bennett v. New Jersey, 470 U.S. 632 (1985); Bennett v. Kentucky Dep't of Education, 470 U.S. 656 (1985).

[650] *E.g.*, King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Lau v. Nichols, 414 U.S. 563 (1974); Miller v. Youakim, 440 U.S. 125 (1979). Suits may be brought under 42 U.S.C. § 1983, *see* Maine v. Thiboutot, 448 U.S. 1 (1980), although in some instances the statutory conferral of rights may be too imprecise or vague for judicial enforcement. *Compare* Suter v. Artist M., 503 U.S. 347 (1992), *with* Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987).

[651] *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681; Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[652] Here the principal constraint is the Eleventh Amendment. *See*, *e.g.*, Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act of 1990 exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages).

[653] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[654] 301 U.S. 619 (1937).

[655] United States v. Realty Co., 163 U.S. 427 (1896); Pope v. United States, 323 U.S. 1, 9 (1944).

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pine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[656] Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In *United States v. Fisher*,[657] the Supreme Court sustained a statute that gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange that apparently had been purchased by the United States. Invoking the Necessary and Proper Clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay its obligations by the following reasoning: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe."[658]

Clause 2. The Congress shall have Power * * * To borrow Money on the credit of the United States.

BORROWING POWER

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States."[659] When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money, the convention voted, nine states to two, to delete the words "and emit bills."[660] Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[661]

When it borrows money "on the credit of the United States," Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the

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[656] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[657] 6 U.S. (2 Cr.) 358 (1805).

[658] 6 U.S. at 396.

[659] 2 M. Farrand, The Records of the Federal Convention of 1787 144, 308–309 (rev. ed. 1937).

[660] Id. at 310.

[661] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

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creditor was denied a remedy in the absence of a showing of actual damage.[662]

Clause 3. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

The Commerce Clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases that reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation.[663] The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word "commerce" came to dominate the clause while the word "regulate" remained in the background. The so-called "constitutional revolution" of the 1930s, however, brought the latter word to its present prominence.

Definition of Terms

Commerce.—The etymology of the word "commerce"[664] carries the primary meaning of traffic, of transporting goods across state lines for sale. This possibly narrow constitutional conception was rejected by Chief Justice Marshall in *Gibbons v. Ogden*,[665] which remains one of the seminal cases dealing with the Constitution. The case arose because of a monopoly granted by the New York legislature on the operation of steam-propelled vessels on its waters, a monopoly challenged by Gibbons, who transported passengers from New Jersey to New York pursuant to privileges granted by an act

[662] Perry v. United States, 294 U.S. 330, 351 (1935). *See also* Lynch v. United States, 292 U.S. 571 (1934).

[663] E. Prentice & J. Egan, The Commerce Clause of the Federal Constitution 14 (1898).

[664] OED: "com– together, with, + merx, merci- merchandise, ware."

[665] 22 U.S. (9 Wheat.) 1 (1824).

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of Congress.[666] The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because the vessels carried only passengers between the two states and were thus not engaged in traffic, in "commerce" in the constitutional sense.

"The subject to be regulated is commerce," the Chief Justice wrote. "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse."[667] The term, therefore, included navigation, a conclusion that Marshall also supported by appeal to general understanding, to the prohibition in Article I, § 9, against any preference being given "by any regulation of commerce or revenue, to the ports of one State over those of another," and to the admitted and demonstrated power of Congress to impose embargoes.[668]

Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[669] But, today, "commerce" in the constitutional sense, and hence "interstate commerce," covers every species of movement of persons and things, whether for profit or not, across state lines,[670] every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise,[671] every species of commercial negotiation that will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines.[672]

There was a long period in the Court's history when a majority of the Justices, seeking to curb the regulatory powers of the Federal Government by various means, held that certain things were not encompassed by the Commerce Clause because they were nei-

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[666] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[667] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[668] 22 U.S. at 190–94.

[669] 22 U.S. at 193.

[670] As we will see, however, in many later formulations the crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.

[671] *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).

[672] "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549–50 (1944).

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ther interstate commerce nor bore a sufficient nexus to interstate commerce. Thus, at one time, the Court held that mining or manufacturing, even when the product would move in interstate commerce, was not reachable under the Commerce Clause;[673] it held insurance transactions carried on across state lines not to be commerce,[674] and that exhibitions of baseball between professional teams that travel from state to state were not in commerce.[675] Similarly, it held that the Commerce Clause was not applicable to the making of contracts for the insertion of advertisements in periodicals in another state[676] or to the making of contracts for personal services to be rendered in another state.[677]

Later decisions either have overturned or have undermined all of these holdings. The gathering of news by a press association and its transmission to client newspapers are interstate commerce.[678] The activities of Group Health Association, Inc., which serves only its own members, are "trade" and capable of becoming interstate commerce;[679] the business of insurance when transacted between an insurer and an insured in different states is interstate commerce.[680] But most important of all there was the development of,

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[673] Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[674] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); *see also* the cases to this effect cited in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).

[675] Federal Baseball League v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). When called on to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect and that the business had developed under the understanding that it was not subject to these laws, a reversal of which would have retroactive effect. Toolson v. New York Yankees, 346 U.S. 356 (1953). In Flood v. Kuhn, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but it thought the doctrine entitled to the benefits of *stare decisis*, as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses conducted on a multistate basis, but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, Radovich v. National Football League, 352 U.S. 445 (1957), professional boxing, United States v. International Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions. United States v. Shubert, 348 U.S. 222 (1955).

[676] Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436 (1920).

[677] Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. United States Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Railway Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Manufacturing Co. v. Colley, 247 U.S. 21 (1918).

[678] Associated Press v. United States, 326 U.S. 1 (1945).

[679] American Medical Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Oregon Medical Society, 343 U.S. 326 (1952).

[680] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

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or more accurately the return to,[681] the rationales by which manufacturing,[682] mining,[683] business transactions,[684] and the like, which are antecedent to or subsequent to a move across state lines, are conceived to be part of an integrated commercial whole and therefore subject to the reach of the commerce power.

Among the Several States.—Continuing in *Gibbons v. Ogden*, Chief Justice Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state." It must therefore have been selected to exclude "the exclusively internal commerce of a state." Although, of course, the phrase "may very properly be restricted to that commerce which concerns more states than one," it is obvious that "[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior." The Chief Justice then succinctly stated the rule, which, though restricted in some periods, continues to govern the interpretation of the clause. "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[685]

Recognition of an "exclusively internal" commerce of a state, or "intrastate commerce" in today's terms, was regarded as setting out an area of state concern that Congress was precluded from reaching.[686] Although these cases seemingly visualized Congress's power arising only when there was an actual crossing of state boundaries, this view ignored Marshall's equation of intrastate commerce that affects other states or with which it is necessary to interfere in order to effectuate congressional power with those actions which

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[681] "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824). *See also* id. at 195–196.

[682] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[683] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *See also* Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 275–283 (1981); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).

[684] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

[685] 22 U.S. (9 Wheat.) 1, 194, 195 (1824).

[686] New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); *License Cases*, 46 U.S. (5 How.) 504 (1847); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849); Patterson v. Kentucky, 97 U.S. 501 (1879); *Trade-Mark Cases*, 100 U.S. 82 (1879); Kidd v. Pearson, 128 U.S. 1 (1888); Illinois Central R.R. v. McKendree, 203 U.S. 514 (1906); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923).

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are purely interstate. This equation came back into its own, both with the Court's stress on the "current of commerce" bringing each element in the current within Congress's regulatory power,[687] with the emphasis on the interrelationships of industrial production to interstate commerce[688] but especially with the emphasis that even minor transactions have an effect on interstate commerce[689] and that the cumulative effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation.[690] "Commerce among the states must, of necessity, be commerce with[in] the states. . . . The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states."[691]

Regulate.— "We are now arrived at the inquiry—what is this power?" continued the Chief Justice. "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the ex-

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[687] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

[688] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[689] NLRB v. Fainblatt, 306 U.S. 601 (1939); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–243 (1980); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[690] United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Perez v. United States, 402 U.S. 146 (1971); Russell v. United States, 471 U.S. 858 (1985); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[691] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). Commerce "among the several States" does not comprise commerce of the District of Columbia nor of the territories of the United States. Congress's power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); *In re* Bryant, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865). Transportation between two points in the same state, when a part of the route is a loop outside the state, is interstate commerce. Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 (1903); Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the state's reach. Greyhound Lines v. Mealey, 334 U.S. 653, 660 (1948); Eichholz v. Public Service Comm'n, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the state of departure but in conjunction with an interstate trip are reachable. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

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ercise of the power as are found in the constitution of the United States."[692]

Of course, the power to regulate commerce is the power to prescribe conditions and rules for the carrying-on of commercial transactions, the keeping-free of channels of commerce, the regulating of prices and terms of sale. Even if the clause granted only this power, the scope would be wide, but it extends to include many more purposes than these. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."[693] Thus, in upholding a federal statute prohibiting the shipment in interstate commerce of goods made with child labor, not because the goods were intrinsically harmful but in order to extirpate child labor, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."[694]

The power has been exercised to enforce majority conceptions of morality,[695] to ban racial discrimination in public accommodations,[696] and to protect the public against evils both natural and contrived by people.[697] The power to regulate interstate commerce is, therefore, rightly regarded as the most potent grant of authority in section 8.

Necessary and Proper Clause.—All grants of power to Congress in § 8, as elsewhere, must be read in conjunction with the Necessary and Proper Clause, § 8, cl. 18, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." Chief Justice Marshall alluded to the power thus enhanced by this clause when he said that the regulatory power did not extend "to those internal con-

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[692] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–197 (1824).

[693] Brooks v. United States, 267 U.S. 432, 436–37 (1925).

[694] United States v. Darby, 312 U.S. 100, 114 (1941).

[695] *E.g.*, Caminetti v. United States, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes); Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives across state lines by Mormons); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[696] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[697] *E.g.*, Reid v. Colorado, 187 U.S. 137 (1902) (transportation of diseased livestock across state line); Perez v. United States, 402 U.S. 146 (1971) (prohibition of all loansharking).

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cerns [of a state] . . . with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[698] There are numerous cases permitting Congress to reach "purely" intrastate activities on the theory, combined with the previously mentioned emphasis on the cumulative effect of minor transactions, that it is necessary to regulate them in order that the regulation of interstate activities might be fully effectuated.[699] In other cases, the clause may not have been directly cited, but the dictates of Chief Justice Marshall have been used to justify more expansive applications of the commerce power.[700]

Federalism Limits on Exercise of Commerce Power.—As is recounted below, prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of "dual federalism," under which Congress's power to regulate much activity depended on whether it had a "direct" rather than an "indirect" effect on interstate commerce.[701] When the restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot. However, in a number of instances the states engaged in commercial activities that would be regulated by federal legislation if the enterprise were privately owned, and the Court easily sustained application of federal law to these state proprietary activities.[702] However, as Congress began to extend regulation to state governmental activities, the judicial response was inconsistent and wavering.[703] Although the Court may shift again to constrain federal power on federalism grounds, at the present time the rule is that Congress lacks authority under the Commerce Clause to regulate the states as states in some circumstances, namely, when

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[698] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

[699] *E.g.*, Houston & Texas Ry. v. United States, 234 U.S. 342 (1914) (necessary for ICC to regulate rates of an intrastate train in order to effectuate its rate setting for a competing interstate train); Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922) (same); Southern Ry. v. United States, 222 U.S. 20 (1911) (upholding requirement of same safety equipment on intrastate as interstate trains). *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Gonzales v. Raich, 545 U.S. 1 (2005).

[700] *See*, *e.g.*, United States v. Darby, 312 U.S. 100, 115–16 (1941).

[701] *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, there existed much of this time a parallel doctrine under which federal power was not so limited. *E.g.*, Houston & Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

[702] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[703] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

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the federal statutory provisions "commandeer" a state's legislative or executive authority in order to implement a regulatory program.[704]

Illegal Commerce

That Congress's protective power over interstate commerce reaches all kinds of obstructions and impediments was made clear in *United States v. Ferger*.[705] The defendants had been indicted for issuing a false bill of lading to cover a fictitious shipment in interstate commerce. Before the Court they argued that, because there could be no commerce in a fraudulent bill of lading, Congress had no power to exercise criminal jurisdiction over them. Chief Justice White wrote: "But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."[706] Much of Congress's criminal legislation is based simply on the crossing of a state line as creating federal jurisdiction.[707]

Interstate Versus Foreign Commerce

There are certain dicta urging or suggesting that Congress's power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation's unlimited power over foreign relations, the former was conferred upon the National Government

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[704] New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997). For elaboration, *see* the discussions under the Supremacy Clause and under the Tenth Amendment.

[705] 250 U.S. 199 (1919).

[706] 250 U.S. at 203.

[707] *E.g.*, Hoke v. United States, 227 U.S. 308 (1913) (transportation of women for purposes of prostitution); Gooch v. United States, 297 U.S. 124 (1936) (kidnaping); Brooks v. United States, 267 U.S. 432 (1925) (stolen autos). For example, in Scarborough v. United States, 431 U.S. 563 (1977), the Court upheld a conviction for possession of a firearm by a felon upon a mere showing that the gun had sometime previously traveled in interstate commerce, and Barrett v. United States, 423 U.S. 212 (1976), upheld a conviction for receipt of a firearm on the same showing. The Court does require Congress in these cases to speak plainly in order to reach such activity, inasmuch as historic state police powers are involved. United States v. Bass, 404 U.S. 336 (1971).

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primarily in order to protect freedom of commerce from state interference. The four dissenting Justices in the *Lottery Case* endorsed this view in the following words: "[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other." [708]

Twelve years later, Chief Justice White, speaking for the Court, expressed the same view: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand." [709]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." [710] And nearly fifty years later, Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." [711] Today it is firmly established that the power to regulate commerce, whether with foreign nations or among the several states, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress's pow-

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[708] Lottery Case (Champion v. Ames), 188 U.S. 321, 373 (1903).

[709] Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in Japan Line v. County of Los Angeles, 441 U.S. 434, 448–51 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

[710] *License Cases*, 46 U.S. (5 How.) 504, 578 (1847).

[711] Pittsburg & Southern Coal Co. v. Bates, 156 U.S. 577, 587 (1895).

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ers, as by the Due Process Clause of the Fifth Amendment, are not transgressed.[712]

Instruments of Commerce

The applicability of Congress's power to the agents and instruments of commerce is implied in Marshall's opinion in *Gibbons v. Ogden*,[713] where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,[714] a case closely paralleling *Gibbons v. Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."[715]

The Radio Act of 1927[716] whereby "all forms of interstate and foreign radio transmissions within the United States, its Territo-

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[712] United States v. Carolene Products Co., 304 U.S. 144, 147–148 (1938).

[713] 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

[714] 96 U.S. 1 (1878). *See also* Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).

[715] 96 U.S. at 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873).

[716] Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*.

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ries and possessions" were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[717]

Congressional Regulation of Waterways

Navigation.—In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[718] the Court granted an injunction requiring that a bridge erected over the Ohio River under a charter from the State of Virginia either be altered so as to admit of free navigation of the river or else be entirely abated. The decision was justified on the basis both of the Commerce Clause and of a compact between Virginia and Kentucky, under which both these states had agreed to keep the Ohio River "free and common to the citizens of the United States." The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be "a lawful structure" and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it.[719] This act the Court sustained as within Congress's power under the Commerce Clause, saying: "So far . . . as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law. . . . [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government."[720] In short, it is Congress, and not the Court, which is authorized by the Constitution to regulate commerce.[721]

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[717] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice Hughes speaking for the Court in Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933). *See also* Fisher's Blend Station v. Tax Comm'n, 297 U.S. 650, 654–55 (1936).

[718] 54 U.S. (13 How.) 518 (1852).

[719] Ch. 111, § 6, 10 Stat 112 (1852).

[720] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440 (1946).

[721] *But see In re* Debs, 158 U.S. 564 (1895), in which the Court held that in the absence of legislative authorization the Executive had power to seek and federal courts to grant injunctive relief to remove obstructions to interstate commerce and the free flow of the mail.

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The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court's opinion in *Gilman v. Philadelphia*.[722] "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."[723]

Thus, Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds.[724] Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress's powers over commerce, and the same is true of the property of riparian owners that is damaged.[725] And while it was formerly held that lands adjoining nonnavigable streams were not subject to

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[722] 70 U.S. (3 Wall.) 713 (1866).

[723] 70 U.S. at 724–25.

[724] Union Bridge Co. v. United States, 204 U.S. 364 (1907). *See also* Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910); Wisconsin v. Illinois, 278 U.S. 367 (1929). The United States may seek injunctive or declaratory relief requiring the removal of obstructions to commerce by those negligently responsible for them or it may itself remove the obstructions and proceed against the responsible party for costs. United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967). Congress's power in this area is newly demonstrated by legislation aimed at pollution and environmental degradation. In confirming the title of the states to certain waters under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301 *et seq*., Congress was careful to retain authority over the waters for purposes of commerce, navigation, and the like. United States v. Rands, 389 U.S. 121, 127 (1967).

[725] Gibson v. United States, 166 U.S. 269 (1897). *See also* Bridge Co. v. United States, 105 U.S. 470 (1882); United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); Seattle v. Oregon & W.R.R., 255 U.S. 56, 63 (1921); Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. River Rouge Co., 269 U.S. 411, 419 (1926); Ford & Son v. Little Falls Co., 280 U.S. 369 (1930); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

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the above mentioned servitude,[726] this rule has been impaired by recent decisions;[727] and at any rate it would not apply as to a stream rendered navigable by improvements.[728]

In exercising its power to foster and protect navigation, Congress legislates primarily on things external to the act of navigation. But that act itself and the instruments by which it is accomplished are also subject to Congress's power if and when they enter into or form a part of "commerce among the several States." When does this happen? Words quoted above from the Court's opinion in the *Gilman* case answered this question to some extent; but the decisive answer to it was returned five years later in the case of *The Daniel Ball*.[729] Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the "bays, lakes, rivers, or other navigable waters of the United States," applied to the case of a vessel that navigated only the waters of the Grand River, a stream lying entirely in the State of Michigan. The Court ruled: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; . . . So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[730]

Counsel had suggested that if the vessel was in commerce because it was part of a stream of commerce then all transportation within a State was commerce. Turning to this point, the Court added: "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in

[726] United States v. Cress, 243 U.S. 316 (1917).

[727] United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, 597 (1941); United States v. Willow River Power Co., 324 U.S. 499 (1945).

[728] United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

[729] 77 U.S. (10 Wall.) 557 (1871).

[730] 77 U.S. at 565.

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commerce between the States, when the agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."[731] In short, it was admitted, inferentially, that the principle of the decision would apply to land transportation, but the actual demonstration of the fact still awaited some years.[732]

Hydroelectric Power; Flood Control.—As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power and the ancillary right to sell it to all takers. By a long-standing doctrine of constitutional law, the states possess dominion over the beds of all navigable streams within their borders,[733] but because of the servitude that Congress's power to regulate commerce imposes upon such streams, the states, without the assent of Congress, practically are unable to use their prerogative for power-development purposes. Sensing no doubt that controlling power to this end must be attributed to some government in the United States and that "in such matters there can

[731] 77 U.S. at 566. "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway." Justice Brewer for the Court in Monongahela Navigation Co. v. United States, 148 U.S. 312, 342 (1893).

[732] Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates, N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913), and to authorize the Commission to govern the towing of vessels between points in the same state but partly through waters of an adjoining state. Cornell Steamboat Co. v. United States, 321 U.S. 634 (1944). Congress's power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly "unreasonable practices" by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. California v. United States, 320 U.S. 577 (1944). The same power also comprises regulation of the registry enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. *See The Lottawanna*, 88 U.S. (21 Wall.) 558, 577 (1875); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 589 (1883); *The Hamilton*, 207 U.S. 398 (1907); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

[733] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894).

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be no divided empire,"[734] the Court held in *United States v. Chandler-Dunbar Co.*,[735] that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. "If the primary purpose is legitimate," it said, "we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments."[736]

Since the *Chandler-Dunbar* case, the Court has come, in effect, to hold that it will sustain any act of Congress that purports to be for the improvement of navigation whatever other purposes it may also embody, nor does the stream involved have to be one "navigable in its natural state." Such, at least, seems to be the sum of its holdings in *Arizona v. California*,[737] and *United States v. Appalachian Power Co.*[738] In the former, the Court, speaking through Justice Brandeis, said that it was not free to inquire into the motives "which induced members of Congress to enact the Boulder Canyon Project Act," adding: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation . . . the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. . . . And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power."[739]

And, in the *Appalachian Power* case, the Court, abandoning previous holdings laying down the doctrine that to be subject to Congress's power to regulate commerce a stream must be "navigable in fact," said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken," provided there must be a "balance between cost and need at a time when the improvement would be useful. . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to

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[734] Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U.S. 58, 80 (1898).

[735] 229 U.S. 53 (1913).

[736] 229 U.S. at 73, citing Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891).

[737] 283 U.S. 423 (1931).

[738] 311 U.S. 377 (1940).

[739] 283 U.S. at 455–56. *See also* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

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be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. . . . Nor is it necessary for navigability that the use should be continuous. . . . Even absence of use over long periods of years, because of changed conditions, . . . does not affect the navigability of rivers in the constitutional sense."[740]

Furthermore, the Court defined the purposes for which Congress may regulate navigation in the broadest terms. "It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . That authority is as broad as the needs of commerce. . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."[741] These views the Court has since reiterated.[742] Nor is it by virtue of Congress's power over navigation alone that the National Government may develop water power. Its war powers and powers of expenditure in furtherance of the common defense and the general welfare supplement its powers over commerce in this respect.[743]

Congressional Regulation of Land Transportation

Federal Stimulation of Land Transportation.—The settlement of the interior of the country led Congress to seek to facilitate access by first encouraging the construction of highways. In successive acts, it authorized construction of the Cumberland and the National Road from the Potomac across the Alleghenies to the Ohio, reserving certain public lands and revenues from land sales for construction of public roads to new states granted statehood.[744] Acquisition and settlement of California stimulated interest in railway lines to the west, but it was not until the Civil War that Congress voted aid in the construction of a line from the Missouri River to the Pacific; four years later, it chartered the Union Pacific Company.[745]

The litigation growing out of these and subsequent activities settled several propositions. First, Congress may provide highways and railways for interstate transportation;[746] second, it may charter private corporations for that purpose; third, it may vest such corpora-

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[740] 311 U.S. at 407, 409–10.

[741] 311 U.S. at 426.

[742] Oklahoma v. Atkinson Co., 313 U.S. 508, 523–33 (1941).

[743] Ashwander v. TVA, 297 U.S. 288 (1936).

[744] *Cf.* Indiana v. United States, 148 U.S. 148 (1893).

[745] 12 Stat. 489 (1862); 13 Stat. 356 (1864); 14 Stat. 79 (1866).

[746] The result then as well as now might have followed from Congress's power of spending, independently of the Commerce Clause, as well as from its war and postal powers, which were also invoked by the Court in this connection.

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tions with the power of eminent domain in the states; and fourth, it may exempt their franchises from state taxation.[747]

Federal Regulation of Land Transportation.—Congressional regulation of railroads may be said to have begun in 1866. By the Garfield Act, Congress authorized all railroad companies operating by steam to interconnect with each other "so as to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination."[748] An act of the same year provided federal chartering and protection from conflicting state regulations to companies formed to construct and operate telegraph lines.[749] Another act regulated the transportation by railroad of livestock so as to preserve the health and safety of the animals.[750]

Congress's entry into the rate regulation field was preceded by state attempts to curb the abuses of the rail lines in the Middle West, which culminated in the "Granger Movement." Because the businesses were locally owned, the Court at first upheld state laws as not constituting a burden on interstate commerce;[751] but after the various business panics of the 1870s and 1880s drove numerous small companies into bankruptcy and led to consolidation, there emerged great interstate systems. Thus in 1886, the Court held that a state may not set charges for carriage even within its own boundaries of goods brought from without the state or destined to points outside it; that power was exclusively with Congress.[752] In the following year, Congress passed the original Interstate Commerce Act.[753] A Commission was authorized to pass upon the "reasonableness" of all rates by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all charges found to be "unreasonable." In *ICC v. Brimson*,[754] the Court upheld

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[747] Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579 (1870); California v. Pacific R.R. Co. (Pacific Ry. Cases), 127 U.S. 1 (1888); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

[748] 14 Stat. 66 (1866).

[749] 14 Stat. 221 (1866).

[750] 17 Stat. 353 (1873).

[751] Munn v. Illinois, 94 U.S. 113 (1877); Chicago B. & Q. R. Co. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Pickard v. Pullman Southern Car Co., 117 U.S. 34 (1886).

[752] Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886). A variety of state regulations have been struck down on the burdening-of-commerce rationale. *E.g.*, Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945) (train length); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926) (locomotive accessories); Pennsylvania R.R. v. Public Service Comm'n, 250 U.S. 566 (1919). But the Court has largely exempted regulations with a safety purpose, even a questionable one. Brotherhood of Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968).

[753] 24 Stat. 379 (1887).

[754] 154 U.S. 447, 470 (1894).

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the Act as "necessary and proper" for the enforcement of the Commerce Clause and also sustained the Commission's power to go to court to secure compliance with its orders. Later decisions circumscribed somewhat the ICC's power.[755]

Expansion of the Commission's authority came in the Hepburn Act of 1906[756] and the Mann-Elkins Act of 1910.[757] By the former, the Commission was explicitly empowered, after a full hearing on a complaint, "to determine and prescribe just and reasonable" maximum rates; by the latter, it was authorized to set rates on its own initiative and empowered to suspend any increase in rates by a carrier until it reviewed the change. At the same time, the Commission's jurisdiction was extended to telegraphs, telephones, and cables.[758] By the Motor Carrier Act of 1935,[759] the ICC was authorized to regulate the transportation of persons and property by motor vehicle common carriers.

The modern powers of the Commission were largely defined by the Transportation Acts of 1920[760] and 1940.[761] The jurisdiction of the Commission covers not only the characteristics of the rail, motor, and water carriers in commerce among the states but also the issuance of securities by them and all consolidations of existing companies or lines.[762] Further, the Commission was charged with regulating so as to foster and promote the meeting of the transportation needs of the country. Thus, from a regulatory exercise originally begun as a method of restraint there has emerged a policy of encouraging a consistent national transportation policy.[763]

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[755] ICC v. Alabama Midland Ry., 168 U.S. 144 (1897); Cincinnati, N.O. & Texas Pacific Ry. v. ICC, 162 U.S. 184 (1896).

[756] 34 Stat. 584.

[757] 36 Stat. 539.

[758] These regulatory powers are now vested, of course, in the Federal Communications Commission.

[759] 49 Stat. 543 (1935).

[760] 41 Stat. 474.

[761] 54 Stat. 898, U.S.C. §§ 1 *et seq*. The two acts were "intended . . . to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers." United States v. Pennsylvania R.R., 323 U.S. 612, 618–19 (1945). The ICC's powers include authority to determine the reasonableness of a joint through international rate covering transportation in the United States and abroad and to order the domestic carriers to pay reparations in the amount by which the rate is unreasonable. Canada Packers v. Atchison, T. & S. F. Ry., 385 U.S. 182 (1966), and cases cited.

[762] Disputes between the ICC and other government agencies over mergers have occupied a good deal of the Court's time. *Cf.* United States v. ICC, 396 U.S. 491 (1970). *See also* County of Marin v. United States, 356 U.S. 412 (1958); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968).

[763] Among the various provisions of the Interstate Commerce Act which have been upheld are: a section penalizing shippers for obtaining transportation at less than published rates, Armour Packing Co. v. United States, 209 U.S. 56 (1908); a

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Federal Regulation of Intrastate Rates (The Shreveport Doctrine).—Although its statutory jurisdiction did not apply to intrastate rate systems, the Commission early asserted the right to pass on rates, which, though in effect on intrastate lines, gave these lines competitive advantages over interstate lines the rates of which the Commission had set. This power the Supreme Court upheld in a case involving a line operating wholly intrastate in Texas but which paralleled within Texas an interstate line operating between Louisiana and Texas; the Texas rate body had fixed the rates of the intrastate line substantially lower than the rate fixed by the ICC on the interstate line. "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the States and not the Nation, would be supreme in the national field." [764]

The same holding was applied in a subsequent case in which the Court upheld the Commission's action in annulling intrastate passenger rates it found to be unduly low in comparison with the rates the Commission had established for interstate travel, thus tending to thwart, in deference to a local interest, the general purpose of the act to maintain an efficient transportation service for the benefit of the country at large.[765]

Federal Protection of Labor in Interstate Rail Transportation.—Federal entry into the field of protective labor legislation and the protection of organization efforts of workers began in connection with the railroads. The Safety Appliance Act of 1893,[766] applying only to cars and locomotives engaged in moving interstate

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section construed as prohibiting the hauling of commodities in which the carrier had at the time of haul a proprietary interest, United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); a section abrogating life passes, Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911); a section authorizing the ICC to regulate the entire bookkeeping system of interstate carriers, including intrastate accounts, ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); a clause affecting the charging of rates different for long and short hauls. *Intermountain Rate Cases*, 234 U.S. 476 (1914).

[764] Houston & Texas Ry. v. United States, 234 U.S. 342, 351–352 (1914). *See also*, American Express Co. v. Caldwell, 244 U.S. 617 (1917); Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936); Weiss v. United States, 308 U.S. 321 (1939); Bethlehem Steel Co. v. State Board, 330 U.S. 767 (1947); United States v. Walsh, 331 U.S. 432 (1947).

[765] Wisconsin R.R. Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563 (1922). *Cf.* Colorado v. United States, 271 U.S. 153 (1926), upholding an ICC order directing abandonment of an intrastate branch of an interstate railroad. *But see* North Carolina v. United States, 325 U.S. 507 (1945), setting aside an ICC disallowance of intrastate rates set by a state commission as unsupported by the evidence and findings.

[766] 27 Stat. 531, 45 U.S.C. §§ 1–7.

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traffic, was amended in 1903 so as to embrace much of the intrastate rail systems on which there was any connection with interstate commerce.[767] The Court sustained this extension in language much like that it would use in the *Shreveport* case three years later.[768] These laws were followed by the Hours of Service Act of 1907,[769] which prescribed maximum hours of employment for rail workers in interstate or foreign commerce. The Court sustained the regulation as a reasonable means of protecting workers and the public from the hazards which could develop from long, tiring hours of labor.[770]

Most far-reaching of these regulatory measures were the Federal Employers Liability Acts of 1906[771] and 1908.[772] These laws were intended to modify the common-law rules with regard to the liability of employers for injuries suffered by their employees in the course of their employment and under which employers were generally not liable. Rejecting the argument that regulation of such relationships between employers and employees was a reserved state power, the Court adopted the argument of the United States that Congress was empowered to do anything it might deem appropriate to save interstate commerce from interruption or burdening. Inasmuch as the labor of employees was necessary for the function of commerce, Congress could certainly act to ameliorate conditions that made labor less efficient, less economical, and less reliable. Assurance of compensation for injuries growing out of negligence in the course of employment was such a permissible regulation.[773]

Legislation and litigation dealing with the organizational rights of rail employees are dealt with elsewhere.[774]

Regulation of Other Agents of Carriage and Communications.—In 1914, the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipelines from one State to

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[767] 32 Stat. 943, 45 U.S.C. §§ 8–10.

[768] Southern Ry. v. United States, 222 U.S. 20 (1911). *See also* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916); United States v. California, 297 U.S. 175 (1936); United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959).

[769] 34 Stat. 1415, 45 U.S.C. §§ 61–64.

[770] Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911).

[771] 34 Stat. 232, held unconstitutional in part in the *Employers' Liability Cases*, 207 U.S. 463 (1908).

[772] 35 Stat. 65, 45 U.S.C. §§ 51–60.

[773] The *Second Employers' Liability Cases*, 223 U.S. 1 (1912). For a longer period, a Court majority reviewed a surprising large number of FELA cases, almost uniformly expanding the scope of recovery under the statute. *Cf.* Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957). This practice was criticized both within and without the Court, *cf.* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Hart, *Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 96–98 (1959), and has been discontinued.

[774] *See* discussion under Railroad Retirement Act and National Labor Relations Act, *infra*.

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another and held that this power applied to the transportation even though the oil or gas was the property of the lines.[775] Subsequently, the Court struck down state regulation of rates of electric current generated within that state and sold to a distributor in another State as a burden on interstate commerce.[776] Proceeding on the assumption that the ruling meant the Federal Government had the power, Congress in the Federal Power Act of 1935 conferred on the Federal Power Commission authority to regulate the wholesale distribution of electricity in interstate commerce[777] and three years later vested the FPC with like authority over natural gas moving in interstate commerce.[778] Thereafter, the Court sustained the power of the Commission to set the prices at which gas originating in one state and transported into another should be sold to distributors wholesale in the latter state.[779] "The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress . . . . The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."[780]

Other acts regulating commerce and communication originating in this period have evoked no basic constitutional challenge. These include the Federal Communications Act of 1934, providing for the regulation of interstate and foreign communication by wire and ra-

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[775] The *Pipe Line Cases*, 234 U.S. 548 (1914). *See also* State Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921); United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Missouri ex rel. Barrett v. Kansas Gas Co., 265 U.S. 298 (1924).

[776] Public Utilities Comm'n v. Attleboro Co., 273 U.S. 83 (1927). *See also* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Pennsylvania Power Co. v. FPC, 343 U.S. 414 (1952).

[777] 49 Stat. 863, 16 U.S.C. §§ 791a–825u.

[778] 52 Stat. 821, 15 U.S.C. §§ 717–717w.

[779] FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

[780] 315 U.S. at 582. Sales to distributors by a wholesaler of natural gas delivered to it from out-of-state sources are subject to FPC jurisdiction. Colorado-Wyoming Co. v. FPC, 324 U.S. 626 (1945). *See also* Illinois Gas Co. v. Public Service Co., 314 U.S. 498 (1942); FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). In Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the Court ruled that an independent company engaged in one state in production, gathering, and processing of natural gas, which it thereafter sells in the same state to pipelines that transport and sell the gas in other states is subject to FPC jurisdiction. *See also* California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

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dio,[781] and the Civil Aeronautics Act of 1938, providing for the regulation of all phases of airborne commerce, foreign and interstate.[782]

Congressional Regulation of Commerce as Traffic

The Sherman Act: Sugar Trust Case.—Congress's chief effort to regulate commerce in the primary sense of "traffic" is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations" to be "illegal," while the second section makes it a misdemeanor for anybody to "monopolize or attempt to monopolize any part of such commerce."[783] The act was passed to curb the growing tendency to form industrial combinations, and the first case to reach the Court under it was the famous *Sugar Trust Case, United States v. E. C. Knight Co.*[784] Here the government asked for the cancellation of certain agreements, whereby the American Sugar Refining Company, had "acquired," it was conceded, "nearly complete control of the manufacture of refined sugar in the United States."

The question of the validity of the Act was not expressly discussed by the Court but was subordinated to that of its proper construction. The Court, in pursuance of doctrines of constitutional law then dominant with it, turned the Act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller's opinion for the Court sets forth the conception of the federal system that controlled the decision: "It is vital that the independence of the commercial power and of the police power, and the delimination between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more

[781] 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*. *Cf.* United States v. Southwestern Cable Co., 392 U.S. 157 (1968), on the regulation of community antenna television systems (CATV).

[782] 52 Stat. 973, as amended. The CAB has now been abolished and its functions are exercised by the Federal Aviation Administration, 49 U.S.C. § 106, as part of the Department of Transportation.

[783] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.

[784] 156 U.S. 1 (1895).

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serious consequences by resort to expedients of even doubtful constitutionality." [785]

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and, in a series of propositions, it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the states; (2) commerce among the states does not begin until goods "commence their final movement from their State of origin to that of their destination;" (3) the sale of a product is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[786] Applying this reasoning to the case before it, the Court proceeded: "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function."

"Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." [787]

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[785] 156 U.S. at 13.

[786] 156 U.S. at 13–16.

[787] 156 U.S. at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice Harlan undertook to refute in his notable dissenting opinion. "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations." 156 U.S. at 22. "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and

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Sherman Act Revived.—Four years later came *Addyston Pipe and Steel Co. v. United States*,[788] in which the Antitrust Act was successfully applied to an industrial combination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when *Swift & Co. v. United States*[789] was decided.

The "Current of Commerce" Concept: The Swift Case.—Defendants in *Swift* were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other states. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.[790]

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selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. McCulloch v. Maryland, 4 Wheat. 316, 405." 156 U.S. at 33.

[788] 175 U.S. 211 (1899).

[789] 196 U.S. 375 (1905). The Sherman Act was applied to break up combinations of interstate carriers in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898); and Northern Securities Co. v. United States, 193 U.S. 197 (1904).

In Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229–39 (1948), Justice Rutledge, for the Court, critically reviewed the jurisprudence of the limitations on the Act and the deconstruction of the judicial constraints. In recent years, the Court's decisions have permitted the reach of the Sherman Act to expand along with the expanding notions of congressional power. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). The Court, however, does insist that plaintiffs alleging that an intrastate activity violates the Act prove the relationship to interstate commerce set forth in the Act. *Gulf Oil Corp*, 419 U.S. at 194–99.

[790] Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

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Referring to the purchase of livestock at the stockyards, the Court, speaking by Justice Holmes, said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce." [791] Likewise the sales alleged of fresh meat at the slaughtering places fell within the general design. Even if they imported a technical passing of title at the slaughtering places, they also imported that the sales were to persons in other states, and that shipments to such states were part of the transaction.[792] Thus, sales of the type that in the *Sugar Trust* case were thrust to one side as immaterial from the point of view of the law, because they enabled the manufacturer "to fulfill its function," were here treated as merged in an interstate commerce stream.

Thus, the concept of commerce as *trade*, that is, as *traffic*, again entered the constitutional law picture, with the result that conditions directly affecting interstate trade could not be dismissed on the ground that they affected interstate commerce, in the sense of interstate *transportation*, only "indirectly." Lastly, the Court added these significant words: "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." [793] That is to say, the line that confines state power from one side does not always confine national power from the other. Even though the line accurately divides the subject matter of the complementary spheres, national power is always entitled to take on the additional extension that is requisite to guarantee its effective exercise and is furthermore supreme.

The Danbury Hatters Case.—In this respect, the *Swift* case only states what the *Shreveport* case was later to declare more explicitly, and the same may be said of an ensuing series of cases in which combinations of employees engaged in such intrastate activities as manufacturing, mining, building, construction, and the distribution of poultry were subjected to the penalties of the Sherman

[791] 196 U.S. at 398–99.
[792] 196 U.S. at 399–401.
[793] 196 U.S. at 400.

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Act because of the effect or intended effect of their activities on interstate commerce.[794]

Stockyards and Grain Futures Acts.—In 1921, Congress passed the Packers and Stockyards Act,[795] whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision, and in the year following it passed the Grain Futures Act,[796] whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court sustaining these measures both built directly upon the *Swift* case.

In *Stafford v. Wallace*,[797] which involved the former act, Chief Justice Taft, speaking for the Court, said: "The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market."[798] The stockyards, therefore, were "not a place of rest or final destination." They were "but a throat through which the current flows," and the sales there were not "merely local transactions. . . . [T]hey do not stop the flow . . . but, on the contrary, [are] indispensable to its continuity."[799]

In *Chicago Board of Trade v. Olsen*,[800] involving the Grain Futures Act, the same course of reasoning was repeated. Speaking of *Swift*, Chief Justice Taft remarked: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement,

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[794] Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S. 293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Green, 350 U.S. 415 (1956); Callanan v. United States, 364 U.S. 587 (1961).

[795] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[796] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a–17.

[797] 258 U.S. 495 (1922).

[798] 258 U.S. at 514.

[799] 258 U.S. at 515–16. *See also* Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Minnesota v. Blasius, 290 U.S. 1 (1933).

[800] 262 U.S. 1 (1923).

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which taken alone are intrastate, to characterize the movement as such."[801]

Of special significance, however, is the part of the opinion devoted to showing the relation between future sales and cash sales, and hence the effect of the former upon the interstate grain trade. The test, said the Chief Justice, was furnished by the question of price. "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."[802] Thus, a practice that demonstrably affects prices would also affect interstate trade "directly," and so, even though local in itself, would fall within the regulatory power of Congress. In the following passage, indeed, Chief Justice Taft whittled down, in both cases, the "direct-indirect" formula to the vanishing point: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."[803]

It was in reliance on the doctrine of these cases that Congress first set to work to combat the Depression in 1933 and the years immediately following. But, in fact, much of its legislation at this time marked a wide advance upon the measures just passed in review. They did not stop with regulating traffic among the states and the instrumentalities thereof; they also attempted to govern production and industrial relations in the field of production. Confronted with this expansive exercise of Congress's power, the Court again deemed itself called upon to define a limit to the commerce power that would save to the states their historical sphere, and especially their customary monopoly of legislative power in relation to industry and labor management.

Securities and Exchange Commission.—Not all antidepression legislation, however, was of this new approach. The Securities Exchange Act of 1934[804] and the Public Utility Company Act ("Wheeler-Rayburn Act") of 1935[805] were not. The former created the Securities and Exchange Commission and authorized it to lay down regulations designed to keep dealing in securities honest and

[801] 262 U.S. at 35.
[802] 262 U.S. at 40.
[803] 262 U.S. at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).
[804] 48 Stat. 881, 15 U.S.C. §§ 77b *et seq*.
[805] 49 Stat. 803, 15 U.S.C. §§ 79–79z–6.

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aboveboard and closed the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter required the companies governed by it to register with the Securities and Exchange Commission and to inform it concerning their business, organization, and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while, by § 11, the so-called "death sentence" clause, the same act closed the channels of interstate communication after a certain date to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,[806] with the Court relying principally on *Gibbons v. Ogden*.

Congressional Regulation of Production and Industrial Relations: Antidepression Legislation

In the words of Chief Justice Hughes, spoken in a case decided a few days after President Franklin D. Roosevelt's first inauguration, the problem then confronting the new Administration was clearly set forth. "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[807]

National Industrial Recovery Act.—The initial effort of Congress to deal with this situation was embodied in the National Industrial Recovery Act of June 16, 1933.[808] The opening section of the Act asserted the existence of "a national emergency productive of widespread unemployment and disorganization of industry which" burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To affect the removal of these conditions the President was authorized, upon the application of industrial or trade groups, to approve "codes of fair competition," or to prescribe the same in cases where such applications were not duly forthcoming. Among other things such codes, of which eventually more than 700 were promulgated, were required to lay down rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining. For the time being, business and industry were to be cartelized on a national scale.

In *A. L. A. Schechter Poultry Corp. v. United States*,[809] one of these codes, the Live Poultry Code, was pronounced unconstitu-

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[806] Electric Bond Co. v. SEC, 303 U.S. 419 (1938); North American Co. v. SEC, 327 U.S. 686 (1946); American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[807] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

[808] 48 Stat. 195.

[809] 295 U.S. 495 (1935).

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tional. Although it was conceded that practically all poultry handled by the Schechters came from outside the State, and hence via interstate commerce, the Court held, nevertheless, that once the chickens came to rest in the Schechter's wholesale market, interstate commerce in them ceased. The act, however, also purported to govern business activities which "affected" interstate commerce. This, Chief Justice Hughes held, must be taken to mean "directly" affect such commerce: "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[810] In short, the case was governed by the ideology of the *Sugar Trust* case, which was not mentioned in the Court's opinion.[811]

Agricultural Adjustment Act.—Congress's second attempt to combat the Depression was the Agricultural Adjustment Act of 1933.[812] As is pointed out elsewhere, the measure was set aside as an attempt to regulate production, a subject held to be "prohibited" to the United States by the Tenth Amendment.[813]

Bituminous Coal Conservation Act.—The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935.[814] The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold "locally," and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act deal-

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[810] 295 U.S. at 548. *See also* id. at 546.

[811] In United States v. Sullivan, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetic Act of 1938 as applying to the sale by a retailer of drugs purchased from his wholesaler within the State nine months after their interstate shipment had been completed. The Court, speaking by Justice Black, cited United States v. Walsh, 331 U.S. 432 (1947); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941). Justice Frankfurter dissented on the basis of FTC v. Bunte Bros., 312 U.S. 349 (1941). It is apparent that the *Schechter* case has been thoroughly repudiated so far as the distinction between "direct" and "indirect" effects is concerned. *Cf.* Perez v. United States, 402 U.S. 146 (1971). *See also* McDermott v. Wisconsin, 228 U.S. 115 (1913), which preceded *Schechter* by more than two decades.

The NIRA, however, was found to have several other constitutional infirmities besides its disregard, as illustrated by the Live Poultry Code, of the "fundamental" distinction between "direct" and "indirect" effects, namely, the delegation of standardless legislative power, the absence of any administrative procedural safeguards, the absence of judicial review, and the dominant role played by private groups in the general scheme of regulation.

[812] 48 Stat. 31.

[813] United States v. Butler, 297 U.S. 1, 63–64, 68 (1936).

[814] 49 Stat. 991.

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ing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other, but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland, held that the act constituted one connected scheme of regulation, which, because it invaded the reserved powers of the states over conditions of employment in productive industry, violated the Constitution.[815] Justice Sutherland's opinion set out from Chief Justice Hughes' assertion in the *Schechter* case of the "fundamental" character of the distinction between "direct" and "indirect" effects, that is to say, from the doctrine of the *Sugar Trust* case. It then proceeded: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."[816]

Railroad Retirement Act.—Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,[817] ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In *Railroad Retirement Bd. v. Alton R.R.*,[818] however, a closely divided Court held this legislation to be in excess of Congress's power to regulate commerce and contrary to the Due Process Clause of the Fifth Amendment. Justice Roberts wrote for the majority: "We feel bound to hold that a pension plan thus

[815] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[816] 298 U.S. at 308–09.
[817] 48 Stat. 1283.
[818] 295 U.S. 330 (1935).

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imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation."[819]

Chief Justice Hughes, speaking for the dissenters, contended, on the contrary, that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service." He added: "The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable."[820] Under subsequent legislation, an excise is levied on interstate carriers and their employees, while by separate but parallel legislation a fund is created in the Treasury out of which pensions are paid along the lines of the original plan. The constitutionality of this scheme appears to be taken for granted in *Railroad Retirement Board v. Duquesne Warehouse Co.*[821]

National Labor Relations Act.—The case in which the Court reduced the distinction between "direct" and "indirect" effects to the vanishing point and thereby placed Congress in the position to regulate productive industry and labor relations in these industries was *NLRB v. Jones & Laughlin Steel Corporation*.[822] Here the statute

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[819] 295 U.S. at 374.

[820] 295 U.S. at 379, 384.

[821] 326 U.S. 446 (1946). Indeed, in a case decided in June 1948, Justice Rutledge, speaking for a majority of the Court, listed the *Alton* case as one "foredoomed to reversal," though the formal reversal has never taken place. *See* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 230 (1948). *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[822] 301 U.S. 1 (1937). A major political event had intervened between this decision and those described in the preceding pages. President Roosevelt, angered at the Court's invalidation of much of his depression program, proposed a "reorganization" of the Court by which he would have been enabled to name one new Justice for each Justice on the Court who was more than 70 years old, in the name of "judicial efficiency." The plan was defeated in the Senate, in part, perhaps, because in such cases as *Jones & Laughlin* a Court majority began to demonstrate sufficient

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involved was the National Labor Relations Act of 1935,[823] which declared the right of workers to organize, forbade unlawful employer interference with this right, established procedures by which workers could choose exclusive bargaining representatives with which employers were required to bargain, and created a board to oversee all these processes.[824]

The Court, speaking through Chief Justice Hughes, upheld the Act and found the corporation to be subject to the Act. "The close and intimate effect," he said, "which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." Nor will it do to say that such effect is "indirect." Considering defendant's "far-flung activities," the effect of strife between it and its employees "would be immediate and [it] might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be main-

"judicial efficiency." *See* Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 SUP. CT. REV. 347 (P. Kurland ed.); Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L. J. 791 (1952); 2 M. PUSEY, CHARLES EVANS HUGHES 759–765 (1951).

[823] 49 Stat. 449, as amended, 29 U.S.C. §§ 151 *et seq*.

[824] The NLRA was enacted against the backdrop of depression, although obviously it went far beyond being a mere antidepression measure, and Congress could find precedent in railway labor legislation. In 1898, Congress passed the Erdman Act, 30 Stat. 424, which attempted to influence the unionization of railroad workers and facilitate negotiations with employers through mediation. The statute fell largely into disuse because the railroads refused to mediate. Additionally, in Adair v. United States, 208 U.S. 161 (1908), the Court struck down a section of the law outlawing "yellow-dog contracts," by which employers exacted promises of workers to quit or not to join unions as a condition of employment. The Court held the section not to be a regulation of commerce, there being no connection between an employee's membership in a union and the carrying on of interstate commerce. *Cf.* Coppage v. Kansas, 236 U.S. 1 (1915).

In Wilson v. New, 243 U.S. 332 (1917), the Court did uphold a congressional settlement of a threatened rail strike through the enactment of an eight-hour day and a time-and-a-half for overtime for all interstate railway employees. The national emergency confronting the Nation was cited by the Court, but with the implication that the power existed in more normal times, suggesting that Congress's powers were not as limited as some judicial decisions had indicated.

Congress's enactment of the Railway Labor Act in 1926, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 *et seq.*, was sustained by a Court decision admitting the connection between interstate commerce and union membership as a substantial one. Texas & N.L.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 (1930). A subsequent decision sustained the application of the Act to "back shop" employees of an interstate carrier who engaged in making heavy repairs on locomotives and cars withdrawn from service for long periods, the Court finding that the activities of these employees were related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

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tained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."[825]

While the Act was thus held to be within the constitutional powers of Congress in relation to a productive concern because the interruption of its business by strike "might be catastrophic," the decision was forthwith held to apply also to two minor concerns,[826] and in a later case the Court stated specifically that the smallness of the volume of commerce affected in any particular case is not a material consideration.[827] Subsequently, the act was declared to be applicable to a local retail auto dealer on the ground that he was an integral part of the manufacturer's national distribution system,[828] to a labor dispute arising during alteration of a county courthouse because one-half of the cost—$225,000—was attributable to materials shipped from out-of-state,[829] and to a dispute involving a retail distributor of fuel oil, all of whose sales were local, but who obtained the oil from a wholesaler who imported it from another state.[830]

Indeed, "[t]his Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[831] Thus, the Board has formulated jurisdictional standards which assume the requisite effect on interstate commerce from a prescribed dollar volume of business and these standards have been implicitly approved by the Court.[832]

Fair Labor Standards Act.—In 1938, Congress enacted the Fair Labor Standards Act. The measure prohibited not only the shipment in interstate commerce of goods manufactured by employees whose wages are less than the prescribed maximum but also the employment of workmen in the production of goods for such com-

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[825] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38, 41–42 (1937).

[826] NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[827] NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

[828] Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).

[829] Journeymen Plumbers' Union v. County of Door, 359 U.S. 354 (1959).

[830] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

[831] 371 U.S. at 226. *See also* Guss v. Utah Labor Bd., 353 U.S. 1, 3 (1957); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

[832] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224, 225 n.2 (1963); Liner v. Jafco, 375 U.S. 301, 303 n.2 (1964).

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merce at other than the prescribed wages and hours. Interstate commerce was defined by the act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

It was further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was employed . . . in any process or occupation directly essential to the production thereof in any State."[833] Sustaining an indictment under the act, a unanimous Court, speaking through Chief Justice Stone, said: "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows."[834] In support of the decision, the Court invoked Chief Justice Marshall's reading of the Necessary and Proper Clause in *McCulloch v. Maryland* and his reading of the Commerce Clause in *Gibbons v. Ogden*.[835] Objections purporting to be based on the Tenth Amendment were met from the same point of view: "Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers."[836]

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[833] 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase "in any process or occupation directly essential to the production thereof in any State" for the original phrase "in any process or occupation necessary to the production thereof in any State." In Mitchell v. H.B. Zachry Co., 362 U.S. 310, 317 (1960), the Court noted that the change "manifests the view of Congress that on occasion courts . . . had found activities to be covered, which . . . [Congress now] deemed too remote from commerce or too incidental to it." The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any "enterprise" engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. §§ 201 *et seq*. *See* 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

[834] United States v. Darby, 312 U.S. 100, 115 (1941).

[835] 312 U.S. at 113, 114, 118.

[836] 312 U.S. at 123–24.

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Subsequent decisions of the Court took a very broad view of which employees should be covered by the Act,[837] and in 1949 Congress to some degree narrowed the permissible range of coverage and disapproved some of the Court's decisions.[838] But, in 1961,[839] with extensions in 1966,[840] Congress itself expanded by several million persons the coverage of the Act, introducing the "enterprise" concept by which all employees in a business producing anything in commerce or affecting commerce were brought within the protection of the minimum wage-maximum hours standards.[841] The "enterprise concept" was sustained by the Court in *Maryland v. Wirtz*.[842] Justice Harlan for a unanimous Court on this issue found the extension entirely proper on the basis of two theories: one, a business' competitive position in commerce is determined in part by all its significant labor costs, and not just those costs attributable to its employees engaged in production in interstate commerce, and, two, labor peace and thus smooth functioning of interstate commerce was facilitated by the termination of substandard labor conditions affecting all employees and not just those actually engaged in interstate commerce.[843]

Agricultural Marketing Agreement Act.—After its initial frustrations, Congress returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937,[844] authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or . . . directly burdens, obstructs or affects interstate or foreign com-

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[837] *E.g.*, Kirschbaum v. Walling, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); Walton v. Southern Package Corp., 320 U.S. 540 (1944) (night watchman in a plant the substantial portion of the production of which was shipped in interstate commerce); Armour & Co. v. Wantock, 323 U.S. 126 (1944) (employees on stand-by auxiliary fire-fighting service of an employer engaged in interstate commerce); Borden Co. v. Borella, 325 U.S. 679 (1945) (maintenance employees in building housing company's central offices where management was located though the production of interstate commerce was elsewhere); Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946) (employees of a window-cleaning company the principal business of which was performed on windows of industrial plants producing goods for interstate commerce); Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[838] *Cf.* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 316–318 (1960).

[839] 75 Stat. 65.

[840] 80 Stat. 830.

[841] 29 U.S.C. §§ 203(r), 203(s).

[842] 392 U.S. 183 (1968).

[843] Another aspect of this case was overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), which itself was overruled in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985).

[844] 50 Stat. 246, 7 U.S.C. §§ 601 *et seq*.

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merce in such commodity or product thereof." In *United States v. Wrightwood Dairy Co.*,[845] the Court sustained an order of the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said: "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."[846]

In *Wickard v. Filburn*,[847] the Court sustained a still deeper penetration by Congress into the field of production. As amended by the act of 1941, the Agricultural Adjustment Act of 1938[848] regulated production even when not intended for commerce but wholly for consumption on the producer's farm. Sustaining this extension of the act, the Court pointed out that the effect of the statute was to support the market. "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The

[845] 315 U.S. 110 (1942). The Court had previously upheld other legislation that regulated agricultural production through limitations on sales in or affecting interstate commerce. Currin v. Wallace, 306 U.S. 1 (1939); Mulford v. Smith, 307 U.S. 38 (1939).

[846] 315 U.S. at 118–19.

[847] 317 U.S. 111 (1942).

[848] 52 Stat. 31, 7 U.S.C. §§ 612c, 1281–1282 *et seq*.

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stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."[849] And, it elsewhere stated "that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce. . . . The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible."[850]

Acts of Congress Prohibiting Commerce

Foreign Commerce: Jefferson's Embargo.—"Jefferson's Embargo" of 1807–1808, which cut all trade with Europe, was attacked on the ground that the power to regulate commerce was the power to preserve it, not the power to destroy it. This argument was rejected by Judge Davis of the United States District Court for Massachusetts in the following words: "A national sovereignty is created [by the Constitution]. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualification and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and control, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States;

[849] 317 U.S. at 128–29.

[850] 317 U.S. at 120, 123–24. In United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Justice Reed wrote for the majority of the Court: "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales." Id. at 568–69.

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and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate. . . . Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? . . . The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them. . . . [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range."

"Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. . . . Under the Confederation, . . . we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. . . . Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the Federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where."[851]

Foreign Commerce: Protective Tariffs.—Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress's revenue powers and under its power to regulate foreign commerce. For the Court in *Board*

[851] United States v. The William, 28 Fed. Cas. 614, 620–623 (No. 16,700) (D. Mass. 1808). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 191 (1824); United States v. Marigold, 50 U.S. (9 How.) 560 (1850).

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of Trustees v. United States,[852] in 1933, Chief Justice Hughes said: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. . . . It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. . . . It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons v. Ogden*, *supra*, p. 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter*, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, 1088."[853]

Foreign Commerce: Banned Articles.—The forerunners of more recent acts excluding objectionable commodities from interstate commerce are the laws forbidding the importation of like commodities from abroad. Congress has exercised this power since 1842, when it forbade the importation of obscene literature or pictures from abroad.[854] Six years, later it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[855] Such legislation guarding against the importation of noxiously adulterated foods, drugs, or liquor has been on the statute books ever since. In 1887, the importation by Chinese nationals of opium was prohibited,[856] and subsequent statutes passed in 1909 and 1914 made it unlawful for anyone to import it.[857] In 1897, Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared with a legal standard.[858] The Act was sustained in 1904, in *Buttfield v. Stranahan*.[859] In *"The Abby Dodge"* an act excluding sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida was sustained but

[852] 289 U.S. 48 (1933).
[853] 289 U.S. at 57, 58.
[854] Ch. 270, § 28, 5 Stat. 566.
[855] 9 Stat. 237 (1848).
[856] 24 Stat. 409.
[857] 35 Stat. 614; 38 Stat. 275.
[858] 29 Stat. 605.
[859] 192 U.S. 470 (1904).

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construed as not applying to sponges taken from the territorial water of a state.[860]

In *Weber v. Freed*,[861] the Court upheld an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial representation of prize fights. Chief Justice White grounded his opinion for a unanimous Court on the complete and total control over foreign commerce possessed by Congress, in contrast implicitly to its lesser power over interstate commerce.[862] And, in *Brolan v. United States*,[863] the Court rejected as wholly inappropriate citation of cases dealing with interstate commerce on the question of Congress's power to prohibit foreign commerce. It has been earlier noted, however, that the purported distinction is one that the Court both previously to and subsequent to these opinions has rejected.

Interstate Commerce: Power to Prohibit Questioned.—The question whether Congress's power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favor of congressional power is an event of first importance for the future of American federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade.[864] The debate was concluded ninety-nine years later by the decision in *United States v. Darby*,[865] which sustained the Fair Labor Standards Act.[866]

Interstate Commerce: National Prohibitions and State Police Power.—The earliest acts prohibiting commerce were in the nature of quarantine regulations and usually dealt solely with interstate transportation. In 1884, the exportation or shipment in interstate commerce of livestock having any infectious disease was

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[860] 223 U.S. 166 (1912); *cf.* United States v. California, 332 U.S. 19 (1947).

[861] 239 U.S. 325 (1915).

[862] 239 U.S. at 329.

[863] 236 U.S. 216 (1915).

[864] Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 488–89 (1841).

[865] 312 U.S. 100 (1941).

[866] The judicial history of the argument may be examined in the majority and dissenting opinions in Hammer v. Dagenhart, 247 U.S. 251 (1918), a five-to-four decision, in which the majority held Congress not to be empowered to ban from the channels of interstate commerce goods made with child labor, since Congress's power was to prescribe the rule by which commerce was to be carried on and not to prohibit it, except with regard to those things the character of which—diseased cattle, lottery tickets—was inherently evil. With the majority opinion, *compare* Justice Stone's unanimous opinion in United States v. Darby, 312 U.S. 100, 112–24 (1941), overruling Hammer v. Dagenhart. *See also* Corwin, *The Power of Congress to Prohibit Commerce*, 3 Selected Essays on Constitutional Law 103 (1938).

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forbidden.[867] In 1903, power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce.[868] In 1905, the same official was authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one state to another when the public necessity might demand it.[869] A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[870] In 1912, a similar exclusion of diseased nursery stock was decreed,[871] while by the same act and again by an act of 1917,[872] the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. Although the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,[873] this view has today been abandoned.

The Lottery Case.—The first case to come before the Court in which the issues discussed above were canvassed at all thoroughly was *Champion v. Ames*,[874] involving the act of 1895 "for the suppression of lotteries."[875] An earlier act excluding lottery tickets from the mails had been upheld in the case *In re Rapier*,[876] on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not put to bad use. But in the case of commerce, the facilities are not ordinarily furnished by the National Government, and the right to engage in foreign and interstate commerce comes from the Constitution itself or is anterior to it.

How difficult the Court found the question produced by the act of 1895, forbidding any person to bring within the United States or to cause to be "carried from one State to another" any lottery ticket, or an equivalent thereof, "for the purpose of disposing of the same," was shown by the fact that the case was argued three times before

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[867] 23 Stat. 31.
[868] 32 Stat. 791.
[869] 33 Stat. 1264.
[870] 33 Stat. 1269.
[871] 37 Stat. 315.
[872] 39 Stat. 1165.
[873] Illinois Central R.R. v. McKendree, 203 U.S. 514 (1906). *See also* United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870).
[874] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[875] 28 Stat. 963.
[876] 143 U.S. 110 (1892).

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the Court and the fact that the Court's decision finally sustaining the act was a five-to-four decision. The opinion of the Court, on the other hand, prepared by Justice Harlan, marked an almost unqualified triumph at the time for the view that Congress's power to regulate commerce among the States included the power to prohibit it, especially to supplement and support state legislation enacted under the police power. Early in the opinion, extensive quotation is made from Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[877] with special stress upon the definition there given of the phrase "to regulate." Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign State over commerce, . . . amounts to nothing more than a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in *Brown v. Houston*,[878] that "[t]he power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

Following the wake of the *Lottery Case*, Congress repeatedly brought its prohibitory powers over interstate commerce and communications to the support of certain local policies of the states in the exercise of their reserved powers, thereby aiding them in the repression of a variety of acts and deeds objectionable to public morality. The conception of the Federal System on which the Court based its validation of this legislation was stated by it in 1913 in sustaining the Mann "White Slave" Act in the following words: "Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material, and moral."[879] At the same time, the Court made it plain that in prohibiting commerce among the states, Congress was equally free to support state legislative policy or to devise a policy of its own. "Congress," it said, "may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its

[877] 22 U.S. (9 Wheat.) 1, 227 (1824).
[878] 114 U.S. 622, 630 (1885).
[879] Hoke v. United States, 227 U.S. 308, 322 (1913).

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purpose. The control of Congress over interstate commerce is not to be limited by State laws."[880]

In *Brooks v. United States*,[881] the Court sustained the National Motor Vehicle Theft Act[882] as a measure protective of owners of automobiles; that is, of interests in "the State of origin." The statute was designed to repress automobile motor thefts, notwithstanding that such thefts antedate the interstate transportation of the article stolen. Speaking for the Court, Chief Justice Taft, at the outset, stated the general proposition that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin." Noting "the radical change in transportation" brought about by the automobile, and the rise of "[e]laborately organized conspiracies for the theft of automobiles . . . and their sale or other disposition" in another jurisdiction from the owner's, the Court concluded that such activity "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." The fact that stolen vehicles were "harmless" and did not spread harm to persons in other states on this occasion was not deemed to present any obstacle to the exercise of the regulatory power of Congress.[883]

The Darby Case.—In sustaining the Fair Labor Standards Act[884] in 1941,[885] the Court expressly overruled *Hammer v. Dagenhart*.[886] "The distinction on which the [latter case] . . . was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the States of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . The conclusion is inescap-

[880] United States v. Hill, 248 U.S. 420, 425 (1919).
[881] 267 U.S. 432 (1925).
[882] 41 Stat. 324 (1919), 18 U.S.C., §§ 2311–2313.
[883] 267 U.S. at 436–39. *See also* Kentucky Whip & Collar Co. v. Ill. Cent. R.R., 299 U.S. 334 (1937).
[884] 29 U.S.C. §§ 201–219.
[885] United States v. Darby, 312 U.S. 100 (1941).
[886] 247 U.S. 251 (1918).

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able that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."[887]

The Commerce Clause as a Source of National Police Power

The Court has several times expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[888] It should follow, therefore, that Congress may achieve results unrelated to purely commercial aspects of commerce, and this result in fact has often been accomplished. Paralleling and contributing to this movement is the virtual disappearance of the distinction between interstate and intrastate commerce.

Is There an Intrastate Barrier to Congress's Commerce Power?.—Not only has there been legislative advancement and judicial acquiescence in Commerce Clause jurisprudence, but the melding of the Nation into one economic union has been more than a little responsible for the reach of Congress's power. "The volume of interstate commerce and the range of commonly accepted objects of government regulation have . . . expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power."[889]

Congress's commerce power has been characterized as having three, or sometimes four, interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a

[887] 312 U.S. at 116–17.

[888] *E.g.*, Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941). *See* Cushman, *The National Police Power Under the Commerce Clause*, 3 Selected Essays on Constitutional Law 62 (1938).

[889] New York v. United States, 505 U.S. 144, 158 (1992).

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substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[890]

An example of the first category, regulating to protect the channels and instrumentalities of interstate commerce, is *Pierce County v. Guillen*,[891] in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information."

Under the second category, which attaches to instrumentalities[892] and persons crossing of state lines, Congress has validly legislated to protect interstate travelers from harm, to prevent such travelers from being deterred in the exercise of interstate traveling, and to prevent them from being burdened. Many of the 1964 public accommodations law applications have been premised on the point that larger establishments do serve interstate travelers and that even small stores, restaurants, and the like may serve interstate travelers, and, therefore, it is permissible to regulate them to prevent or deter racial discrimination.[893]

Commerce regulation under this second category is not limited to persons who cross state lines but can also extend to an object that will or has crossed state lines, and the regulation of a purely intrastate activity may be premised on the presence of such object. Thus, the public accommodations law reached small establishments that served food and other items that had been purchased from interstate channels.[894] Congress has validly penalized convicted felons, who had no other connection to interstate commerce, for possession or receipt of firearms, which had been previously transported in interstate commerce independently of any activity by the two felons.[895]

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[890] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[891] 537 U.S. 129, 147 (2003).

[892] Examples of laws addressing instrumentalities of commerce include prohibitions on the destruction of an aircraft, 18 U.S.C. § 32, or on theft from interstate shipments. *Accord* Perez v. United States, 402 U.S. 146, 150 (1971).

[893] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[894] Katzenbach v. McClung, 379 U.S. 294, 298, 300–02 (1964); Daniel v. Paul, 395 U.S. 298, 305 (1969).

[895] Scarborough v. United States, 431 U.S. 563 (1977); Barrett v. United States, 423 U.S. 212 (1976). However, because such laws reach far into the traditional police powers of the states, the Court insists Congress clearly speak to its intent to cover such local activities. United States v. Bass, 404 U.S. 336 (1971). *See also* Rewis v. United States, 401 U.S. 808 (1971); United States v. Enmons, 410 U.S. 396 (1973). A similar tenet of construction has appeared in the Court's recent treatment of fed-

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This reach is not of recent origin. In *United States v. Sullivan*,[896] the Court sustained a conviction of misbranding under the Federal Food, Drug and Cosmetic Act. Sullivan, a Columbus, Georgia druggist, had bought a properly labeled 1000-tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of "the constitutional power of Congress under the Commerce Clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce."[897]

Under the third category, Congress's power reaches not only transactions or actions that occasion the crossing of state or national boundaries but extends as well to activities that, though local, "affect" commerce; this power derives from the Commerce Clause enhanced by the Necessary and Proper Clause. The seminal case, of course, is *Wickard v. Filburn*,[898] sustaining federal regulation of a crop of wheat grown on a farm and intended solely for home consumption. The premise was that if it were never marketed, it supplied a need otherwise to be satisfied only in the market, and that if prices rose it might be induced onto the market. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."[899] Coverage under federal labor and wage-and-hour laws after the 1930s showed the reality of this doctrine.[900]

In upholding federal regulation of strip mining, the Court demonstrated the breadth of the "affects" standard. One case dealt with statutory provisions designed to preserve "prime farmland." The trial court had determined that the amount of such land disturbed annu-

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eral prosecutions of state officers for official corruption under criminal laws of general applicability. *E.g.*, McDonnell v. United States, 579 U.S. ___, No. 15–474, slip op. at 24 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would "raise[] significant federalism concerns" by intruding on a state's "prerogative to regulate the permissible scope of interactions between state officials and their constituents."); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987). Congress has overturned the latter case. 102 Stat. 4508, § 7603, 18 U.S.C. § 1346.

[896] 332 U.S. 689 (1948).

[897] 332 U.S. at 698–99.

[898] 317 U.S. 111 (1942).

[899] Fry v. United States, 421 U.S. 542, 547 (1975).

[900] *See* Maryland v. Wirtz, 392 U.S. 183, 188–93 (1968).

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ally amounted to 0.006% of the total prime farmland acreage in the Nation and, thus, that the impact on commerce was "infinitesimal" or "trivial." Disagreeing, the Court said: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[901] Moreover, "[t]he pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."[902]

In a companion case, the Court reiterated that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause. As previously noted, the commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'"[903] Judicial review is narrow. Congress's determination of an "effect" must be deferred to if it is rational, and Congress must have acted reasonably in choosing the means.[904]

Fourth, a still more potent engine of regulation has been the expansion of the class-of-activities standard, which began in the "affecting" cases. In *Perez v. United States*,[905] the Court sustained the application of a federal "loan-sharking" law to a local culprit. The Court held that, although individual loan-sharking activities might be intrastate in nature, still it was within Congress's power to determine that the activity was within a class the activities of which did affect interstate commerce, thus affording Congress the opportunity to regulate the entire class. Although the *Perez* Court and the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime's na-

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[901] Hodel v. Indiana, 452 U.S. 314, 323–24 (1981).

[902] 452 U.S. at 324.

[903] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[904] 452 U.S. at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice Rehnquist, concurring in the two *Hodel* cases, objected that the Court was making it appear that no constitutional limits existed under the Commerce Clause, whereas in fact it was necessary that a regulated activity must have a *substantial* effect on interstate commerce, not just *some* effect. He thought it a close case that the statutory provisions here met those tests. 452 U.S. at 307–13.

[905] 402 U.S. 146 (1971).

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tional operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

Thus, the Court applied the federal arson statute to the attempted "torching" of a defendant's two-unit apartment building. The Court merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate."[906] The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context.[907]

In a case allowing the continuation of an antitrust suit challenging a hospital's exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead is on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is to be measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was being excluded.[908]

Requirement that Regulation be Economic.—In *United States v. Lopez*[909] the Court, for the first time in almost sixty years,[910] invalidated a federal law as exceeding Congress's authority under the Commerce Clause. The statute made it a federal offense to possess a firearm within 1,000 feet of a school.[911] The Court reviewed the doctrinal development of the Commerce Clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate com-

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[906] Russell v. United States, 471 U.S. 858, 862 (1985). In a later case the Court avoided the constitutional issue by holding the statute inapplicable to the arson of an owner-occupied private residence.

[907] Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). *See also* Jones v. United States, 529 U.S. 848 (2000) (an owner-occupied building is not "used" in interstate commerce within the meaning of the federal arson statute).

[908] 500 U.S. at 330–32. The decision was 5-to-4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

[909] 514 U.S. 549 (1995). The Court was divided 5-to-4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

[910] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down regulation of mining industry as outside of Commerce Clause).

[911] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally to turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. 104–208, 110 Stat. 3009–370.

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merce when a law is challenged.[912] As noted previously, the Court evaluation started with a consideration of whether the legislation fell within the three broad categories of activity that Congress may regulate or protect under its commerce power: (1) use of the channels of interstate commerce, (2) the use of instrumentalities of interstate commerce, or (3) activities that substantially affect interstate commerce.[913]

Clearly, the Court said, the criminalized activity did not implicate the first two categories.[914] As for the third, the Court found an insufficient connection. First, a wide variety of regulations of "intrastate economic activity" has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with "commerce" or with "any sort of economic enterprise." Therefore, it could not be sustained under precedents "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[915] The provision did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[916] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case.

Finally, the Court rejected the arguments of the government and of the dissent that there existed a sufficient connection between the offense and interstate commerce.[917] At base, the Court's concern was that accepting the attenuated connection arguments presented would result in the evisceration of federalism. "Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[918]

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[912] 514 U.S. at 556–57, 559.

[913] 514 U.S. at 558–59. For an example of regulation of persons or things in interstate commerce, see Reno v. London, 528 U.S. 141 (2000) (information about motor vehicles and owners, regulated pursuant to the Driver's Privacy Protection Act, and sold by states and others, is an article of commerce)

[914] 514 U.S. at 559.

[915] 514 U.S. at 559–61.

[916] 514 U.S. at 561.

[917] 514 U.S. at 563–68.

[918] 514 U.S. at 564.

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Whether *Lopez* bespoke a Court determination to police more closely Congress's exercise of its commerce power, so that it would be a noteworthy case,[919] or whether it was rather a "warning shot" across the bow of Congress, urging more restraint in the exercise of power or more care in the drafting of laws, was not immediately clear. The Court's decision five years later in *United States v. Morrison*,[920] however, suggests that stricter scrutiny of Congress's commerce power exercises is the chosen path, at least for legislation that falls outside the area of economic regulation.[921] The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In *Morrison* the Court applied *Lopez* principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity,"[922] the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain "numerous" congressional findings about the serious effects of gender-motivated crimes,[923] but the Court rejected reliance on these findings. "The existence of congressional findings is not suf-

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[919] "Not every epochal case has come in epochal trappings." 514 U.S. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

[920] 529 U.S. 598 (2000). Once again, the Justices were split 5–4, with Chief Justice Rehnquist's opinion of the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.

[921] For an expansive interpretation in the area of economic regulation, decided during the same Term as *Lopez*, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). *Lopez* did not "purport to announce a new rule governing Congress's Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

[922] 529 U.S. at 613.

[923] Dissenting Justice Souter pointed to a "mountain of data" assembled by Congress to show the effects of domestic violence on interstate commerce. 529 U.S. at 628–30. The Court has evidenced a similar willingness to look behind congressional findings purporting to justify exercise of enforcement power under section 5 of the Fourteenth Amendment. See discussion under "enforcement," infra. In *Morrison* itself, the Court determined that congressional findings were insufficient to justify the VAWA as an exercise of Fourteenth Amendment power. 529 U.S. at 619–20.

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ficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . [The issue of constitutionality] is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[924]

The problem with the VAWA findings was that they "relied heavily" on the reasoning rejected in Lopez—the "but-for causal chain from the initial occurrence of crime . . . to every attenuated effect upon interstate commerce." As the Court had explained in *Lopez*, acceptance of this reasoning would eliminate the distinction between what is truly national and what is truly local, and would allow Congress to regulate virtually any activity, and basically any crime.[925] Accordingly, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Resurrecting the dual federalism dichotomy, the Court could find "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[926]

Yet, the ultimate impact of these cases on Congress's power over commerce may be limited. In *Gonzales v. Raich*,[927] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act (CSA).[928] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited noncommercial use of marijuana should be evaluated separately.

In *Raich*, the Court declined the invitation to apply *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for

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[924] 529 U.S. at 614.

[925] 529 U.S. at 615–16. Applying the principle of constitutional doubt, the Court in Jones v. United States, 529 U.S. 848 (2000), interpreted the federal arson statute as inapplicable to the arson of a private, owner-occupied residence. Were the statute interpreted to apply to such residences, the Court noted, "hardly a building in the land would fall outside [its] domain," and the statute's validity under *Lopez* would be squarely raised. 529 U.S. at 857.

[926] 529 U.S. at 618.

[927] 545 U.S. 1 (2005).

[928] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

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marijuana generally. The Court found that there was a "rational basis" to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.[929] The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of "economics" includes "the production, distribution, and consumption of commodities,"[930] the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.[931]

The Court's decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.[932] The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.[933] Justice Scalia, in concurrence, suggested that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or whether it substantially affected interstate commerce.[934]

Activity Versus Inactivity.—In *National Federation of Independent Business (NFIB) v. Sebelius*,[935] the Court held that Congress did not have the authority under the Commerce Clause to impose a requirement compelling certain individuals to maintain a minimum level of health insurance (although, as discussed previ-

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[929] 545 U.S. at 19.

[930] 545 U.S. at 25, quoting Webster's Third New International Dictionary 720 (1966).

[931] *See also* Taylor v. United States, 579 U.S. ___, No. 14–6166, slip op. at 3 (2016) (rejecting the argument that the government, in prosecuting a defendant under the Hobbs Act for robbing drug dealers, must prove the interstate nature of the drug activity). The *Taylor* Court viewed this result as following necessarily from the Court's earlier decision in *Raich*, because the Hobbs Act imposes criminal penalties on robberies that affect "all . . . commerce over which the United States has jurisdiction," 18 U.S.C. § 1951(b)(3) (2012), and *Raich* established the precedent that the market for marijuana, "including its intrastate aspects," is "commerce over which the United States has jurisdiction." *Taylor*, slip op. at 6–7. *Taylor* was, however, expressly "limited to cases in which a defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." *Id.* at 9. The Court did not purport to resolve what federal prosecutors must prove in Hobbs Act robbery cases "where some other type of business or victim is targeted." *Id.*

[932] 545 U.S. at 18, 22.

[933] 545 U.S. at 23–25.

[934] 545 U.S. at 34–35 (Scalia, J., concurring).

[935] 567 U.S. ___, No. 11–393, slip op. (2012).

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ously, the Court found such power to exist under the taxing power). Under this "individual mandate," failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code.[936] By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces healthy individuals into the insurance risk pool, thus allowing insurers to subsidize the costs of covering the unhealthy individuals they are now required to accept.

Chief Justice Roberts, in a controlling opinion,[937] suggested that Congress's authority to regulate interstate commerce presupposes the existence of a commercial activity to regulate. Further, his opinion noted that the commerce power had been uniformly described in previous cases as involving the regulation of an "activity."[938] The individual mandate, on the other hand, compels an individual to become active in commerce on the theory that the individual's inactivity affects interstate commerce. Justice Roberts suggested that regulation of individuals because they are doing nothing would result in an unprecedented expansion of congressional authority with few discernable limitations. While recognizing that most people are likely to seek health care at some point in their lives, Justice Roberts noted that there was no precedent for the argument that individuals who might engage in a commercial activity in the future could, on that basis, be regulated today.[939] The Chief Justice similarly rejected the argument that the Necessary and Proper Clause could provide this additional authority. Rather than serving as a "incidental" adjunct to the Commerce Clause, reliance on the Necessary and Proper Clause in this instance would, according to the Chief Justice, create a substantial expansion of federal authority to regulate persons not otherwise subject to such regulation.[940]

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[936] Patient Protection and Affordable Care Act (ACA), Pub. L. 111–148, as amended. This mandate was necessitated by the Act's "guaranteed-issue" and "community-rating" provisions, under which insurance companies are prohibited from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. Id. at §§ 300gg, 300gg–1, 300gg–3, 300gg–4. As these requirements provide an incentive for individuals to delay purchasing health insurance until they become sick, this would impose new costs on insurers, leading them to significantly increase premiums on everyone.

[937] Although no other Justice joined Chief Justice Robert's opinion, four dissenting Justices reached similar conclusions regarding the Commerce Clause and the Necessary and Proper Clause. *NFIB*, No. 11–393, slip op. at 4–16 (joint opinion of Scalia, Kennedy, Thomas and Alito, dissenting).

[938] *See, e.g., Lopez*, 514 U.S. at 573 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

[939] *NFIB*, No. 11–393, slip op. at 20, 26.

[940] *NFIB*, No. 11–393, slip op. at 30.

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Civil Rights.—It had been generally established some time ago that Congress had power under the Commerce Clause to prohibit racial discrimination in the use of the channels of commerce.[941] The power under the clause to forbid discrimination within the states was firmly and unanimously sustained by the Court when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[942] Hotels and motels were declared covered—that is, declared to "affect commerce"—if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce.[943] The Court sustained the Act as applied to a downtown Atlanta motel that did serve interstate travelers,[944] to an out-of-the-way restaurant in Birmingham that catered to a local clientele but that had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[945] and to a rural amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the state.[946]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[947]

But, it was objected, Congress is regulating on the basis of moral judgments and not to facilitate commercial intercourse. "That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disrup-

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[941] Boynton v. Virginia, 364 U.S. 454 (1960); Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946).

[942] Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a *et seq*.

[943] 42 U.S.C. § 2000a(b).

[944] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[945] Katzenbach v. McClung, 379 U.S. 294 (1964).

[946] Daniel v. Paul, 395 U.S. 298 (1969).

[947] Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 301–04 (1964).

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tive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong."[948] The evidence did, in fact, noted the Justice, support Congress's conclusion that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove.[949]

The Commerce Clause basis for civil rights legislation prohibiting private discrimination was important because of the understanding that Congress's power to act under the Fourteenth and Fifteenth Amendments was limited to official discrimination.[950] The Court's subsequent determination that Congress is not necessarily so limited in its power reduces greatly the importance of the Commerce Clause in this area.[951]

Criminal Law.—Federal criminal jurisdiction based on the commerce power, and frequently combined with the postal power, has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that constitute state crimes on the basis of some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[952] Examples of this type of federal criminal statute abound, including the Mann Act designed to outlaw interstate white slavery,[953] the Dyer Act punishing interstate transportation of stolen automobiles,[954] and the Lindbergh Law punishing interstate transportation of kidnapped persons.[955] But, just as in other areas, Congress has passed beyond a proscription of the use of interstate facilities in the commission of a crime, it has in the

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[948] Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).

[949] 379 U.S. at 252–53; Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964).

[950] *Civil Rights Cases*, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Collins v. Hardyman, 341 U.S. 651 (1951).

[951] The Fair Housing Act (Title VIIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 *et seq*., was based on the Commerce Clause, but, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[952] *E.g.*, Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); Lewis v. United States, 445 U.S. 55 (1980); McElroy v. United States, 455 U.S. 642 (1982).

[953] 18 U.S.C. § 2421.

[954] 18 U.S.C. § 2312.

[955] 18 U.S.C. § 1201.

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criminal law area expanded the scope of its jurisdiction. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion . . . ."[956] Nonetheless, "Congress cannot punish felonies generally" and may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the commerce power.[957] As a consequence, "most federal offenses include . . . a jurisdictional" element that ties the underlying offense to one of Congress's constitutional powers.[958]

The most far-reaching measure the Court has sustained is the "loan-sharking" prohibition of the Consumer Credit Protection Act.[959] The title affirmatively finds that extortionate credit transactions affect interstate commerce because loan sharks are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Upholding the statute, the Court found that though individual loan-sharking activities may be intrastate in nature, still it is within Congress's power to determine that it was within a class the activities of which did affect interstate commerce, thus affording Congress power to regulate the entire class.[960]

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on state power.[961] This circumstance does not, however, of itself signify that the states were expected to participate in the power thus granted Congress, subject only to the operation of the Supremacy Clause. As Hamilton pointed out in *The Federalist*,[962] while some of the powers that

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[956] 18 U.S.C. § 1951. *See also* 18 U.S.C. § 1952.

[957] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[958] *See* Luna Torres v. Lynch, 578 U.S. ___, No. 14–1096, slip op. at 4.

[959] Title II, 82 Stat. 159 (1968), 18 U.S.C. §§ 891 *et seq*.

[960] Perez v. United States, 402 U.S. 146 (1971). Taylor v. United States, 579 U.S. ___, No. 14–6166, slip op. at 3 (2016); Russell v. United States, 471 U.S. 858, 862 (1985).

[961] Thus, by Article I, § 10, cl. 2, States are denied the power to "lay any Imposts or Duties on Imports or Exports" except by the consent of Congress. The clause applies only to goods imported from or exported to another country, not from or to another State, Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869), which prevents its application to interstate commerce, although Chief Justice Marshall thought to the contrary, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), and the contrary has been strongly argued. W. Crosskey, Politics and the Constitution in the History of the United States 295–323 (1953).

[962] The Federalist No. 32 (J. Cooke ed. 1961), 199–203. Note that in connection with the discussion that follows, Hamilton avowed that the taxing power of the States,

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are vested in the National Government admit of their "concurrent" exercise by the states, others are of their very nature "exclusive," and hence render the notion of a like power in the states "contradictory and repugnant." As an example of the latter kind of power, Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably, one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would thereby be brought to an end. As Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."[963] In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity.[964]

That the Commerce Clause, unimplemented by congressional legislation, took from the states any and all power over foreign and interstate commerce was by no means conceded and was, indeed, counterintuitive, considering the extent of state regulation that existed before the Constitution.[965] Moreover, legislation by Congress that regulated any particular phase of commerce would raise the

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save for imposts or duties on imports or exports, "remains undiminished." Id. at 201. The States "retain [the taxing] authority in the most absolute and unqualified sense[.]" Id. at 199.

[963] 22 U.S. (9 Wheat.) 1, 11 (1824). Justice Johnson's assertion, concurring, was to the same effect. Id. at 226. Late in life, James Madison stated that the power had been granted Congress mainly as "a negative and preventive provision against injustice among the States." 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1865).

[964] It was evident from THE FEDERALIST that the principal aim of the Commerce Clause was the protection of the national market from the oppressive power of individual States acting to stifle or curb commerce. Id. at No. 7, 39–41 (Hamilton); No. 11, 65–73 (Hamilton); No. 22, 135–137 (Hamilton); No. 42, 283–284 (Madison); No. 53, 362–364 (Madison). *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949). For a comprehensive history of the adoption of the Commerce Clause, which does not indicate a definitive answer to the question posed, *see* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). Professor Abel discovered only nine references in the Convention records to the Commerce Clause, all directed to the dangers of interstate rivalry and retaliation. Id. at 470–71 & nn. 169–75.

[965] The strongest suggestion of exclusivity found in the Convention debates is a remark by Madison. "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (rev. ed. 1937). However, the statement is recorded during debate on the clause, Art. I, § 10, cl. 3, prohibiting states from laying tonnage duties. That the Convention adopted this clause, when tonnage duties would

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question whether the states were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government"[966]—in a word, the "police power."

The text and drafting record of the Commerce Clause fails, therefore to settle the question of what power is left to the states to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases of flat conflict between an act or acts of Congress that regulate such commerce and a state legislative act or acts, from whatever state power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy.[967] But suppose, first, that Congress has passed no act, or second, that its legislation does not clearly cover the ground traversed by previously enacted state legislation. What rules then apply? Since *Gibbons v. Ogden*, both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first, determined that it has power to decide when state power is validly exercised, and, second, it has coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.[968]

Thus, it has been judicially established that the Commerce Clause is not only a "positive" grant of power to Congress, but is also a "negative" constraint upon the states. This aspect of the Commerce Clause, sometimes called the "dormant" commerce clause, means that the courts may measure state legislation against Commerce Clause values even in the absence of congressional regulation, *i.e.*, when Congress's exercise of its power is dormant.

Webster, in *Gibbons*, argued that a state grant of a monopoly to operate steamships between New York and New Jersey not only

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certainly be one facet of regulating interstate and foreign commerce, casts doubt on the assumption that the commerce power itself was intended to be exclusive.

[966] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

[967] 22 U.S. at 210–11.

[968] The writings detailing the history are voluminous. *See*, *e.g.*, F. Frankfurter, The Commerce Clause Under Marshall, Taney, and White (1937); B. Gavit, The Commerce Clause of the United States Constitution (1932) (usefully containing appendices cataloguing every Commerce Clause decision of the Supreme Court to that time); Sholleys, *The Negative Implications of the Commerce Clause*, 3 U. Chi. L. Rev. 556 (1936). Among the recent writings, *see* Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 Wayne L. Rev. 885 (1985) (a disputed conceptualization arguing the Court followed a consistent line over the years), and articles cited, id. at 887 n.4.

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contravened federal navigation laws but violated the Commerce Clause as well, because that clause conferred an *exclusive* power upon Congress to make the rules for national commerce, although he conceded that the grant to regulate interstate commerce was so broad as to reach much that the states had formerly had jurisdiction over, the courts must be reasonable in interpretation.[969] But, because he thought the state law was in conflict with the federal legislation, Chief Justice Marshall was not compelled to pass on Webster's arguments, although in dicta he indicated his considerable sympathy with them and suggested that the power to regulate commerce between the states might be an exclusively federal power.[970]

Chief Justice Marshall originated the concept of the "dormant commerce clause" in *Willson v. Black Bird Creek Marsh Co.*,[971] although in dicta. Attacked before the Court was a state law authorizing the building of a dam across a navigable creek, and it was claimed the law was in conflict with the federal power to regulate interstate commerce. Rejecting the challenge, Marshall said that the state act could not be "considered as repugnant to the [federal] power to regulate commerce in its dormant state . . . ."

Returning to the subject in *Cooley v. Board of Wardens of Port of Philadelphia*,[972] the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Curtis' opinion, the state act was valid on the basis of a distinction between those subjects of commerce that "imperatively demand a single uniform rule" operating throughout the country and those that "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress's power to be "exclusive"; as to the latter, it held that the states enjoyed a power

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[969] 22 U.S. (9 Wheat.) at 13–14, 16.

[970] 22 U.S. at 17–18, 209. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–96 (1819), Chief Justice Marshall denied that the grant of the bankruptcy power to Congress was exclusive. *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (militia).

[971] 27 U.S. (2 Pet.) 245, 252 (1829).

[972] 53 U.S. (12 How.) 299 (1851). The issue of exclusive federal power and the separate issue of the dormant commerce clause was present in the *License Cases*, 46 U.S. (5 How.) 504 (1847), and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), but, despite the fact that much ink was shed in multiple opinions discussing the questions, nothing definitive emerged. Chief Justice Taney, in contrast to Marshall, viewed the clause only as a grant of power to Congress, containing no constraint upon the states, and the Court's role was to void state laws in contravention of federal legislation. 46 U.S. (5 How.) at 573; 48 U.S. (7 How.) at 464.

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of "concurrent legislation."[973] The Philadelphia pilotage requirement was of the latter kind.

Thus, the contention that the federal power to regulate interstate commerce was exclusive of state power yielded to a rule of partial exclusivity. Among the welter of such cases, the first actually to strike down a state law solely[974] on Commerce Clause grounds was the *State Freight Tax Case*.[975] The question before the Court was the validity of a nondiscriminatory statute that required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried. Opining that a tax upon freight, or any other article of commerce, transported from state to state is a regulation of commerce among the states and, further, that the transportation of merchandise or passengers through a state or from state to state was a subject that required uniform regulation, the Court held the tax in issue to be repugnant to the Commerce Clause.

Whether exclusive or partially exclusive, however, the Commerce Clause as a restraint upon state exercises of power, absent congressional action, received no sustained justification or explanation; the clause, of course, empowers Congress, not the courts, to regulate commerce among the states. Often, as in *Cooley* and in later cases, the Court stated or implied that the rule was imposed by the Commerce Clause.[976] In *Welton v. Missouri*,[977] the Court at-

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[973] 48 U.S. at 317–20. Although Chief Justice Taney had formerly taken the strong position that Congress's power over commerce was not exclusive, he acquiesced silently in the *Cooley* opinion. For a modern discussion of *Cooley*, *see* Goldstein v. California, 412 U.S. 546, 552–60 (1973), in which, in the context of the Copyright Clause, the Court, approving *Cooley* for Commerce Clause purposes, refused to find the Copyright Clause either fully or partially exclusive.

[974] Just a few years earlier, the Court, in an opinion that merged Commerce Clause and Import-Export Clause analyses, had seemed to suggest that it was a discriminatory tax or law that violates the Commerce Clause and not simply a tax on interstate commerce. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[975] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873). For cases in which the Commerce Clause basis was intermixed with other express or implied powers, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). Chief Justice Marshall, in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 488–89 (1827), indicated, in dicta, that a state tax might violate the Commerce Clause.

[976] "Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States." Leisy v. Hardin, 135 U.S. 100, 108–09 (1890). The Commerce Clause "remains in the Constitution as a grant of power to Congress . . . and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter." Carter v. Virginia, 321 U.S. 131, 137 (1944). The Commerce Clause, the Court has said, "does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the mean-

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tempted to suggest a somewhat different justification. The case involved a challenge to a state statute that required a "peddler's" license for merchants selling goods that came from other states, but that required no license if the goods were produced in the state. Declaring that uniformity of commercial regulation is necessary to protect articles of commerce from hostile legislation and that the power asserted by the state belonged exclusively to Congress, the Court observed that "[t]he fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled." [978]

It has been evidently of little importance to the Court to explain. "Whether or not this long recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same." [979] Thus, "[f]or a hundred years it has been accepted constitutional doctrine . . . that . . . where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [980]

Two other justifications can be found throughout the Court's decisions, but they do not explain why the Court is empowered under a grant of power to Congress to police state regulatory and taxing

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ing it has given these great silences of the Constitution." H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–35 (1949). Subsequently, the Court stated that the Commerce Clause "has long been recognized as a *self-executing limitation* on the power of the States to enact laws imposing substantial burdens on such commerce.'" Dennis v. Higgins, 498 U.S. 439, 447 (1991) (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) (emphasis added)).

[977] 91 U.S. 275 (1876).

[978] 91 U.S. at 282. In Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 33 (1867), the Court suggested that congressional silence with regard to matters of "local" concern may in some circumstances signify a willingness that the states regulate. These principles were further explained by Chief Justice Stone, writing for the Court in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 479 n.1 (1939). "The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority." The fullest development of the "silence" rationale was not by the Court but by a renowned academic, Professor Dowling. *Interstate Commerce and State Power*, 29 VA. L. REV. 1 (1940); *Interstate Commerce and State Power: Revisited Version*, 47 COLUM. L. REV. 546 (1947).

[979] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768 (1945).

[980] 325 U.S. at 769. *See also* California v. Zook, 336 U.S. 725, 728 (1949).

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decisions. For example, in *Welton v. Missouri*,[981] the statute under review, as the Court observed several times, was clearly discriminatory as between in-state and interstate commerce, but that point was not sharply drawn as the constitutional fault of the law. That the Commerce Clause had been motivated by the Framers' apprehensions about state protectionism has been frequently noted.[982] A later theme has been that the Framers desired to create a national area of free trade, so that unreasonable burdens on interstate commerce violate the clause in and of themselves.[983]

Nonetheless, the power of the Court is established and is freely exercised. No reservations can be discerned in the opinions for the Court.[984] Individual Justices, to be sure, have urged renunciation of the power and remission to Congress for relief sought by litigants,[985] but that has not been the course followed.

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[981] 91 U.S. 275, 277, 278, 279, 280, 281, 282 (1876).

[982] 91 U.S. at 280–81; Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446 (1827) (Chief Justice Marshall); Guy v. City of Baltimore, 100 U.S. 434, 440 (1879); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 550, 552 (1935); Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

[983] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440 (1939); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330–31 (1944); Freeman v. Hewit, 329 U.S. 249, 252, 256 (1946); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538, 539 (1949); Dennis v. Higgins, 498 U.S. 439, 447–50 (1991). "[W]e have steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 280 (1987) (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977)).

[984] *E.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Natural Resources Dep't, 504 U.S. 353, 359 (1992); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992). Indeed, the Court, in Dennis v. Higgins, 498 U.S. 439, 447–50 (1991), broadened its construction of the clause, holding that it confers a "right" upon individuals and companies to engage in interstate trade. With respect to the *exercise* of the power, the Court has recognized Congress's greater expertise to act and noted its hesitancy to impose uniformity on state taxation. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978). *Cf. Quill Corp.*, 504 U.S. at 318.

[985] In McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940), Justice Black, for himself and Justices Frankfurter and Douglas, dissented, taking precisely this view. *See also* Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (Justice Black dissenting in part); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939) (Justice Black dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945) (Justice Black dissenting); id. at 795 (Justice Douglas dissenting). Justices Douglas and Frankfurter subsequently wrote and joined opinions applying the dormant commerce clause. In Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954), the Court rejected the urging that it uphold all not-patently discriminatory taxes and let Congress deal with conflicts. More recently, Justice Scalia has taken the view that, as a matter of original intent, a "dormant" or "negative" commerce power cannot be justified in either taxation or regulation cases, but, yielding to the force of precedent, he will vote to strike down state actions that discriminate against interstate commerce or that are governed by the Court's precedents, without extending any of those precedents. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987) (concurring); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (concurring in part and dissenting in part); Bendix Autolite Corp. v. Midwesco

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The State Proprietary Activity (Market Participant) Exception.—In a case of first impression, the Court held that a Maryland bounty scheme by which the state paid scrap processors for each "hulk" automobile destroyed is "the kind of action with which the Commerce Clause is not concerned."[986] As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was amended in a manner that substantially disadvantaged out-of-state processors. The Court held "that entry by the State itself into the market itself as a purchaser, in effect, of a potential article of interstate commerce [does not] create[ ] a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State."[987]

Affirming and extending this precedent, the Court held that a state operating a cement plant could in times of shortage (and presumably at any time) confine the sale of cement by the plant to residents of the state.[988] "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[989] It is yet unclear how far this concept of the state as market participant rather than market regulator will be extended.[990]

Congressional Authorization of Otherwise Impermissible State Action.—The Supreme Court has heeded the lesson that was administered to it by the Act of Congress of August 31, 1852,[991] which

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Enterprises, Inc., 486 U.S. 888 (1988) (concurring in judgment); American Trucking Assn's v. Smith, 496 U.S. 167 (1990) (concurring); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc.., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the Commerce Clause but not the Imports-Exports Clause).

[986] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805 (1976).

[987] 426 U.S. at 808.

[988] Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

[989] 447 U.S. at 436–37; *see also* McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. at 14 (2013) (to the extent that the Virginia Freedom of Information Act created a market for public documents in Virginia, the Commonwealth was the sole manufacturer of the product, and therefore did not offend the Commerce Clause when it limited access to those documents under the Act to citizens of the Commonwealth).

[990] *See also* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (city may favor its own residents in construction projects paid for with city funds); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (illustrating the deep divisions in the Court respecting the scope of the exception).

[991] Ch. 111, 10 Stat. 112, § 6.

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pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[992] The lesson, subsequently observed the Court, is that "[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce."[993] Similarly, when in the late 1880s and the early 1890s statewide prohibition laws began making their appearance, Congress again authorized state laws that the Court had held to violate the dormant commerce clause.

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[994] Although it held that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[995] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[996] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[997] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[998] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[999] Congress did

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[992] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852), statute sustained in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). The latter decision seemed facially contrary to a dictum of Justice Curtis in Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299, 318 (1851), *and cf.* Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 263 n.4 (1987) (Justice Scalia concurring in part and dissenting in part), but if indeed the Court is interpreting the silence of Congress as a bar to action under the dormant commerce clause, then when Congress speaks it is enacting a regulatory authorization for the states to act.

[993] Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883).

[994] The Court had developed the "original package" doctrine to restrict application of a state tax on imports from a foreign country in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827). Although Chief Justice Marshall had indicated in dictum in *Brown* that the same rule would apply to imports from sister states, the Court had refused to follow that dictum in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[995] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).

[996] 125 U.S. 465 (1888).

[997] Leisy v. Hardin, 135 U.S. 100 (1890).

[998] Ch. 728, 26 Stat. 313 (1890), upheld in *In re* Rahrer, 140 U.S. 545 (1891).

[999] Rhodes v. Iowa, 170 U.S. 412 (1898).

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not fully nullify the *Bowman* case until 1913, when enactment of the Webb-Kenyon Act[1000] clearly authorized states to regulate direct shipments for personal use.

National Prohibition, imposed by the Eighteenth Amendment, temporarily mooted these conflicts, but they reemerged with repeal of Prohibition by the Twenty-first Amendment. Section 2 of the Twenty-first Amendment prohibits "the importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Initially the Court interpreted this language to authorize states to discriminate against imported liquor in favor of that produced in-state, but the modern Court has rejected this interpretation, holding instead that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[1001]

Less than a year after the ruling in *United States v. South-Eastern Underwriters Ass'n*[1002] that insurance transactions across state lines constituted interstate commerce, thereby establishing their immunity from discriminatory state taxation, Congress passed the McCarran-Ferguson Act,[1003] authorizing state regulation and taxation of the insurance business. In *Prudential Ins. Co. v. Benjamin*,[1004] the Court sustained a South Carolina statute that imposed on foreign insurance companies, as a condition of their doing business in the state, an annual tax of three percent of premiums from business done in South Carolina, while imposing no similar tax on local corporations. "Obviously," said Justice Rutledge for the Court, "Congress's purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects."[1005]

[1000] Ch. 90, 37 Stat. 699 (1913), sustained in Clark-Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

[1001] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989), and the analysis of section 2 under Discrimination Between Domestic and Imported Products.

[1002] 322 U.S. 533 (1944).

[1003] 59 Stat. 33, 15 U.S.C. §§ 1011–15.

[1004] 328 U.S. 408 (1946).

[1005] 328 U.S. at 429–30.

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Justice Rutledge continued: "The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. . . . This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective." [1006]

Thus, it is now well-established that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." [1007] But the Court requires congressional intent to permit otherwise impermissible state actions to "be unmistakably clear." [1008] The fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was, therefore, "insufficient indicium" that Congress intended to authorize the state to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on com-

[1006] 328 U.S. at 434–35. The Act restored state taxing and regulatory powers over the insurance business to their scope prior to *South-Eastern Underwriters*. Discriminatory state taxation otherwise cognizable under the Commerce Clause must, therefore, be challenged under other provisions of the Constitution. *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). An equal protection challenge was successful in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), invalidating a discriminatory tax and stating that a favoring of local industries "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Id. at 878. In Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 176–78 (1985), the Court declined to follow *Ward* where state statutes did not, as in *Ward*, favor local corporations at the expense of out-of-state corporations, but instead "favor[ed] out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country." The Court noted that the statutes in *Northeast Bancorp* were concerned with "preserv[ing] a close relationship between those in the community who need credit and those who provide credit," and with protecting "the independence of local banking institutions"; they did not, like the statutes in *Ward*, discriminate against "nonresident corporations solely because they were nonresidents."

[1007] Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located, as authorizing state laws that allow only banks within the particular region to acquire an in-state bank, on a reciprocal basis, since what the states could do entirely they can do in part).

[1008] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90 (1984).

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merce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact "collective decisions" made by Congress rather than unilateral choices imposed on unrepresented out-of-state interests by individual states.[1009] And Congress must be plain as well when the issue is not whether it has exempted a state action from the Commerce Clause but whether it has taken the less direct form of reduction in the level of scrutiny.[1010]

State Taxation and Regulation: The Old Law

In 1959, the Supreme Court acknowledged that, with respect to the taxing power of the states in light of the negative (or "dormant") commerce clause, "some three hundred full-dress opinions" as of that year had not resulted in "consistent or reconcilable" doctrine but rather in something more resembling a "quagmire."[1011] Although many of the principles still applicable in constitutional law may be found in the older cases, the Court has worked a revolution in this area, though at different times for taxation and for regulation. Thus, in this section we summarize the "old" law and then deal more fully with the "modern" law of the negative commerce clause.

[1009] 467 U.S. at 92. *See also* Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws). Earlier cases had required express statutory sanction of state burdens on commerce but under circumstances arguably less suggestive of congressional approval. *E.g.*, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958–60 (1982) (congressional deference to state water law in 37 statutes and numerous interstate compacts did not indicate congressional sanction for *invalid* state laws imposing a burden on commerce); New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a State of "lawful authority" over interstate transmissions held not to evince a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause"). *But see* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (Congress held to have sanctioned municipality's favoritism of city residents through funding statute under which construction funds were received).

[1010] Maine v. Taylor, 477 U.S. 131 (1986) (holding that Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state law otherwise invalid under the Clause nor shifts analysis from the presumption of invalidity for discriminatory laws to the balancing test for state laws that burden commerce only incidentally).

[1011] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)). Justice Frankfurter was similarly skeptical of definitive statements. "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." Freeman v. Hewit, 329 U.S. 249, 251–52 (1946). The comments in all three cases dealt with taxation, but they could just as well have included regulation.

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General Considerations.—The task of drawing the line between state power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct.[1012] With "commerce among the States" affairs are very different. Interstate commerce is conducted in the interior of the country, by persons and corporations that are ordinarily engaged also in local business; its usual incidents are acts that, if unconnected with commerce among the states, would fall within the state's powers of police and taxation, while the things it deals in and the instruments by which it is carried on comprise the most ordinary subject matter of state power. In this field, the Court consequently has been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fluctuating and tentative, even contradictory, and this is particularly the case with respect to the infringement of interstate commerce by the state taxing power.[1013]

Taxation.—The leading case dealing with the relation of the states' taxing power to interstate commerce—the case in which the Court first struck down a state tax as violating the Commerce Clause—was the *State Freight Tax Case*.[1014] Before the Court was the validity of a Pennsylvania statute that required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. The Court's reasoning was forthright. Transportation of freight constitutes commerce.[1015] A tax upon freight transported from one state to another effects a regulation of interstate commerce.[1016] Under the *Cooley* doctrine, whenever the subject of a regulation of commerce is in its nature of national interest or admits of one uniform system or plan of regulation, that subject is within the exclusive regulating control of Congress.[1017] Transportation of passengers or merchandise through a state, or from one state to another, is of this nature.[1018] Hence, a state law imposing a tax upon freight, taken up within the state and transported out of it or taken up outside the state and transported into it, violates the Commerce Clause.[1019]

[1012] *See* J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials (8th ed. 2005), ch. 5.

[1013] In addition to the sources previously cited, *see* J. Hellerstein & W. Hellerstein (8th ed.), ch. 5, *supra*. For a succinct description of the history, *see* Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37 (1987).

[1014] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873).

[1015] 82 U.S. at 275.

[1016] 82 U.S. at 275–76, 279.

[1017] 82 U.S. at 279–80.

[1018] 82 U.S. at 280.

[1019] 82 U.S. at 281–82.

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The principle thus asserted, that a state may not tax interstate commerce, confronted the principle that a state may tax all purely domestic business within its borders and all property "within its jurisdiction." Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some state or other, the task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the *State Tax on Railway Gross Receipts Case*,[1020] decided the same day as the *State Freight Tax Case*, the issue was a tax upon gross receipts of all railroads chartered by the state, part of the receipts having been derived from interstate transportation of the same freight that had been held immune from tax in the first case. If the latter tax were regarded as a tax on interstate commerce, it too would fall. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. "[I]t is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[1021] A gross receipts tax upon a railroad company, which concededly affected commerce, was not a regulation "directly. Very manifestly it is a tax upon the railroad company. . . . That its ultimate effect may be to increase the cost of transportation must be admitted. . . . Still it is not a tax upon transportation, or upon commerce. . . ."[1022]

Insofar as it drew a distinction between these two cases, the Court did so in part on the basis of *Cooley*, that some subjects embraced within the meaning of commerce demand uniform, national regulation, whereas other similar subjects permit of diversity of treatment, until Congress acts; and in part on the basis of a concept of a "direct" tax on interstate commerce, which was impermissible, and an "indirect" tax, which was permissible until Congress acted.[1023] Confusingly, the two concepts were sometimes conflated and sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax

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[1020] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 284 (1872).

[1021] 82 U.S. at 293.

[1022] 82 U.S. at 294. This case was overruled 14 years later, when the Court voided substantially the same tax in Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).

[1023] *See* The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913) (reviewing and summarizing at length both taxation and regulation cases). *See also* Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298, 307 (1924).

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was a nondiscriminatory levy applied alike to local commerce.[1024] "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it . . . ; or upon persons or property in transit in interstate commerce." [1025] However, some taxes imposed only an "indirect" burden and were sustained; property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce, were sustained.[1026] A good rule of thumb in these cases is that taxation was sustained if the tax was imposed on some local, rather than an interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory, that its impact was intentionally or unintentionally felt by interstate commerce and not by local, perhaps in pursuit of parochial interests. Many of the early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground (and one of the most important today).[1027]

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and reliance on the direct-indirect distinction. Instead, a state or local levy would be voided only if in the opinion of the Court it created a risk of multiple taxation for interstate commerce not felt by local commerce.[1028] It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the taxing state, so as to reduce the risk of multiple taxation.[1029] But, just as the Court had achieved constancy in the area of regulation, it reverted to the older doctrines in the taxation area

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[1024] Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[1025] The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400–401 (1913).

[1026] The *Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 439 (1894); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. HELLERSTEIN & W. HELLERSTEIN (8th ed.), *supra*, at 195 *et seq*.

[1027] *E.g.*, Welton v. Missouri, 91 U.S. 275 (1875); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Co. v. Flynt, 256 U.S. 421 (1921).

[1028] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[1029] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Central Greyhound Lines

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and reiterated that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect distinction.[1030] The stage was set, following a series of cases in which through formalistic reasoning the states were permitted to evade the Court's precedents,[1031] for the formulation of a more realistic doctrine.

Regulation.—Much more diverse were the cases dealing with regulation by the state and local governments. Taxation was one thing, the myriad approaches and purposes of regulations another. Generally speaking, if the state action was perceived by the Court to be a regulation of interstate commerce itself, it was deemed to impose a "direct" burden on interstate commerce and impermissible. If the Court saw it as something other than a regulation of interstate commerce, it was considered only to "affect" interstate commerce or to impose only an "indirect" burden on it in the proper exercise of the police powers of the states.[1032] But the distinction between "direct" and "indirect" burdens was often perceptible only to the Court.[1033]

A corporation's status as a foreign entity did not immunize it from state requirements, conditioning its admission to do a local business, to obtain a local license, and to furnish relevant information as well as to pay a reasonable fee.[1034] But no registration was permitted of an out-of-state corporation, the business of which in

v. Mealey, 334 U.S. 653 (1948). Notice the Court's distinguishing of *Central Greyhound* in Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 188–91 (1995).

[1030] Freeman v. Hewit, 329 U.S. 249 (1946); Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951).

[1031] Thus, the states carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the state, which was not permitted, Railway Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Railway Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. *E.g.*, Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975).

[1032] Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 924–925 (1985). In addition to the sources already cited, *see* the Court's summaries in The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913), and Southern Pacific Co. v. Arizona, 325 U.S. 761, 766–70 (1945). In the latter case, Chief Justice Stone was reconceptualizing the standards under the clause, but the summary represents a faithful recitation of the law.

[1033] *See* Di Santo v. Pennsylvania, 273 U.S. 34 (1927) (Justice Stone dissenting). The dissent was the precursor to Chief Justice Stone's reformulation of the standard in 1945. *DiSanto* was overruled in California v. Thompson, 313 U.S. 109 (1941).

[1034] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

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the host state was purely interstate in character.[1035] Neither did the Court permit a state to exclude from its courts a corporation engaging solely in interstate commerce because of a failure to register and to qualify to do business in that state.[1036]

Interstate transportation brought forth hundreds of cases. State regulation of trains operating across state lines resulted in divergent rulings. It was early held improper for states to prescribe charges for transportation of persons and freight on the basis that the regulation must be uniform and thus could not be left to the states.[1037] The Court deemed "reasonable" and therefore constitutional many state regulations requiring a fair and adequate service for its inhabitants by railway companies conducting interstate service within its borders, as long as there was no unnecessary burden on commerce.[1038] A marked tolerance for a class of regulations that arguably furthered public safety was long exhibited by the Court,[1039] even in instances in which the safety connection was tenuous.[1040] Of particular controversy were "full-crew" laws, represented as safety measures, that were attacked by the companies as "feather-bedding" rules.[1041]

[1035] Crutcher v. Kentucky, 141 U.S. 47 (1891); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

[1036] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). *But see* Eli Lilly & Co. v. Sav-on Drugs, 366 U.S. 276 (1961).

[1037] Wabash, S. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886). The power of the states generally to set rates had been approved in Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877), and Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877). After the *Wabash* decision, states retained power to set rates for passengers and freight taken up and put down within their borders. Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922).

[1038] Generally, the Court drew the line at regulations that provided for adequate service, not any and all service. Thus, one class of cases dealt with requirements that trains stop at designated cities and towns. The regulations were upheld in such cases as Gladson v. Minnesota, 166 U.S. 427 (1897), and Lake Shore & Mich. South. Ry. v. Ohio, 173 U.S. 285 (1899), and invalidated in Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896). *See* Chicago, B. & Q. R.R. v. Wisconsin R.R. Comm'n, 237 U.S. 220, 226 (1915); St. Louis & S. F. Ry. v. Public Service Comm'n, 254 U.S. 535, 536–537 (1921). The cases were extremely fact-specific.

[1039] *E.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (required locomotive engineers to be examined and licensed by the state, until Congress should deem otherwise); New York, N.H. & H. R.R. v. New York, 165 U.S. 628 (1897) (forbidding heating of passenger cars by stoves); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) (requiring three brakemen on freight trains of more than 25 cars).

[1040] *E.g.*, Terminal Ass'n v. Trainmen, 318 U.S. 1 (1943) (requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (forbidding freight trains to run on Sundays). *But see* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous on interstate transportation a law requiring trains to come to almost a complete stop at all grade crossings, when there were 124 highway crossings at grade in 123 miles, doubling the running time).

[1041] Four cases over a lengthy period sustained the laws. Chicago, R.I. & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911); St. Louis, I. Mt. & So. Ry. v. Arkansas, 240

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Similarly, motor vehicle regulations have met mixed fates. Basically, it has always been recognized that states, in the interest of public safety and conservation of public highways, may enact and enforce comprehensive licensing and regulation of motor vehicles using its facilities.[1042] Indeed, states were permitted to regulate many of the local activities of interstate firms and thus the interstate operations, in pursuit of these interests.[1043] Here, too, safety concerns became overriding objects of deference, even in doubtful cases.[1044] In regard to navigation, which had given rise to *Gibbons v. Ogden* and *Cooley*, the Court generally upheld much state regulation on the basis that the activities were local and did not demand uniform rules.[1045]

As a general rule, although the Court during this time did not permit states to regulate a purely interstate activity or prescribe prices for purely interstate transactions,[1046] it did sustain a great deal of price and other regulation imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the period upheld state price-fixing schemes applied to goods intended for interstate commerce.[1047]

U.S. 518 (1916); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. R.R., 382 U.S. 423 (1966). In the latter case, the Court noted the extensive and conflicting record with regard to safety, but it then ruled that with the issue in so much doubt it was peculiarly a legislative choice.

[1042] Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916).

[1043] *E.g.*, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933) (state could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (maximum hours for drivers of motor vehicles); Eichholz v. Public Service Comm'n, 306 U.S. 268 (1939) (reasonable regulations of traffic). *But compare* Michigan Comm'n v. Duke, 266 U.S. 570 (1925) (state may not impose common-carrier responsibilities on business operating between states that did not assume them); Buck v. Kuykendall, 267 U.S. 307 (1925) (denial of certificate of convenience under circumstances was a ban on competition).

[1044] *E.g.*, Mauer v. Hamilton, 309 U.S. 598 (1940) (ban on operation of any motor vehicle carrying any other vehicle above the head of the operator). By far, the example of the greatest deference is South Carolina Highway. Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court upheld, in a surprising Stone opinion, truck weight and width restrictions prescribed by practically no other state (in terms of the width, no other).

[1045] *E.g.*, Transportation Co. v. City of Chicago, 99 U.S. 635 (1879); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). *See* Kelly v. Washington, 302 U.S. 1 (1937) (upholding state inspection and regulation of tugs operating in navigable waters, in absence of federal law).

[1046] *E.g.*, Western Union Tel Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934).

[1047] Milk Control Board v. Eisenberg Co., 306 U.S. 346 (1939) (milk); Parker v. Brown, 317 U.S. 341 (1943) (raisins).

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However, the states always had an obligation to act nondiscriminatorily. Just as in the taxing area, regulation that was parochially oriented, to protect local producers or industries, for instance, was not evaluated under ordinary standards but subjected to practically *per se* invalidation. The mirror image of *Welton v. Missouri*,[1048] the tax case, was *Minnesota v. Barber*,[1049] in which the Court invalidated a facially neutral law that in its practical effect discriminated against interstate commerce and in favor of local commerce. The law required fresh meat sold in the state to have been inspected by its own inspectors with 24 hours of slaughter. Thus, meat slaughtered in other states was excluded from the Minnesota market. The principle of the case has a long pedigree of application.[1050] State protectionist regulation on behalf of local milk producers has occasioned judicial censure. Thus, in *Baldwin v. G.A.F. Seelig.*,[1051] the Court had before it a complex state price-fixing scheme for milk, in which the state, in order to keep the price of milk artificially high within the state, required milk dealers buying out-of-state to pay producers, wherever they were, what the dealers had to pay within the state, and, thus, in-state producers were protected. And, in *H. P. Hood & Sons, Inc. v. Du Mond*,[1052] the Court struck down a state refusal to grant an out-of-state milk distributor a license to operate a milk receiving station within the state on the basis that the additional diversion of local milk to the other state would impair the supply for the in-state market. A state may not bar an interstate market to protect local interests.[1053]

[1048] 91 U.S. 275 (1875).

[1049] 136 U.S. 313 (1890).

[1050] *E.g.*, Brimmer v. Rebman, 138 U.S. 78 (1891) (law requiring postslaughter inspection in each county of meat transported over 100 miles from the place of slaughter); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (city ordinance preventing selling of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison). As the latter case demonstrates, it is constitutionally irrelevant that other Wisconsin producers were also disadvantaged by the law. For a modern application of the principle of these cases, *see* Fort Gratiot Sanitary Landfill v. Michigan Nat. Res. Dep't, 504 U.S. 353 (1992) (forbidding landfills from accepting out-of-county wastes). *See also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (discrimination against interstate commerce not preserved because local businesses also suffer).

[1051] 294 U.S. 511 (1935). *See also* Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). With regard to products originating within the state, the Court had no difficulty with price fixing. Nebbia v. New York, 291 U.S. 502 (1934).

[1052] 336 U.S. 525 (1949). For the most recent case in this saga, *see* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[1053] And the Court does not permit a state to combat discrimination against its own products by admitting only products (here, again, milk) from states that have reciprocity agreements with it to protect its own dealers. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

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State Taxation and Regulation: The Modern Law

General Considerations.—Transition from the old law to the modern standard occurred relatively smoothly in the field of regulation,[1054] but in the area of taxation the passage was choppy and often witnessed retreats and advances.[1055] In any event, both taxation and regulation now are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

Taxation.—During the 1940s and 1950s, there was conflict within the Court between the view that interstate commerce could not be taxed at all, at least "directly," and the view that the negative commerce clause protected against the risk of double taxation.[1056] In *Northwestern States Portland Cement Co. v. Minnesota*,[1057] the Court reasserted the principle expressed earlier in *Western Live Stock*, that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.[1058] *Northwestern States* held that a state could constitutionally impose a nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states' taxing powers."[1059] Thus, in *Northwestern States*, foreign corporations that maintained a sales office and employed sales staff in the taxing state for solicitation of orders for their merchandise that, upon acceptance of the orders at their home office in another jurisdiction, were shipped to customers in the taxing state, were held liable to pay the latter's income tax on that portion of the net in-

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[1054] Formulation of a balancing test was achieved in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), and was thereafter maintained more or less consistently. The Court's current phrasing of the test was in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1055] Indeed, scholars dispute just when the modern standard was firmly adopted. The conventional view is that it was articulated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), but there also seems little doubt that the foundation of the present law was laid in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[1056] *Compare* Freeman v. Hewit, 329 U.S. 249, 252–256 (1946), *with* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258, 260 (1938).

[1057] 358 U.S. 450 (1959).

[1058] 358 U.S. at 461–62. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). For recent reiterations of the principle, *see* Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 310 n.5 (1992) (citing cases).

[1059] Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 54 (1987).

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come of their interstate business as was attributable to such solicitation.

Yet, the following years saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for the states to tax a corporation's net income, properly apportioned to the taxing state, as in *Northwestern States*, but no state could levy a tax on a foreign corporation for the privilege of doing business in the state, both taxes alike in all respects.[1060] In *Complete Auto Transit, Inc. v. Brady*,[1061] the Court overruled the cases embodying the distinction and articulated a standard that has governed the cases since. The tax in *Brady* was imposed on the privilege of doing business as applied to a corporation engaged in interstate transportation services in the taxing state; it was measured by the corporation's gross receipts from the service. The appropriate concern, the Court wrote, was to pay attention to "economic realities" and to "address the problems with which the commerce clause is concerned."[1062] The standard, a set of four factors that was distilled from precedent but newly applied, was firmly set out. A tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[1063] All subsequent cases have been decided in this framework.

Nexus.—"The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. The Due Process Clause demands that there exist some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with

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[1060] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer's capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing state, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

[1061] 430 U.S. 274 (1977).

[1062] 430 U.S. at 279, 288. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980)).

[1063] 430 U.S. at 279. The rationale of these four parts of the test is set out in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312–13 (1992). A recent application of the four-part *Complete Auto Transit* test is Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

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the taxing State. The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation."[1064] "The broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return."[1065]

The question of the presence of a substantial nexus often arises when a state imposes on out-of-state vendors an obligation to collect use taxes on goods sold in the taxing state, and a determinative factor is whether the vendor is physically present in the state. The Court has sustained such an imposition on mail order sellers with retail outlets, solicitors, or property within the taxing state,[1066] but it has denied the power to a state to tax a seller whose "only connection with customers in the State is by common carrier or the United States mail."[1067] The validity of general business taxes on interstate enterprises may also be determined by the nexus stan-

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[1064] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505 (2008) (citations and internal quotation marks omitted). "[T]he due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. . . . In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312 (1992).

[1065] 128 S. Ct. at 1505 (internal quotation marks omitted). It had been thought, prior to the decision in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 305 (1992), that the tests for nexus under the Commerce Clause and the Due Process Clause were identical, but the Court in that case, although stating that the two tests "are closely related" (citing National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 756 (1967)), held that they "differ fundamentally" and found a state tax to satisfy the Due Process Clause but to violate the Commerce Clause. *Compare Quill* at 325–28 (Justice White concurring in part and dissenting in part). However, the requirement for "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" probably survives the bifurcation of the tests in *Quill*. National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 756 (1967) (Commerce Clause), quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954) (Due Process Clause).

[1066] Scripto v. Carson, 362 U.S. 207 (1960); National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977). In *Scripto*, the vendor's agents that were in the state imposing the tax were independent contractors, rather than employees, but this distinction was irrelevant. *See also* Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232, 249–50 (1987) (reaffirming *Scripto* on this point). *See also* D. H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) (upholding imposition of use tax on catalogs, printed outside state at direction of an in-state corporation and shipped to prospective customers within the state).

[1067] National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 758 (1967), reaffirmed with respect to the Commerce Clause in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298 (1992).

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dard. However, again, only a minimal contact is necessary.[1068] Thus, maintenance of one full-time employee within the state (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus.[1069] The application of a state business-and-occupation tax on the gross receipts from a large wholesale volume of pipe and drainage products in the state was sustained, even though the company maintained no office, owned no property, and had no employees in the state, its marketing activities being carried out by an in-state independent contractor.[1070] The Court also upheld a state's application of a use tax to aviation fuel stored temporarily in the state prior to loading on aircraft for consumption in interstate flights.[1071]

When "there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. To answer that question, [the Court has] developed the unitary business principle. Under that principle, a State need not isolate the intrastate income-producing activities from the rest of the business but may tax an apportioned sum of the corporation's multistate business if the business is unitary. The court must determine whether intrastate and extrastate activities formed part of a single unitary business, or whether the out-of-state values that the State seeks to tax derive[d] from unrelated business activity which constitutes a discrete business enterprise. . . . If the value the State wishe[s] to tax derive[s] from a 'unitary business' operated within and without the State, the State [may] tax an apportioned share of the value of that business instead of isolating the value attributable to the operation of the business within the State. Conversely, if the value the State wished to tax derived from a discrete business enterprise, then the State could not tax even an apportioned share of that value." [1072] But, even when

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[1068] Reacting to *Northwestern States*, Congress enacted Pub. L. 86–272, 15 U.S.C. § 381, providing that mere solicitation by a company acting outside the state did not support imposition of a state income tax on a company's proceeds. *See* Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972).

[1069] Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975). *See also* General Motors Corp. v. Washington, 377 U.S. 436 (1964).

[1070] Tyler Pipe Indus. v. Dept. of Revenue, 483 U.S. 232, 249–51 (1987). The Court agreed with the state court's holding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." Id. at 250.

[1071] United Air Lines v. Mahin, 410 U.S. 623 (1973).

[1072] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505–06 (2008) (citations and internal quotation marks omitted). The holding of this case was that the concept of "operational function," which the Court had introduced in prior cases, was "not intended to modify the unitary business principle by adding a

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there is a unitary business, "[t]he Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'"[1073]

Apportionment.—This requirement is of long standing,[1074] but its importance has broadened as the scope of the states' taxing powers has enlarged. It is concerned with what formulas the states must use to claim a share of a multistate business' tax base for the taxing state, when the business carries on a single integrated enterprise both within and without the state. A state may not exact from interstate commerce more than the state's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor has been seen as both a Commerce Clause and a due process requisite,[1075] although, as one recent Court decision notes, some tax measures that are permissible under the Due Process Clause nonetheless could run afoul of the Commerce Clause.[1076] The Court has declined to im-

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new ground for apportionment." Id. at 1507–08. In other words, the Court declined to adopt a basis upon which a state could tax a non-unitary business.

[1073] Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 165–66 (1983) (internal quotation marks omitted). *See also* ASARCO Inc. v. Id. State Tax Comm'n, 458 U.S. 307, 316–17 (1982); Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 58 (2000) (interest deduction not properly apportioned between unitary and non-unitary business).

[1074] *E.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891); Maine v. Grand Trunk Ry., 142 U.S. 217, 278 (1891).

[1075] *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992); Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 251 (1987); Container Corp. of Amer. v. Franchise Tax Bd., 463 U.S. 159 (1983); F. W. Woolworth Co. v. N.M. Tax. & Revenue Dep't, 458 U.S. 354 (1982); ASARCO Inc. v. Id. State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). *Cf.* Am. Trucking Ass'ns Inc. v. Scheiner, 483 U.S. 266 (1987).

[1076] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 13 (2015) ("The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' But 'while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.") (internal citations omitted). The challenge in *Wynne* was brought by Maryland residents, whose worldwide income three dissenting Justices would have seen as subject to Maryland taxation based on their domicile in the state, even though it resulted in the double taxation of income earned in other states. *Id.* at 2 (Ginsburg, J., dissenting) ("For at least a century, 'domicile' has been recognized as a secure ground for taxation of residents' worldwide income."). However, the majority took a different view, holding that Maryland's taxing scheme was unconstitutional under the dormant Commerce Clause because it did not provide a full credit for taxes paid to other states on income earned from interstate activities. *Id.* at 21–25 (majority opinion).

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pose any particular formula on the states, reasoning that to do so would be to require the Court to engage in "extensive judicial lawmaking," for which it was ill-suited and for which Congress had ample power and ability to legislate.[1077]

"Instead," the Court wrote, "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. . . . The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity." [1078]

In *Goldberg v. Sweet*, the Court upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the state and charged to an in-state service address, regardless of where the telephone call was billed or paid.[1079] A complex state tax imposed on trucks displays the operation of the test. Thus, a state registration tax met the internal consistency test because every state honored every other states', and a motor fuel tax similarly was sustained because it was apportioned to mileage traveled in the state, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the state's roads, were voided, under the internal consistency test, because if every state imposed them, then the burden on interstate commerce would be great.[1080] Similarly, the Court held that Maryland's personal income tax scheme—which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states—"fails the internal consistency test." [1081] The Court did so because, if every state adopted the same approach, taxpayers who "earn[] income inter-

[1077] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278–80 (1978).

[1078] Goldberg v. Sweet, 488 U.S. 252, 261, 262 (1989) (citations omitted).

[1079] 488 U.S. 252 (1989). The tax law provided a credit for any taxpayer who was taxed by another state on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.

[1080] American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[1081] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 22 (2015). The Court in *Wynne* expressly declined to distinguish between taxes on gross receipts and taxes on net income or between taxes on individuals and taxes

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state" would be taxed twice on a portion of that income, while those who earned income solely within their state of residence would be taxed only once.[1082]

Deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the state but terminated in another state. The tax was unapportioned to reflect the intrastate travel and the interstate travel.[1083] The tax in this case was different from the tax upheld in *Central Greyhound*, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, because if every state imposed a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the state, not a tax on the travel.[1084]

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the state's exposure to the state income tax.[1085]

Discrimination.—The "fundamental principle" governing this factor is simple. "'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[1086] That is, a tax that by its terms or operation imposes greater bur-

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on corporations. *Id.* at 7, 9. The Court also noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but the Court did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[1082] *Id.* at 22–23.

[1083] Indeed, there seemed to be a precedent squarely on point: Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948). The Court in that case struck down a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the state.

[1084] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the state and that were billed to an in-state address.

[1085] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The state had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333–44. *See also* South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[1086] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). The principle, as we have observed above, is a long-standing one under the Commerce Clause. *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876).

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dens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the Commerce Clause.[1087] In *Armco, Inc. v. Hardesty*,[1088] the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found that the imposition discriminated against the interstate wholesaler.[1089] A state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the Commerce Clause.[1090] A state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the state, or if it was produced in another state that granted a similar credit to the state's ethanol fuel, was found discriminatory in violation of the clause.[1091] The Court reached the same conclusion as to Maryland's personal income tax scheme, previously noted, which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states, finding the scheme "inherently discriminatory."[1092]

[1087] Maryland v. Louisiana, 451 U.S. 725, 753–760 (1981). *But see* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–619 (1981). *See also* Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994) (surcharge on in-state disposal of solid wastes that discriminates against companies disposing of waste generated in other states invalid).

[1088] 467 U.S. 638 (1984).

[1089] The Court applied the "internal consistency" test here too, in order to determine the existence of discrimination. 467 U.S. at 644–45. Thus, the wholesaler did not have to demonstrate it had paid a like tax to another state, only that if other states imposed like taxes it would be subject to discriminatory taxation. *See also* Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232 (1987); American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987); Amerada Hess Corp. v. Director, New Jersey Taxation Div., 490 U.S. 66 (1989); Kraft Gen. Foods v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

[1090] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[1091] New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988). *Compare* Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (state intangibles tax on a fraction of the value of corporate stock owned by in-state residents inversely proportional to the corporation's exposure to the state income tax violated dormant commerce clause), *with* General Motors Corp. v. Tracy, 519 U.S. 278 (1997) (state imposition of sales and use tax on all sales of natural gas except sales by regulated public utilities, all of which were in-state companies, but covering all other sellers that were out-of-state companies did not violate dormant commerce clause because regulated and unregulated companies were not similarly situated).

[1092] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 23 (2015) ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff."). In so doing, the Court noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but it did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

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Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[1093] applied its nondiscrimination element of the doctrine to invalidate the state's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily out-of-state residents. The claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen had it been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant." [1094]

Benefit Relationship.—Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the levy be fairly related to benefits provided by the taxing state, it has declined to be drawn into any consideration of the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the first factor, the business has the requisite nexus with the state; if it does, then the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections that the state has afforded it.[1095]

Regulation.—The modern standard of Commerce Clause review of state regulation of, or having an impact on, interstate com-

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[1093] 520 U.S. 564 (1997). The decision was 5-to-4 with a strong dissent by Justice Scalia, id. at 595, and a philosophical departure by Justice Thomas. Id. at 609.

[1094] 520 U.S. at 586.

[1095] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the state, were found to violate this standard in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 291 (1987). *But see* American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

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merce was adopted in *Southern Pacific Co. v. Arizona*,[1096] although it was presaged in a series of opinions, mostly dissents, by Chief Justice Stone.[1097] *Southern Pacific* tested the validity of a state train-length law, justified as a safety measure. Revising a hundred years of doctrine, the Chief Justice wrote that whether a state or local regulation was valid depended upon a "reconciliation of the conflicting claims of state and national power [that] is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."[1098] Save in those few cases in which Congress has acted, "this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."[1099]

That the test to be applied was a balancing one, the Chief Justice made clear at length, stating that, in order to determine whether the challenged regulation was permissible, "matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."[1100]

The test today continues to be the Stone articulation, although the more frequently quoted encapsulation of it is from *Pike v. Bruce Church, Inc.*: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[1101]

Obviously, the test requires "evenhanded[ness]." *Discrimination* in regulation is another matter altogether. When on its face or in its effect a regulation betrays "economic protectionism"—an in-

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[1096] 325 U.S. 761 (1945).

[1097] *E.g.*, DiSanto v. Pennsylvania, 273 U.S. 34, 43 (1927) (dissenting); California v. Thompson, 313 U.S. 109 (1941); Duckworth v. Arkansas, 314 U.S. 390 (1941); Parker v. Brown, 317 U.S. 341, 362–68 (1943) (alternative holding).

[1098] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768–69 (1941).

[1099] 325 U.S. at 769.

[1100] 325 U.S. at 770–71.

[1101] 397 U.S. 137, 142 (1970) (citation omitted).

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tent to benefit in-state economic interests at the expense of out-of-state interests—then no balancing is required. "When a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, ... Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied."[1102] Thus, an Oklahoma law that required coal-fired electric utilities in the state, producing power for sale in the state, to burn a mixture of coal containing at least 10% Oklahoma-mined coal was invalidated at the behest of a state that had previously provided virtually 100% of the coal used by the Oklahoma utilities.[1103] Similarly, the Court invalidated a state law that permitted interdiction of export of hydroelectric power from the state to neighboring states, when in the opinion of regulatory authorities the energy was required for use in the state; a state may not prefer its own citizens over out-of-state residents in access to resources within the state.[1104]

States may certainly promote local economic interests and favor local consumers, but they may not do so by adversely regulating out-of-state producers or consumers. In *Hunt v. Washington State Apple Advertising Comm'n*,[1105] the Court confronted a North Caro-

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[1102] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). In Maine v. Taylor, 477 U.S. 131 (1986), the Court upheld a protectionist law, finding a valid justification aside from economic protectionism. The state barred the importation of out-of-state baitfish, and the Court credited lower-court findings that legitimate ecological concerns existed about the possible presence of parasites and nonnative species in baitfish shipments.

[1103] Wyoming v. Oklahoma, 502 U.S. 437 (1992). *See also* Maryland v. Louisiana, 451 U.S. 725 (1981) (a tax case, invalidating a state first-use tax, which, because of exceptions and credits, imposed a tax only on natural gas moving out-of-state, because of impermissible discrimination).

[1104] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). *See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (voiding a ban on transporting minnows caught in the state for sale outside the state); Sporhase v. Nebraska, 458 U.S. 941 (1982) (invalidating a ban on the withdrawal of ground water from any well in the state intended for use in another state). These cases largely eviscerated a line of older cases recognizing a strong state interest in protection of animals and resources. *See* Geer v. Connecticut, 161 U.S. 519 (1896). *New England Power* had rather old antecedents. *E.g.*, West v. Kansas Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[1105] 432 U.S. 333 (1977). Other cases in which a state was attempting to promote and enhance local products and businesses include Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (state required producer of high-quality cantaloupes to pack them in the state, rather than in an adjacent state at considerably less expense, in order that the produce be identified with the producing state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (state banned export of shrimp from state until hulls and heads were removed and processed, in order to favor canning and manufacture within the state).

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lina requirement that closed containers of apples offered for sale or shipped into North Carolina carry no grade other than the applicable U.S. grade. Washington State mandated that all apples produced in and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The inability to display the recognized state grade in North Carolina impeded marketing of Washington apples. The Court obviously suspected that the impact was intended, but, rather than strike down the state requirement as purposeful, it held that the regulation had the practical effect of discriminating, and, as no defense based on possible consumer protection could be presented, the Court invalidated the state law.[1106] State actions to promote local products and producers, of everything from milk[1107] to alcohol,[1108] may not be achieved through protectionism.

Even garbage transportation and disposition is covered by the negative commerce clause. A New Jersey statute that banned the importation of most solid or liquid wastes that originated outside the state was struck down as "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites"; the state could not justify the statute as a quarantine law designed to protect the public health because New Jersey left its landfills open to domestic waste.[1109] Further extending the application of the negative commerce clause to waste disposal,[1110] the Court, in *C & A Carbone, Inc. v. Town of*

[1106] That discriminatory effects will result in invalidation, as well as purposeful discrimination, is also drawn from Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[1107] *E.g.*, H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). *See also* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (state effort to combat discrimination by other states against its milk through reciprocity provisions). In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state milk pricing order, which imposed an assessment on all milk sold by dealers to in-state retailers, the entire assessment being distributed to in-state dairy farmers despite the fact that about two-thirds of the assessed milk was produced out of state. The avowed purpose and undisputed effect of the provision was to enable higher-cost in-state dairy farmers to compete with lower-cost dairy farmers in other states.

[1108] Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986). *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (a tax case). *But cf.* Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

[1109] City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978), *reaffirmed and applied* in Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), and Fort Gratiot Sanitary Landfill v. Michigan Natural Resources Dept., 504 U.S. 353 (1992).

[1110] *See also* Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).

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Clarkstown,[1111] invalidated as discriminating against interstate commerce a local "flow control" ordinance that required all solid waste within the town to be processed at a designated transfer station before leaving the municipality. Underlying the restriction was the town's decision to have a solid waste transfer station built by a private contractor, rather than with public funds. To make the arrangement appealing to the contractor, the town guaranteed it a minimum waste flow, which the town ensured by requiring that all solid waste generated within the town be processed at the contractor's station.

The Court saw the ordinance as a form of economic protectionism, in that it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."[1112] The Court found that the town could not "justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other states."[1113] The Court also found that the town's goal of "revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State."[1114] Moreover, the town had other means to raise revenue, such as subsidizing the facility through general taxes or municipal bonds.[1115] The Court did not deal with—indeed, did not notice—the fact that the local law conferred a governmentally granted monopoly—an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level.[1116]

In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[1117] the Court declined to apply *Carbone* where haulers were required to bring waste to facilities owned and operated by a state-created public benefit corporation instead of to a *private* processing facility, as was the case in *Carbone*. The Court

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[1111] 511 U.S. 383 (1994).

[1112] 511 U.S. at 392. The Court added: "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." Id.

[1113] 511 U.S. at 393.

[1114] 511 U.S. at 393–94.

[1115] 511 U.S. at 394.

[1116] *See The Supreme Court, Leading Cases, 1993 Term*, 108 Harv. L. Rev. 139, 149–59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).

[1117] 550 U.S. 330 (2007).

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found this difference constitutionally significant because "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer . . . ." [1118]

In *Department of Revenue of Kentucky v. Davis*,[1119] the Court considered a challenge to the long-standing state practice of issuing bonds for public purposes while exempting interest on the bonds from state taxation.[1120] In *Davis*, a challenge was brought against Kentucky for such a tax exemption because it applied only to government bonds that Kentucky issued, and not to government bonds issued by other states. The Court, however, recognizing the long pedigree of such taxation schemes, applied the logic of *United Haulers Ass'n, Inc.*, noting that the issuance of debt securities to pay for public projects is a "quintessentially public function," and that Kentucky's differential tax scheme should not be treated like one that discriminated between privately issued bonds.[1121] In what may portend a significant change in dormant commerce clause doctrine, however, the Court declined to evaluate the governmental benefits of Kentucky's tax scheme versus the economic burdens it imposed, hold-

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[1118] 550 U.S. at 334. The Commerce Clause test referred to is the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). "Under the *Pike* test, we will uphold a nondiscriminatory statute . . . 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 1797 (quoting *Pike*, 397 U.S. at 142). The fact that a state is seeking to protect itself from economic or other difficulties, is not, by itself, sufficient to justify barriers to interstate commerce. Edwards v. California, 314 U.S. 160 (1941) (striking down California effort to bar "Okies"—persons fleeing the Great Plains dust bowl during the Depression). *Cf.* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of Constitution, Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[1119] 128 S. Ct. 1801 (2008).

[1120] This exemption from state taxes is also generally made available to bonds issued by local governmental entities within a state.

[1121] 128 S. Ct. at 1810–11. The Court noted that "[t]here is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market." Id. at 1811. Three members of the Court would have also found this taxation scheme constitutional under the "market participant" doctrine, despite the argument that the state, in this instance, was acting as a market regulator, not as a market participant. Id. at 1812–14 (Justice Souter, joined by Justices Stevens and Breyer).

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ing that, at least in this instance, the "Judicial Branch is not institutionally suited to draw reliable conclusions." [1122]

Drawing the line between regulations that are facially discriminatory and regulations that necessitate balancing is not an easy task. Not every claim of unconstitutional protectionism has been sustained. Thus, in *Minnesota v. Clover Leaf Creamery Co.*,[1123] the Court upheld a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other nonreturnable, nonrefillable containers, such as paperboard cartons. The Court found no discrimination against interstate commerce, because both in-state and out-of-state interests could not use plastic containers, and it refused to credit a lower, state-court finding that the measure was intended to benefit the local pulpwood industry. In *Exxon Corp. v. Governor of Maryland*,[1124] the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland. The statute did not on its face discriminate against out-of-state companies, but, as there were no producers or refiners in Maryland, "the burden of the divestiture requirements" fell solely on such companies.[1125] The Court found, however, that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level," [1126] as the statute does not "distinguish between in-state and out-of-state companies in the retail market." [1127]

Still a model example of balancing is Chief Justice Stone's opinion in *Southern Pacific Co. v. Arizona*.[1128] At issue was the validity of Arizona's law barring the operation within the state of trains of more than 14 passenger cars (no other state had a figure this low) or 70 freight cars (only one other state had a cap this low). First, the Court observed that the law substantially burdened interstate commerce. Enforcement of the law in Arizona, while train lengths

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[1122] 128 S. Ct. at 1817.

[1123] 449 U.S. 456, 470–74 (1981).

[1124] 437 U.S. 117 (1978).

[1125] 437 U.S. at 125.

[1126] 437 U.S. at 125.

[1127] 437 U.S. at 126.

[1128] 325 U.S. 761 (1945). Interestingly, Justice Stone had written the opinion for the Court in South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which, in a similar case involving regulation of interstate transportation and proffered safety reasons, he had eschewed balancing and deferred overwhelmingly to the state legislature. *Barnwell Bros*. involved a state law that prohibited use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 pounds, with from 85% to 90% of the Nation's trucks exceeding these limits. This deference and refusal to evaluate evidence resurfaced in a case involving an attack on railroad "full-crew" laws. Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. Railroad Co., 393 U.S. 129 (1968).

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went unregulated or were regulated by varying standards in other states, meant that interstate trains of a length lawful in other states had to be broken up before entering Arizona. As it was not practicable to break up trains at the border, that act had to be done at yards quite removed, with the result that the Arizona limitation controlled train lengths as far east as El Paso, Texas, and as far west as Los Angeles. Nearly 95 percent of the rail traffic in Arizona was interstate. The other alternative was to operate in other states with the lowest cap, Arizona's, with the result that Arizona's law controlled the railroads' operations over a wide area.[1129] If other states began regulating at different lengths, as they would be permitted to do, the burden on the railroads would burgeon. Moreover, the additional number of trains needed to comply with the cap just within Arizona was costly, and delays were occasioned by the need to break up and remake lengthy trains.[1130]

Conversely, the Court found that, as a safety measure, the state cap had "at most slight and dubious advantage, if any, over unregulated train lengths." That is, although there were safety problems with longer trains, the shorter trains mandated by state law required increases in the numbers of trains and train operations and a consequent increase in accidents generally more severe than those attributable to longer trains. In short, the evidence did not show that the cap lessened rather than increased the danger of accidents.[1131]

Conflicting state regulations appeared in *Bibb v. Navajo Freight Lines.*[1132] There, Illinois required the use of contour mudguards on trucks and trailers operating on the state's highways, while adjacent Arkansas required the use of straight mudguards and banned contoured ones. At least 45 states authorized straight mudguards. The Court sifted the evidence and found it conflicting on the comparative safety advantages of contoured and straight mudguards. But, admitting that if that were all that was involved the Court would have to sustain the costs and burdens of outfitting with the required mudguards, the Court invalidated the Illinois law, because of the massive burden on interstate commerce occasioned by the necessity of truckers to shift cargoes to differently designed vehicles at the state's borders.

[1129] The concern about the impact of one state's regulation upon the laws of other states is in part a reflection of the *Cooley* national uniformity interest and partly a hesitation about the autonomy of other states. *E.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88–89 (1987); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583–84 (1986).

[1130] Southern Pacific Co. v. Arizona, 325 U.S. 761, 771–75 (1945).

[1131] 325 U.S. at 775–79, 781–84.

[1132] 359 U.S. 520 (1959).

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Arguably, the Court in more recent years has continued to stiffen the scrutiny with which it reviews state regulation of interstate carriers purportedly for safety reasons.[1133] Difficulty attends any evaluation of the possible developing approach, because the Court has spoken with several voices. A close reading, however, indicates that, although the Court is most reluctant to invalidate regulations that touch upon safety and that if safety justifications are not illusory it will not second-guess legislative judgments, the Court nonetheless will not accept, without more, state assertions of safety motivations. "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Rather, the asserted safety purpose must be weighed against the degree of interference with interstate commerce. "This 'weighing' . . . requires . . . a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." [1134]

Balancing has been used in other than transportation-industry cases. Indeed, the modern restatement of the standard was in such a case.[1135] There, the state required cantaloupes grown in the state to be packed there, rather than in an adjacent state, so that in-state packers' names would be associated with a superior product. Promotion of a local industry was legitimate, the Court, said, but it did not justify the substantial expense the company would have to incur to comply. State efforts to protect local markets, concerns, or consumers against outside companies have largely been unsuccessful. Thus, a state law that prohibited ownership of local investment-advisory businesses by out-of-state banks, bank holding companies, and trust companies was invalidated.[1136] The Court plainly thought the statute was protectionist, but instead of voiding it for that reason it held that the legitimate interests the state might have did not justify the burdens placed on out-of-state companies and that the state could pursue the accomplishment of legitimate ends through some intermediate form of regulation. In *Edgar v. MITE Corp.*,[1137] an Illinois regulation of take-over attempts of companies that had specified business contacts with the state, as applied to an at-

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[1133] Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

[1134] Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670–71 (1981), (quoting Raymond Motor Transp. v. Rice, 434 U.S. 429, 441, 443 (1978)). Both cases invalidated state prohibitions of the use of 65-foot single-trailer trucks on state highways.

[1135] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1136] Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980).

[1137] 457 U.S. 624 (1982) (plurality opinion).

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tempted take-over of a Delaware corporation with its principal place of business in Connecticut, was found to constitute an undue burden, with special emphasis upon the extraterritorial effect of the law and the dangers of disuniformity. These problems were found lacking in the next case, in which the state statute regulated the manner in which purchasers of corporations chartered within the state and with a specified percentage of in-state shareholders could proceed with their take-over efforts. The Court emphasized that the state was regulating only its own corporations, which it was empowered to do, and no matter how many other states adopted such laws there would be no conflict. The burdens on interstate commerce, and the Court was not that clear that the effects of the law were burdensome in the appropriate context, were justified by the state's interests in regulating its corporations and resident shareholders.[1138]

In other areas, although the Court repeats balancing language, it has not applied it with any appreciable bite,[1139] but in most respects the state regulations involved are at most problematic in the context of the concerns of the Commerce Clause.

Foreign Commerce and State Powers

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of *Brown v. Maryland*,[1140] in the course of striking down a state statute requiring "all importers of foreign articles or commodities," preparatory to selling the goods, to take out a license, Chief Justice Marshall developed a lengthy exegesis explaining why the law was void under both the Import-Export Clause[1141] and the Commerce Clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the taxing power of the states did not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported. This is the famous "original package" doctrine. Only when the importer parts with his importations, mixes them into his gen-

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[1138] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[1139] *E.g.*, Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493, 525–26 (1989); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472–74 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127–28 (1978). *But see* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988).

[1140] 25 U.S. (12 Wheat.) 419 (1827).

[1141] Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar states from levying nondiscriminatory, *ad valorem* property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

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eral property by breaking up the packages, may the state treat them as taxable property.

Obviously, to the extent that the Import-Export Clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a Commerce Clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit.[1142] In other respects, however, the Court has applied the foreign commerce aspect of the clause more stringently against state taxation.

Thus, in *Japan Line, Ltd. v. County of Los Angeles,*[1143] the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce,[1144] "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations . . . come into play. The first is the enhanced risk of multiple taxation. . . . Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." [1145] Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the states. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, *ad valorem* property tax, on foreign-owned instrumentalities, *i.e.*, cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National

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[1142] *See*, *e.g.*, Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in *Michelin Tire*, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 n.14 (1979).

[1143] 441 U.S. 434 (1979).

[1144] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance, 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It taxed the dividends that a corporation received from its foreign subsidiaries, but not the dividends it received from its domestic subsidiaries. Therefore, there was a facial distinction between foreign and domestic commerce.

[1145] 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the state and used in foreign commerce).

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uniformity was endangered, because, although California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted.[1146]

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the state as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction—the sale of fuel—that occurred within only one jurisdiction. Second, the one-voice standard was satisfied, because the United States had never entered into any compact with a foreign nation precluding such state taxation, having only signed agreements with others, which had no force of law, aspiring to eliminate taxation that constituted impediments to air travel.[1147] Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as applied to the taxing of the income of a domestic-based corporate group with extensive foreign operations.[1148]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*,[1149] upheld the state's worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a foreign corporation. The Court determined that the tax easily satisfied three of the four-part *Complete Auto* test—nexus, apportionment, and relation to state's services—and concluded that the nondiscrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in *Japan Lines*, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted

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[1146] 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 187–192 (1983).

[1147] Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986).

[1148] Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). The validity of the formula as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries, so that some of the income earned abroad would be taxed within the taxing state, is a question of some considerable dispute.

[1149] 512 U.S. 298 (1994).

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California's practice.[1150] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[1151]

The power to regulate foreign commerce was always broader than the states' power to tax it, an exercise of the "police power" recognized by Chief Justice Marshall in *Brown v. Maryland*.[1152] That this power was constrained by notions of the national interest and preemption principles was evidenced in the cases striking down state efforts to curb and regulate the actions of shippers bringing persons into their ports.[1153] On the other hand, quarantine legislation to protect the states' residents from disease and other hazards was commonly upheld though it regulated international commerce.[1154] A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was upheld because of the practical necessities of enforcement of domestic law.[1155]

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in *Japan Line*.[1156] Thus, the application of a state civil rights law to a corporation transporting passengers outside the state to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

[1150] Reliance could not be placed on Executive statements, the Court explained, because "the Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" 512 U.S. at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." Id. at 330. Dissenting Justice Scalia noted that, although the Court's ruling correctly restored preemptive power to Congress, "it permits the authority to be exercised by silence. Id. at 332."

[1151] *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 139–49 (1993).

[1152] 25 U.S. (12 Wheat.) 419, 443–44 (1827).

[1153] New York City v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding reporting requirements imposed on ships' masters), *overruled by* Henderson v. Mayor of New York, 92 U.S. 259 (1876); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849)(1849); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[1154] Campagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Louisiana v. Texas, 176 U.S. 1 (1900); Morgan v. Louisiana, 118 U.S. 455 (1886).

[1155] New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908).

[1156] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 n.20 (1979) (construing Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948)).

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CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

In *Gibbons v. Ogden*,[1157] the Court, speaking by Chief Justice Marshall, held that New York legislation that excluded from the navigable waters of that state steam vessels enrolled and licensed under an act of Congress to engage in the coasting trade was in conflict with the federal law and hence void.[1158] The result, said the Chief Justice, was required by the Supremacy Clause, which proclaims that statutes and treaties as well as the Constitution itself supersede state laws that "interfere with, or are contrary to" their dictates. "In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." [1159]

Since the turn of the 20th century, federal legislation, primarily but not exclusively under the Commerce Clause, has penetrated deeper and deeper into areas once occupied by the regulatory power of the states. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress and hence invalid under the supremacy clause.[1160]

"The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end

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[1157] 22 U.S. (9 Wheat.) 1 (1824).

[1158] A modern application of Gibbons v. Ogden is Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), in which the Court, relying on the present version of the licensing statute used by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the *Douglas* opinion, the Court observed that, "[a]lthough it is true that the Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly reenacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny." Id. at 278–79.

[1159] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). Although preemption is basically constitutional in nature, deriving its forcefulness from the Supremacy Clause, it is much more like statutory decisionmaking, in that it depends upon an interpretation of an act of Congress in determining whether a state law is ousted. *E.g.*, Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271–72 (1977). *See also* Swift & Co. v. Wickham, 382 U.S. 111 (1965). "Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." Id. at 120.

[1160] Cases considered under this heading are overwhelmingly about federal legislation based on the Commerce Clause, but the principles enunciated are identical whatever source of power Congress uses. Therefore, cases arising under legislation based on other powers are cited and treated interchangeably.

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in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." [1161] As Justice Black once explained in a much quoted exposition of the matter: "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [1162]

Before setting out in their various forms the standards and canons to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As an astute observer long ago observed, "the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by metaphorical sign-language of 'occupation of the field.' And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor." [1163]

[1161] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 285–86 (1971).

[1162] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This case arose under the immigration power of clause 4.

[1163] Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. Chi. L. Rev. 85, 87–88 (1956). "The [Court] appears to use essentially the same reasoning process in a case nominally hinging on preemption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [The] Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed

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Preemption Standards.—Until roughly the New Deal, as recited above, the Supreme Court applied a doctrine of "dual federalism," under which the Federal Government and the states were separate sovereigns, each preeminent in its own fields but lacking authority in the other's. This conception affected preemption cases, with the Court taking the view, largely, that any congressional regulation of a subject effectively preempted the field and ousted the states.[1164] Thus, when Congress entered the field of railroad regulation, the result was invalidation of many previously enacted state measures. Even here, however, safety measures tended to survive, and health and safety legislation in other areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards, still recited and relied on, for determining when preemption occurred.[1165] All modern cases recite some variation of the basic standards. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute."[1166] Congress's intent to supplant state authority in a particular field may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose."[1167] Because preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed general criteria which it purports to use in determining the preemptive reach.

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state regulation to stand." Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a "thoughtful student comment" in G. GUNTHER, CONSTITUTIONAL LAW 297 (12th ed. 1991)).

[1164] *E.g.*, Charleston & W. Car. Ry. v. Varnville Co., 237 U.S. 597, 604 (1915). *But see* Corn Products Refining Co. v. Eddy, 249 U.S. 427, 438 (1919).

[1165] *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); California v. Zook, 336 U.S. 725 (1949).

[1166] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (internal quotation marks and case citations omitted). Conversely, a *state's* intentions with regard to its own law "is relevant only as it may relate to 'the scope of the state law that Congress understood would survive'" the preemptive effect of federal law or "the nature of the effect of state law on" on the subject matter Congress is regulating. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. ___, No. 14–181, slip op. at 11 (2016) (internal quotations omitted).

[1167] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); FMC Corp. v. Holliday, 498 U.S. 52 (1990); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–605 (1991).

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"Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [1168] However, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained." [1169] At the same time, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." [1170]

In the final analysis, "the generalities" that may be drawn from the cases do not decide them. Rather, "the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances." [1171]

[1168] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and case citations omitted). The same or similar language is used throughout the preemption cases. *E.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *id.* at 532–33 (Justice Blackmun concurring and dissenting); *id.* at 545 (Justice Scalia concurring and dissenting); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–05 (1991); English v. General Electric Co., 496 U.S. 72, 78–80 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203–04 (1983); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[1169] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). Where Congress legislates in a field traditionally occupied by the States, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190, 206 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Nonetheless, this assumption may go only so far. *See, e.g.*, Pliva, Inc. v. Mensing, 564 U.S. ___, No. 09–993, slip op. at 15 (2011) (Thomas, J., plurality opinion) ("[T]he text of the Clause—that federal law shall be supreme, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'—plainly contemplates conflict pre-emption by describing federal law as effectively repealing contrary state law.").

[1170] Free v. Bland, 369 U.S. 663 (1962).

[1171] Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944) (per Justice Frankfurter).

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The Standards Applied.—As might be expected from the *caveat* just quoted, any overview of the Court's preemption decisions can only make the field seem tangled, and to some extent it is. But some threads may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area.[1172] Provisions governing preemption can be relatively interpretation free.[1173] For example, a prohibition of state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline's gross income. "The manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines."[1174]

But, more often than not, express preemptive language may be ambiguous or at least not free from conflicting interpretation. Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the states from having and enforcing laws "relating to rates, routes, or services of any air car-

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[1172] Regulations as well as statutes can preempt. Agency regulations, when Congress has expressly or implied empowered these bodies to preempt, are "the supreme law of the land" and can displace state law. *E.g.*, Smiley v. Citibank, 517 U.S. 735 (1996); City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). Federal common law, *i.e.*, law applied by the courts in the absence of explicit statutory directive, and respecting uniquely federal interests, can also displace state law. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (Supreme Court promulgated common-law rule creating government-contractor defense in tort liability suits, despite Congress's having considered and failed to enact bills doing precisely this); Westfall v. Erwin, 484 U.S. 292 (1988) (civil liability of federal officials for actions taken in the course of their duty). Finally, ordinances of local governments are subject to preemption under the same standards as state law. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985).

[1173] Thus, § 408 of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 U.S.C. § 678, provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state . . . ." *See* Jones v. Rath Packing Co., 430 U.S. 519, 528–32 (1977). *See also* National Meat Ass'n v. Harris, 565 U.S. ___, No. 10–224, slip op. (2012) (broad preemption of all state laws on slaughterhouse activities regardless of conflict with federal law). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that "[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." For examples of other express preemptive provisions, *see* Norfolk & Western Ry. v. American Train Dispatchers' Ass'n, 499 U.S. 117 (1991); Exxon Corp. v. Hunt, 475 U.S. 355 (1986). *See also* Department of Treasury v. Fabe, 508 U.S. 491 (1993).

[1174] Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13–14 (1983).

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rier" applied to displace state consumer-protection laws regulating airline fare advertising.[1175] Delimiting the scope of an exception in an express preemption provision can also present challenges. For example, the Immigration Control and Reform Act of 1986 (IRCA), which imposed the first comprehensive federal sanctions against employing aliens not authorized to work in the United States, preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens."[1176] In *Chamber of Commerce of the United States v. Whiting*, a majority of the Court adopted a straightforward "plain meaning" approach to uphold a 2007 Arizona law that called for the suspension or revocation of the business licenses (including articles of incorporation and like documents) of Arizona employers found to have knowingly hired an unauthorized alien.[1177] By contrast, two dissenting opinions were troubled that the Arizona sanction was far more severe than that authorized for similar violations under either federal law or state laws in force prior to IRCA. The dissents interpreted IRCA's "licensing and similar laws" language narrowly to cover only businesses that primarily recruit or refer workers for employment, or businesses that have been found by federal authorities to have violated federal sanctions, respectively.[1178]

At issue in *AT&T Mobility, LLC v. Concepcion*[1179] was a savings provision of the Federal Arbitration Act (FAA) that made arbi-

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[1175] Morales v. TWA, 504 U.S. 374 (1992). The section, 49 U.S.C. § 1305(a)(1), was held to preempt state rules on advertising. *See also* American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Nw, Inc. v. Ginsberg, 572 U.S. ___, No. 12–462, slip op. (2014) (holding that the Airline Deregulation Act's preemption provision applied to state common law claims, including an airline customer's claim for breach of the implied covenant of good faith and fair dealing). *But see* Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. ___, No. 12–52, slip op. (2013) (provision of Federal Aviation Administration Authorization Act of 1994 preempting state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" held not to preempt state laws on the disposal of towed vehicles by towing companies).

[1176] 8 U.S.C. § 1324a(h)(2).

[1177] 563 U.S. 582 (2011). The *Whiting* majority notably began its analysis of whether the challenged Arizona statute was preempted by federal law with a statement that "[w]hen a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Id.* at 594. Subsequently, in writing for the majority in *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, Justice Thomas cited this language from *Whiting* in support of the proposition that no presumption against preemption is to be applied when a congressional enactment includes an express preemption clause. *See* 579 U.S. ___, No. 15–233, slip op. at 9 (2016) (declining to apply a presumption against preemption in finding that the federal Bankruptcy Code preempts a Puerto Rico bankruptcy law).

[1178] *Whiting*, 563 U.S. at 612 (Breyer, J., dissenting); *id.* at 631 (Sotomayor, J., dissenting).

[1179] 563 U.S. ___, No. 09–893, slip op. (2011).

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tration provisions in contracts "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [1180] An arbitration provision in their cellular telephone contract forbade plaintiffs from seeking arbitration of an allegedly fraudulent practice by AT&T on a class basis. The Court closely divided over whether the FAA saving clause made this anti-class arbitration provision attackable under California law against class action waivers in consumer contracts, or whether the savings clause looked solely to grounds for revoking the cellular contract that had nothing to do with the arbitration provision.[1181] Another case focused on a preemption clause that preempted certain laws of "a State [or] political subdivision of a State" regulating motor carriers, but excepted "[State] safely regulatory authority." The Court interpreted the exception to allow a safety regulation adopted by a city: "[a]bsent a clear statement to the contrary, Congress's reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." [1182]

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions "are not a model of legislative drafting." [1183] The section declares that the statute shall "supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan," but saves to the States the power to enforce "any law . . . which regulates insurance, banking, or securities," except that an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.[1184] Interpretation of the provisions has resulted in contentious and divided Court opinions.[1185]

[1180] 9 U.S.C. § 2.

[1181] Writing for the Court, Justice Scalia held, *inter alia*, that the saving clause was not intended to open arbitration provisions themselves to possible scrutiny. 563 U.S. ___, No. 09–893, slip op. (2011). The four dissenting Justices interpreted the saving clause as allowing use of the California law to attack the anti-class arbitration contract provision. Id. (Breyer, J. dissenting).

[1182] City of Columbus v. Ours Garage and Wrecker Serv., 536 U.S. 424, 429 (2002).

[1183] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), repeated in FMC Corp. v. Holliday, 498 U.S. 52, 58 (1991).

[1184] 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B). The Court has described this section as a "virtually unique pre-emption provision." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983). *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138–139 (1990); *see also* id. at 142–45 (describing and applying another preemption provision of ERISA).

[1185] Gobeille v. Liberty Mut. Ins. Co., 577 U.S. ___, No. 14–181, slip op. at 9 (2016) (holding that ERISA—with its extensive reporting, disclosure, and recordkeep-

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Also illustrative of the judicial difficulty with ambiguous preemption language are the fractured opinions in *Cipollone*, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker.[1186] The 1965 provision barred the requirement of any "statement" relating to smoking health, other

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ing requirements that are "central to, and an essential part of," its uniform plan administration system—preempted a Vermont law requiring certain entities, including health insurers, to report health care related information to a state agency); Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis); De Buono v. NYSA–ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997); Cal. Div. of Labor Standards Enf't v. Dillingham Constr., Inc., 519 U.S. 316 (1997); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (ERISA preempts state common-law claim of wrongful discharge to prevent employee attaining benefits under plan covered by ERISA); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (provision of state motor-vehicle financial-responsibility law barring subrogation and reimbursement from claimant's tort recovery for benefits received from a self-insured health-care plan preempted by ERISA); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing held not preempted by 5–4 vote); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state law mandating that certain minimum mental-health-care benefits be provided to those insured under general health-insurance policy or employee health-care plan is a law "which regulates insurance" and is not preempted); Shaw v. Delta Air Lines, 463 U.S. 85 (1983) (state law forbidding discrimination in employee benefit plans on the basis of pregnancy not preempted, because of another saving provision in ERISA, and provision requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy not preempted under construction of coverage sections, but both laws "relate to" employee benefit plans); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards "relates to" employee benefit plan and is preempted).

[1186] Cipollone v. Liggett Group, 505 U.S. 504 (1992). The decision relied on two controversial rules of construction. First, the courts should interpret narrowly provisions that purport to preempt state police-power regulations, and, second, that when a law has express preemption language courts should look only to that language and presume that when the preemptive reach of a law is defined Congress did not intend to go beyond that reach, so that field and conflict preemption will not be found. Id. at 517; and id. at 532–33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to *implied* preemption, not *express* preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict

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than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions;[1187] different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.[1188]

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr*[1189] was the Medical Device Amendments (MDA) of 1976, which prohibited states from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device.[1190] The issue was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be "substantially equivalent" to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent states from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1–4 with

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preemption, though perhaps field preemption, because of the existence of some express preemptive language. *See* id. at 546–48 (Justice Scalia concurring and dissenting).

[1187] 505 U.S. at 518–19 (opinion of the court), 533–34 (Justice Blackmun concurring).

[1188] 505 U.S. at 520–30 (plurality opinion), 535–43 (Justice Blackmun concurring and dissenting), 548–50 (Justice Scalia concurring and dissenting).

[1189] 518 U.S. 470 (1996). *See also* CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); Norfolk So. Ry. v. Shanklin, 529 U.S. 344 (2000) (applying *Easterwood*).

[1190] 21 U.S.C. § 350k(a).

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respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements "with respect to" specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, "requirements" that were preempted, though they did not agree on the application of that view.[1191]

Following *Cipollone*, the Court observed that, although it "need not go beyond" the statutory preemption language, it did need to "identify the domain expressly pre-empted" by the language, so that "our interpretation of that language does not occur in a contextual vacuum." That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that Congress's purpose is the ultimate touchstone.[1192]

The Court continued to struggle with application of express preemption language to state common-law tort actions in *Geier v. American Honda Motor Co.*[1193] The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying "any safety standard" different from an applicable federal standard, and a "saving clause," providing that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." The Court determined that the express preemption clause was inapplicable, because the saving clause implied that some number of state common law actions would be saved. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with a front seat airbag, in addition to a seat belt, was preempted. According to the Court, allowing the suit would frustrate the purpose of a Federal Motor Vehicle Safety Standard that specifically

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[1191] The dissent, by Justice O'Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. Id. at 503 (concurring).

[1192] 518 U.S. at 484–85. *See also* id. at 508 (Justice Breyer concurring); Freightliner Corp. v. Myrick, 514 U.S. 280, 288–89 (1995); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316, 334 (1997) (Justice Scalia concurring); Boggs v. Boggs, 520 U.S. 833 (1997) (using "stands as an obstacle" preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and id. at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

[1193] 529 U.S. 861 (2000).

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had intended to give manufacturers a choice among a variety of "passive restraint" systems for the applicable model year.[1194] The Court's holding makes clear, contrary to the suggestion in *Cipollone*, that existence of express preemption language does not foreclose the alternative operation of conflict (in this case "frustration of purpose") preemption.[1195]

Field Preemption. Where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"[1196] states are ousted from the field. Still a paradigmatic example of field preemption is *Hines v. Davidowitz*,[1197] in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the state.[1198] Adverting to the supremacy of national power in foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law.[1199] Similarly, in *Pennsylvania v. Nelson*,[1200] the Court

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[1194] The Court focused on the word "exempt" to give the saving clause a narrow application—as "simply bar[ring] a special kind of defense, . . . that compliance with a federal safety standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." 529 U.S. at 869. *But cf.* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

[1195] *Compare* Williamson v. Mazda Motor of America, Inc., 562 U.S. ___, No. 08–1314, slip op. (2011) (applying same statute as *Geir*, and later version of same regulation, no conflict preemption found of common law suit based on rear seat belt type, because giving manufacturers a choice on the type of rear seat belt to install was not a "significant objective" of the statute or regulation). For a decision applying express preemption language to a variety of state common law claims, see Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

[1196] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The case also is the source of the oft-quoted maxim that when Congress legislates in a field traditionally occupied by the states, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id.

[1197] 312 U.S. 52 (1941).

[1198] In Arizona v. United States, the Court struck down state penalties for violating federal alien registration requirements, emphasizing that "[w]here Congress occupies an entire field, . . . even complementary state regulation is impermissible." 567 U.S. ___, No. 11–182, slip op. at 10 (2012) The same case also struck down on preemption grounds state sanctions on unauthorized aliens who work or seek employment, id. at 12–15, and authority for state officers to make warrantless arrests based on possible deportability under federal immigration law. Id. By contrast, a regime of state immigration status checks with federal authorities was found not to be preempted on its face because the regime was supported by federal law facilitating federal-state cooperation in immigration enforcement.

[1199] The Court also said that courts must look to see whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplish-

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invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: (1) the pervasiveness of federal regulation, (2) federal occupation of the field as necessitated by the need for national uniformity, and (3) the danger of conflict between state and federal administration.[1201]

Rice itself held that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation.[1202]

Field preemption analysis often involves delimiting the subject of federal regulation and determining whether a federal law has regulated part of the field, however defined, or the whole area, so that state law cannot even supplement the federal.[1203] Illustrative of this point is the Court's holding that the Atomic Energy Act's preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, because "economic" regulation of power generation has traditionally been left to the states—an arrangement maintained by the Act—and because the state law could be justified as an economic rather than a safety regulation.[1204]

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ment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. That standard is obviously drawn from conflict preemption, for the two standards are frequently intermixed. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. ___, No. 09–893, slip op. at 9–18 (2011) (Scalia, J.). Nonetheless, not all state regulation is precluded. De Canas v. Bica, 424 U.S. 351 (1976) (upholding a state law penalizing the employment of an illegal alien, the case arising before enactment of the federal law doing the same thing).

[1200] 350 U.S. 497 (1956).

[1201] 350 U.S. at 502–05. Obviously, there is a noticeable blending into conflict preemption.

[1202] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[1203] *See* Kurns v. Railroad Friction Products Corp., 565 U.S. ___, No. 10–879, slip op. (2012) (state suit by the estate of maintenance engineer alleging manufacturer's defective design of locomotive components and failure to warn of accompanying dangers held preempted by the Locomotive Inspection Act; the subject of the Act held to be the regulation of locomotive equipment generally, including its manufacture, and not limited to regulating activities of locomotive operators or regulating locomotives while in use for transporation). *Compare* Campbell v. Hussey, 368 U.S. 297 (1961) (state law requiring tobacco of a certain type to be marked by white tags, ousted by federal regulation that occupied the field and left no room for supplementation), *with* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (state law setting minimum oil content for avocados certified as mature by federal regulation is complementary to federal law, because federal standard was a minimum one, the field having not been occupied). One should be wary of assuming that a state law that has dual purposes and impacts will not, just for the duality, be held to be preempted. *See* Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); Perez v. Campbell, 402 U.S. 637 (1971) (under Bankruptcy Clause).

[1204] Pacific Gas & Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety

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A city's effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.[1205] A state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.[1206] On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation.[1207] Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.[1208]

The Court has, however, recognized that when a federal statute preempts a narrow field, leaving states to regulate outside of that field, state laws whose "target" is beyond the field of federal regulation are not necessarily displaced by field preemption principles,[1209] and such state laws may "incidentally" affect the preempted field.[1210] In *Oneok v. Learjet*, gas pipeline companies and

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preempt imposition of punitive damages under state tort law, even if based upon the jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). *See also* English v. General Electric Co., 496 U.S. 72 (1990) (employee's state-law claim for intentional infliction of emotional distress for her nuclear-plant employer's actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).

[1205] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[1206] Askew v. American Waterways Operators, 411 U.S. 325 (1973).

[1207] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). United States v. Locke, 529 U.S. 89 (2000) (applying *Ray*). *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (preempting a state ban on pass-through of a severance tax on oil and gas, because Congress has occupied the field of wholesale sales of natural gas in interstate commerce); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (Natural Gas Act preempts state regulation of securities issuance by covered gas companies); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (under Patent Clause, state law extending patent-like protection to unpatented designs invades an area of pervasive federal regulation).

[1208] City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[1209] Oneok, Inc. v. Learjet, Inc., 575 U.S. ___, No. 13–271, slip op. at 10–12 (2015).

[1210] *Cf.* Hughes v. Talen Energy Mktg., LLC, 578 U.S. ___, No. 14–614, slip op. at 12–13 (2016) (holding that while "States . . . may regulate within the domain Congress assigned to them even when their laws incidentally affect areas" within the federal regulatory field, "States may not seek to achieve ends, however legiti-

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the federal government asserted that state antitrust claims against the pipeline companies for alleged manipulation of certain indices used in setting natural gas prices were field preempted because the Natural Gas Act (NGA) regulates wholesale prices of natural gas.[1211] The Court disagreed. In so doing, the Court noted that the alleged manipulation of the price indices also affected retail prices, the regulation of which is left to the states by the NGA.[1212] Because the Court viewed Congress as having struck a "careful balance" between federal and state regulation when enacting the NGA, it took the view that,[1213] "where (as here) a state law can be applied" both to sales regulated by the federal government and to other sales, "we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the preempted field as defined by our precedents." [1214] The Court found no such preemption here, in part because the "*target* at which the state law aims" was practices affecting retail prices, something which the Court viewed as "firmly on the States' side of th[e] dividing line." [1215] The Court also noted that the "broad applicability" of state antitrust laws supported a finding of no preemption here,[1216] as does the states' historic role in providing common law and statutory remedies against monopolies and unfair business practices.[1217] However, while declining to find field preemption, the Court left open the possibility of conflict preemption, which had not been raised by the parties.[1218]

Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.[1219]

Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in *Rose v. Arkansas State Police*,[1220] federal law provided for death benefits for state law enforcement officers "in ad-

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mate, through regulatory means that intrude on" the federal government's authority over the field in question) (citing to *Oneok, Inc.*, slip op. at 11).

[1211] *See Oneok, Inc.*, slip op. at 3, 10.

[1212] *Id.* at 3.

[1213] *Id.* at 13.

[1214] *Id.* at 10.

[1215] *Id.* at 11.

[1216] *Id.* at 13.

[1217] *Id.* at 14.

[1218] *Id.* at 15–16.

[1219] Transcontinental Gas Pipe Line Corp. v. Mississippi Oil & Gas Board, 474 U.S. 409 (1986); Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988).

[1220] 479 U.S. 1 (1986).

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dition to" any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, *per curiam* opinion, had no difficulty finding the state provision preempted.[1221]

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include "due-on-sale" clauses in their loan instruments and where the state had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.[1222] More problematic are circumstances in which a party has an administrative avenue for seeking removal of impediments to dual compliance. In *Pliva, Inc. v. Mensing*,[1223] federal law required generic drugs to be labeled the same as the brand name counterpart, while state tort law required drug labels to contain adequate warnings to render use of the drug reasonably safe. There had been accumulating evidence that long-term use of the drug metoclopramide carried a significant risk of severe neurological damage, but manufacturers of generic metoclopramide neither amended their warning labels nor sought to have the Food and Drug Administration require the brand name manufacturer to include stronger label warnings, which consequently would have led to stronger labeling of the generic. Five Justices held that state tort law was preempted.[1224] It was impossible to comply both with the state law duty to change the label and the federal law duty to keep the label the same.[1225] The four dissenting Justices argued that inability to change

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[1221] For similar examples of conflict preemption, see Wos v. E.M.A., 568 U.S. ___, No. 12–98, slip op. (2013) (holding that a North Carolina statute allowing the state to collect up to one-third of the amount of a tort settlement as reimbursement for state-paid medical expenses under Medicaid conflicted with anti-lien provisions of the federal Medicaid statute where the settlement designated an amount less than one-third as the medical expenses award). *See also* Doctor's Assoc.'s, Inc. v. Casarotto, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating predispute arbitration agreements that were not entered into in contemplation of substantial interstate activity).

[1222] Fidelity Fed. Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141 (1982).

[1223] 564 U.S. ___, No. 09–993, slip op. (2011).

[1224] 564 U.S. ___, No. 09–993, slip op. (2011) (Thomas, J.).

[1225] Justice Thomas, joined on point by three others, characterized the Supremacy Clause phrase "any [state law] to the Contrary notwithstanding" as a *non obtstante* provision that "suggests that federal law should be understood to impliedly repeal conflicting state law" and indicates limits on the extent to which courts should seek to reconcile federal and state law in preemption cases. 564 U.S. ___, No. 09–993, slip op. at 15–17 (2011) (Thomas, J.).

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the labels unilaterally was insufficient, standing alone, to establish a defense based on impossibility.[1226] Emphasizing the federal duty to monitor the safety of their drugs, the dissenters would require that the generic manufacturers also show some effort to effectuate a labeling change through the FDA.

The Court reached a similar result in *Mutual Pharmaceutical Co. v. Bartlett*.[1227] There, the Court again faced the question of whether FDA labeling requirements preempted state tort law in a case involving sales by a generic drug manufacturer. The lower court had held that it was not impossible for the manufacturer to comply with both the FDA's labeling requirements and state law that required stronger warnings regarding the drug's safety because the manufacturer could simply stop selling the drug. The Supreme Court rejected the "stop-selling rationale" because it "would render impossibility pre-emption a dead letter and work a revolution in . . . preemption case law." [1228]

In contrast to *Pliva, Inc. v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Court found no preemption in *Wyeth v. Levine*,[1229] a state tort action against a brand-name drug manufacturer based on inadequate labeling. A brand-name drug manufacturer, unlike makers of generic drugs, could unilaterally strengthen labeling under federal regulations, subject to subsequent FDA override, and thereby independently meet state tort law requirements. In another case of alleged impossibility, it was held possible for an employer to comply both with a state law mandating leave and reinstatement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.[1230] Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal standard was a "minimum" one rather than a "uniform" one and decided that growers could comply with both.[1231]

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[1232] Thus, de-

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[1226] 564 U.S. ___, No. 09–993, slip op. (2011) (Sotomayor, J., dissenting).

[1227] 570 U.S. ___, No. 12–142, slip op. (2013).

[1228] *Id.* at 1–2.

[1229] 555 U.S. ___, No. 06–1249, slip op. (2009).

[1230] California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). *Compare* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).

[1231] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

[1232] The standard is drawn from Hines v. Davidowitz, 312 U.S. 52, 67 (1941), which often is held out as a leading example of field preemption analysis. When

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spite the inclusion of a saving clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act nevertheless was found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: Giving car manufacturers some leeway in developing and introducing passive safety restraint devices was, according to the Court, a key congressional objective under the Act, one that would frustrated should a tort action be allowed to proceed.[1233] The Court also has voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the state allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers

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"frustration of purpose" predominates in an opinion, it may be fairer to characterize the issue as one of conflict preemption, rather than field preemption, for the possibility of a limited state role would appear to be implicitly recognized. Arizona v. United States, in which the Court found three of the four Arizona immigration provisions it examined to be preempted, illustrates the continuum from field to conflict analysis. In overturning state penalties for violations of federal alien registration requirements, the Court found the sweep and detail of the federal law to leave no room whatsoever for state regulation. In overturning state sanctions against unauthorized aliens seeking employment or working, the Court emphasized that the comprehensive system of federal employer sanctions eschewed employee sanctions, and allowing states to impose them would upset the careful policy balance struck by Congress. In overturning state authority to arrest individuals believed to be deportable on criminal grounds, the Court did not examine whether state officers have any inherent arrest authority in deportation cases, but rather found that allowing states to engage in such arrests as a general matter creates an obstacle to congressional objectives. And finally, the Court declined to overturn on its face a state policy of checking the immigration status of individuals stopped by the police for general law enforcement purposes, finding that federal law facilitated status checks and only implementation of the status check policy would disclose whether federal enforcement policy ultimately would be frustrated. 567 U.S. ___, No. 11–182, slip op. (2012).

See also Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose); Hillman v. Maretta, 569 U.S. ___, No. 11–1221, slip op. (2013) (state law cause of action against ex-spouse for life insurance proceeds paid under a designation of beneficiary in a federal employee policy held to be preempted by a federal employee insurance statute giving employees the right to designate a beneficiary; beyond administrative convenience, Congress intended that the proceeds actually *belong* to the named beneficiary). Unsurprisingly, the Justices at times disagree on what Congress's primary objectives and purposes were in passing particular legislation, and such a disagreement can end with different conclusions about whether state law has been preempted. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. ___, No. 09–893, slip op. (2011).

[1233] Geier v. American Honda Motor Co., 529 U.S. 861 (2000).

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in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.[1234] In *Felder v. Casey*,[1235] a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U.S.C. § 1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.[1236]

In *Boggs v. Boggs*,[1237] the Court, 5-to-4, applied the "stands as an obstacle" test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property state, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law "relate[d] to" a covered pension plan or because state law had an impermissible "connection with" a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption." [1238]

Similarly, the Court found it unnecessary to consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing

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[1234] Jones v. Rath Packing Co., 430 U.S. 519, 532–543 (1977).

[1235] 487 U.S. 131 (1988).

[1236] Philco Aviation v. Shacket, 462 U.S. 406 (1983).

[1237] 520 U.S. 833 (1997).

[1238] 520 U.S. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

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business with Burma imposed obstacles to the accomplishment of Congress's full objectives under the federal Burma sanctions law.[1239] The state law was said to undermine the federal law in several respects that could have implicated field preemption—by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy—but the Court "decline[d] to speak to field preemption as a separate issue." [1240]

Also, a state law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations.[1241] And a state assertion of the right to set minimum streamflow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws "relating to the control, appropriation, use, or distribution of water." [1242]

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements.[1243] The application of state antitrust laws to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, because the federal antitrust laws had been interpreted to not permit indirect purchasers to recover under *federal* law; the state law may have been inconsistent with federal law but in no way did it frustrate federal objectives and policies.[1244] The effect of federal policy was not strong enough to warrant a holding

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[1239] Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[1240] 530 U.S. at 374 n.8.

[1241] Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461 (1984). *See also* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrated federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the copyright law by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (damage action based on common law of downstream state frustrates Clean Water Act's policies favoring permitting state in interstate disputes and favoring predictability in permit process).

[1242] California v. FERC, 495 U.S. 490 (1990). The savings clause was found inapplicable on the basis of an earlier interpretation of the language in First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).

[1243] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 614–16 (1991).

[1244] California v. ARC America Corp., 490 U.S. 93 (1989).

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of preemption when a state authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.[1245]

Federal Versus State Labor Laws.—One group of cases, which has caused the Court much difficulty over the years, concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago reached a settled rule, changes in membership on the Court re-opened the issue and modified the rules.

With the enactment of the National Labor Relations Act and subsequent amendments, Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy.[1246] It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme. Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law that had not been invoked and that did not touch on some of the union conduct in question.[1247] A cease-and-desist order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law,[1248] and another order of the board was also

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[1245] Hayfield Northern Ry. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984). *See also* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (federal law's broad purpose of protecting shareholders as a group is furthered by state anti-takeover law); Rose v. Rose, 481 U.S. 619 (1987) (provision governing veterans' disability benefits protects veterans' families as well as veterans, hence state child-support order resulting in payment out of benefits is not preempted).

[1246] Throughout the ups and downs of federal labor-law preemption, it remains the rule that the Board remains preeminent and almost exclusive. *See*, *e.g.*, Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986) (states may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (city may not condition taxicab franchise on settlement of strike by set date, because this intrudes into collective-bargaining process protected by NLRA). On the other hand, the NLRA's protection of associational rights is not so strong as to outweigh the Social Security Act's policy permitting states to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute. New York Tel. Co. v. New York Labor Dep't, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977); Baker v. General Motors Corp., 478 U.S. 621 (1986).

[1247] Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740 (1942).

[1248] United Automobile Workers v. WERB, 336 U.S. 245 (1949), *overruled by* Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976).

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sustained in its prohibition of the discharge of an employee under a maintenance-of-membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.[1249]

By contrast, a state statute requiring business agents of unions operating in the state to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law.[1250] And state statutes providing for mediation and outlawing public utility strikes were similarly voided as being in specific conflict with federal law.[1251] A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation.[1252] The latter approach was predominant through the 1950s, as the Court voided state court action in enjoining[1253] or awarding damages[1254] for peaceful picketing, in awarding of relief by damages or otherwise for conduct that constituted an unfair labor practice under federal law,[1255] or in enforcing state antitrust laws so as to affect collective bargaining agreements[1256] or to bar a strike as a restraint

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[1249] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

[1250] Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). More recently, the Court has held that *Hill's* premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been involved in racketeering and other criminal conduct, were not inconsistent with federal law. Brown v. Hotel Employees, 468 U.S. 491 (1984).

[1251] United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Bus Employees v. WERB, 340 U.S. 383 (1951). *See also* Bus Employees v. Missouri, 374 U.S. 74 (1963).

[1252] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953);Bethlehem Steel Co. v. New York Employment Relations Bd., 330 U.S. 767 (1947). *See also* Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding a practice of a state labor commissioner preempted because it stood as an obstacle to the achievement of the purposes of NLRA). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956). The Court has held that state courts may adjudicate questions relating to the permissibility of particular types of union security arrangements under state law even though the issue involves as well an interpretation of federal law. Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963).

[1253] Garner v. Teamsters Local 776, 346 U.S. 485 (1953); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62 (1956); Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957); Construction Laborers v. Curry, 371 U.S. 542 (1963).

[1254] San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

[1255] Guss v. Utah Labor Board, 353 U.S. 1 (1957).

[1256] Teamsters Union v. Oliver, 358 U.S. 283 (1959).

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of trade,[1257] even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.

In *San Diego Building Trades Council v. Garmon*,[1258] the Court enunciated the rule, based on its previous decade of adjudication. "When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." [1259]

For much of the period since *Garmon*, the dispute in the Court concerned the scope of the few exceptions permitted in the *Garmon* principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly drawn injunctions directed against violence and mass picketing have been permitted [1260] as well as damages to compensate for harm growing out of such activities.[1261]

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state courts without the danger of a conflict between state and federal law.[1262] The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB.[1263] *Gonzales* was said to be limited to "purely inter-

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[1257] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

[1258] 359 U.S. 236 (1959).

[1259] 359 U.S. at 245. The rule is followed in, *e.g.*, Radio & Television Technicians v. Broadcast Service of Mobile, 380 U.S. 255 (1965); Hattiesburg Building & Trades Council v. Broome, 377 U.S. 126 (1964); Longshoremen's Local 1416 v. Ariane Shipping Co., 397 U.S. 195 (1970); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). *Cf.* Nash v. Florida Industrial Comm., 389 U.S. 235 (1967).

[1260] United Automobile Workers v. WERB, 351 U.S. 266 (1956); Youngdahl v. Rainfair, 355 U.S. 131 (1957).

[1261] United Automobile Workers v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[1262] International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

[1263] Journeymen & Plumbers' Union 100 v. Borden, 373 U.S. 690 (1963); Iron Workers Local 207 v. Perko, 373 U.S. 701 (1963). Applying *Perko*, the Court held that a state court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983).

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nal union matters."[1264] Finally, *Gonzales*, was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual's employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues had to pursue his federal remedies.[1265] Justice Harlan wrote for the Court that, although it was not likely that, in *Gonzales*, a state court resolution of the scope of duty owed the member by the union would implicate principles of federal law, state court resolution in this case involved an interpretation of the contract's union security clause, a matter on which federal regulation is extensive.[1266]

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In *Linn v. Plant Guard Workers*,[1267] the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And, in *Letter Carriers v. Austin*,[1268] the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the state seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged, and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortuous conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[1269]

[1264] 373 U.S. at 697 (*Borden*), and 705 (*Perko*).

[1265] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971).

[1266] 403 U.S. at 296.

[1267] 383 U.S. 53 (1966).

[1268] 418 U.S. 264 (1974).

[1269] Farmer v. Carpenters, 430 U.S. 290 (1977). Following this case, the Court held that a state court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted. The action for breach of contract by replacement workers having no remedies under the NLRA was found to be deeply rooted in local law and of

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A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co. v. Carpenters*,[1270] in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store, instead of the public sidewalks, to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests "deeply rooted in local feeling"[1271] in holding that where there exists "a significant state interest in protecting the citizens from the challenged conduct" and there exists "little risk of interference with the regulatory jurisdiction" of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, "critical inquiry" was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.[1272]

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party

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only peripheral concern under the Act. Belknap, Inc. v. Hale, 463 U.S. 491 (1983). *See also* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986).

[1270] 436 U.S. 180 (1978).

[1271] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

[1272] Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 190–98 (1978).

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who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.[1273]

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction, and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the *Garmon* rule but the applicability and interpretation of § 301 of the Taft-Hartley Act,[1274] which authorizes suits in federal, and state,[1275] courts to enforce collective bargaining agreements. The Court has held that in enacting § 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the *Garmon* preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and obligations are embodied in a collective-bargaining agreement, perhaps as interpreted in an arbitration proceeding.[1276]

Here, too, the permissible role of state tort actions has been in great dispute. Generally, a state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective-bargaining agreement.[1277] Thus, a state damage action for the bad-

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[1273] 436 U.S. at 199–207.

[1274] 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

[1275] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). The state courts must, however, apply federal law. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

[1276] Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Humphrey v. Moore, 375 U.S. 335 (1964); Vaca v. Sipes, 386 U.S. 171 (1967).

[1277] *See* the analysis in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state tort action for retaliatory discharge for exercising rights under a state workers' compensation law is not preempted by § 301, there being no required interpretation of a collective-bargaining agreement).

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faith handling of an insurance claim under a disability plan that was part of a collective-bargaining agreement was preempted because it involved interpretation of that agreement and because state enforcement would frustrate the policies of § 301 favoring uniform federal-law interpretation of collective-bargaining agreements and favoring arbitration as a predicate to adjudication.[1278]

Finally, the Court has indicated that, with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in "self-help," so that conduct not subject to federal law is nonetheless withdrawn from state control.[1279] However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so states are free to impose minimum labor standards.[1280]

COMMERCE WITH INDIAN TRIBES

Congress's power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision,[1281] has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of Native Americans. Although Congress in 1871 forbade the further making of treaties with Indian tribes,[1282] cases disputing the application of the old treaties and especially their effects upon attempted state taxation and regulation of on-reservation activities

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[1278] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). *See also* Int'l Brotherhood of Electric Workers v. Hechler, 481 U.S. 851 (1987) (state-law claim that union breached duty to furnish employee a reasonably safe workplace preempted); United Steelworkers of America v. Rawson, 495 U.S. 362 (1990) (state-law claim that union was negligent in inspecting a mine, the duty to inspect being created by the collective-bargaining agreement preempted).

[1279] Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969); Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). *Cf.* New York Telephone Co. v. New York Labor Dept., 440 U.S. 519 (1979).

[1280] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (upholding a state requirement that health-care plans, including those resulting from collective bargaining, provide minimum benefits for mental-health care).

[1281] United States v. Kagama, 118 U.S. 375 (1886). Rejecting the Commerce Clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. *Cf.* United States v. Holiday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). This special fiduciary responsibility can also be created by statute. *E.g.*, United States v. Mitchell, 463 U.S. 206 (1983).

[1282] 16 Stat. 544, 566, 25 U.S.C. § 71.

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continue to be a staple of the Court's docket.[1283] But this clause is one of the two bases now found sufficient to empower Federal Government authority over Native Americans. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." [1284]

Forsaking reliance upon other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. However, the "semi-autonomous status" of Indian tribes erects an "independent but related" barrier to the exercise of state authority over commercial activity on an Indian reservation.[1285] Thus, the question of preemption is not governed by the standards of preemption developed in other areas. "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the preemption analysis that governs this inquiry. . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." [1286] A corollary is that the preemption doctrine will not be applied strictly to prevent states from aiding Native Americans.[1287] However, the protective rule is inapplicable to state regulation of liquor transac-

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[1283] *E.g.*, Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Montana v. United States, 450 U.S. 544 (1981).

[1284] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). *See also* Morton v. Mancari, 417 U.S. 535, 551–553 (1974); United States v. Mazurie, 419 U.S. 544, 553–56 (1974); Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982); United States v. Lara, 541 U.S. 193, 200 (2004).

[1285] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–143 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837–838 (1982). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id. at 837 (quoting *White Mountain*, 448 U.S. at 143).

[1286] Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[1287] Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Indians involving transactions that occurred in Indian country). However, attempts by states to retrocede jurisdiction favorable to Native Americans may be held to be preempted. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986).

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tions, because there has been no tradition of tribal sovereignty with respect to that subject.[1288]

The scope of state taxing powers—the conflict of "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations"[1289]—has been often litigated. Absent cession of jurisdiction or other congressional consent, states possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.[1290] Off-reservation Indian activities require an express federal exemption to deny state taxing power.[1291] Subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state power because of its burdens upon the development of tribal self-sufficiency as promoted through federal law and its interference with the tribes' ability to exercise their sovereign functions.[1292]

That operating premise, however, seems to have been eroded. For example, in *Cotton Petroleum Corp. v. New Mexico*,[1293] the Court held that, despite of the existence of multiple taxation occasioned by a state oil and gas severance tax applied to on-reservation operations by non-Indians, which was already taxed by the tribe,[1294] the impairment of tribal sovereignty was "too indirect and too insubstantial" to warrant a finding of preemption. The fact that the state provided significant services to the oil and gas lessees justified state taxation and also distinguished earlier cases in which the state had "asserted no legitimate regulatory interest that might justify the tax."[1295] Still further erosion, or relaxation, of the principle of construction may be found in a later case, in which the Court, confronted with arguments that the imposition of particular state taxes

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[1288] Rice v. Rehner, 463 U.S. 713 (1983).

[1289] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 165 (1973).

[1290] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Bryan v. Itasca County, 426 U.S. 373 (1976); Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). *See also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). A discernable easing of the reluctance to find congressional cession is reflected in more recent cases. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

[1291] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–149 (1973).

[1292] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).

[1293] 490 U.S. 163 (1989).

[1294] Held permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1295] 490 U.S. at 185 (distinguishing *Bracker* and *Ramah Navaho School Bd*).

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on Indian property on the reservation was inconsistent with self-determination and self-governance, denominated these as "policy" arguments properly presented to Congress rather than the Court.[1296]

The impact on tribal sovereignty is also a prime determinant of relative state and tribal regulatory authority.[1297]

Since *Worcester v. Georgia*,[1298] the Court has recognized that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.[1299] They are, of course, no longer possessed of the full attributes of sovereignty,[1300] having relinquished some part of it by their incorporation within the territory of the United States and their acceptance of its protection. By specific treaty provision, they yielded up other sovereign powers, and Congress has removed still others. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[1301]

[1296] County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992). To be sure, this response was in the context of the reading of statutory texts and giving effect to them, but the unqualified designation is suggestive. For recent tax controversies, *see* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[1297] *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[1298] 31 U.S. (6 Pet.) 515 (1832). *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Under this doctrine, tribes possess sovereign immunity from suit in the same way that the United States and the states do. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512–13 (1940). The Court has repeatedly rejected arguments to abolish tribal sovereign immunity or at least to curtail it. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991).

[1299] United States v. Wheeler, 435 U.S. 313 (1978) (inherent sovereign power to punish tribal offenders). *Compare* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (state regulation of on-reservation bingo is preempted as basically civil/regulatory rather than criminal/prohibitory), *with* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (extensive ownership of land within "open areas" of reservation by non-members of tribe precludes application of tribal zoning within such areas). *See also* Hagen v. Utah, 510 U.S. 399 (1994). Among the fundamental attributes of sovereignty which a tribe possesses unless divested of it by federal law is the power to tax non-Indians entering the reservation to engage in economic activities. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1300] United States v. Kagama, 118 U.S. 375, 381 (1886); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[1301] United States v. Wheeler, 435 U.S. 313, 323 (1978). *See* South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of Indian treaty rights and reduction of sovereignty). Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in Duro v. Reina, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reserva-

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In a case of major import for the settlement of Indian land claims, the Court ruled in *County of Oneida v. Oneida Indian Nation*,[1302] that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval required by the Nonintercourse Act.[1303] The Act reflected the accepted principle that extinguishment of the title to land by Native Americans required the consent of the United States and left intact a tribe's common-law remedies to protect possessory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Native Americans and that Congress may abrogate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Act did not constitute ratification of the invalid conveyances.[1304] Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common-law action, and it rejected the dissent's view that, given "the extraordinary passage of time," the doctrine of laches should have been applied to bar the claim.[1305]

Although the power of Congress over Indian affairs is broad, it is not limitless.[1306] The Court has promulgated a standard of review that defers to the legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians . . . "[1307] A more searching review is warranted when it is alleged that the Federal Government's behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either com-

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tion; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over non-member Indians, and the Court upheld congressional authority to do so in United States v. Lara, 541 U.S. 193 (2004).

[1302] 470 U.S. 226 (1985).

[1303] 1 Stat. 379 (1793).

[1304] 470 U.S. at 246–48.

[1305] 470 U.S. at 255, 257 (Justice Stevens).

[1306] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion) (quoted with approval in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

[1307] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as against other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

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pensating the tribe or otherwise giving the Indians the full value of the land.[1308]

Clause 4. The Congress shall have Power * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

NATURALIZATION AND CITIZENSHIP

Nature and Scope of Congress's Power

Naturalization has been defined by the Supreme Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[1309] In the *Dred Scott* case,[1310] the Court asserted that the power of Congress under this clause applies only to "persons born in a foreign country, under a foreign Government."[1311] These dicta are much too narrow to describe the power that Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."[1312]

Congress's power over naturalization is an exclusive power; no state has the independent power to constitute a foreign subject a citizen of the United States.[1313] But power to naturalize aliens under federal standards may be, and was early, devolved by Congress upon state courts of record.[1314] And though the states may not prescribe requirements for citizenship, they may confer rights, includ-

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[1308] United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (there must be "substantial and compelling evidence of congressional intention to diminish Indian lands" before the Court will hold that a statute removed land from a reservation); Nebraska v. Parker, 577 U.S. ___, No. 14–1406, slip op. at 5–6 (2016) (noting that "only Congress can divest a reservation of its land and diminish its boundaries," but finding that the statute in question did not clearly indicate Congress's intent to effect such a diminishment of the Omaha reservation).

[1309] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892).

[1310] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[1311] 60 U.S. at 417.

[1312] Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

[1313] Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898).

[1314] The first naturalization act, 1 Stat. 103 (1790), so provided. *See* 8 U.S.C. § 1421. In Holmgren v. United States, 217 U.S. 509 (1910), the Court held that Congress may provide for the punishment of false swearing in the proceedings in state courts.

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ing political rights, to resident aliens. At one time, it was not uncommon for states to confer the right of suffrage upon resident aliens, especially upon those who had declared their intention to become citizens, and several states continued to do so until well into the twentieth century.[1315]

Citizenship by naturalization is a privilege to be given or withheld as Congress may determine: "It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice." [1316] This interpretation makes of the naturalization power the only power granted in § 8 of Article I that is unrestrained by constitutional limitations on its exercise. Thus, the first naturalization act enacted by the first Congress restricted naturalization to "free white person[s]," [1317] which was expanded in 1870 so that persons of "African nativity and . . . descent" were entitled to be naturalized.[1318] "Chinese laborers" were specifically excluded from eligibility in 1882,[1319] and the courts enforced these provisions without any indication that constitutional issues were thereby raised.[1320] These exclusions are no longer law. Present naturalization statutes continue to require loyalty and good moral character

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[1315] Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977). *See* Spragins v. Houghton, 3 Ill. 377 (1840); Stewart v. Foster, 2 Binn. (Pa.) 110 (1809). *See also* K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES ch. 5 (1918).

[1316] United States v. Macintosh, 283 U.S. 605 (1931). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 707–08 (1893). Though Congress broadly controls the path to naturalization in the United States, it is restricted in conditioning the retention of citizenship so conferred. The Fourteenth Amendment declares persons born or naturalized in the United States to be citizens, and Congress may not distinguish among classes of "Fourteenth Amendment" citizens in setting rules for expatriation (assuming the absence of fraud in obtaining naturalization). Schneider v. Rusk, 377 U.S. 163 (1964). By contrast, Congress controls by statute who born abroad becomes a U.S. citizen at birth (based generally on the citizenship status of the parents), at times has conditioned this "statutory" citizenship on subsequent periodic residence in the United States, and has had relinquishment of citizenship for failure to meet this condition subsequent upheld by the Court. Rogers v. Bellei, 401 U.S. 815 (1971).

[1317] 1 Stat. 103 (1790).

[1318] Act of July 14, 1870, § 7, 16 Stat. 254, 256.

[1319] Act of May 6, 1882, § 1, 22 Stat. 58. The statute defined "Chinese laborers" to mean "both skilled and unskilled laborers and Chinese employed in mining." 22 Stat. 61.

[1320] *Cf.* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); Toyota v. United States, 268 U.S. 402 (1925); Morrison v. California, 291 U.S. 82 (1934). The Court refused to review the only case in which the constitutional issue was raised and rejected. Kharaiti Ram Samras v. United States, 125 F.2d 879 (9th Cir. 1942), *cert. denied*, 317 U.S. 634 (1942).

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and generally bar subversives, terrorists, and criminals, among others, from citizenship.[1321]

Although the usual form of naturalization is through individual application and official response on the basis of general congressional rules, naturalization is not so limited. Citizenship can be conferred by special act of Congress,[1322] it can be conferred collectively either through congressional action, such as the naturalization of all residents of an annexed territory or of a territory made a state,[1323] or through treaty provision.[1324]

Categories of Citizens: Birth and Naturalization

The first sentence of § 1 of the Fourteenth Amendment contemplates two sources of citizenship and two only: birth and naturalization.[1325] This contemplation is given statutory expression in § 301 of the Immigration and Nationality Act of 1952,[1326] which itemizes those categories of persons who are citizens of the United States at birth; all other persons in order to become citizens must pass through the naturalization process. The first category merely tracks the language of the first sentence of § 1 of the Fourteenth Amendment in declaring that all persons born in the United States and subject to the jurisdiction thereof are citizens by birth.[1327] But there are six other categories of citizens by birth. They are: (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, (3) a person born outside the United States of citizen parents one of whom has been resident in the United States, (4) a person born outside the United States of one citizen parent who has been continuously resident in the United States for one year prior to the birth and of a parent who is a national but not a citizen, (5) a person born in an outlying possession of the United States of one citizen parent who has been continuously resident in the United States or an outlying possession for one year prior to

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[1321] The Alien and Sedition Act of 1798, 1 Stat. 570, empowered the President to deport any alien he found dangerous to the peace and safety of the Nation. In 1903, Congress provided for denial of naturalization and for deportation for mere belief in certain doctrines, *i.e.*, anarchy. Act of March 3, 1903, 32 Stat. 1214. *See* United States ex rel. Turner v. Williams, 194 U.S. 279 (1904). The range of forbidden views was broadened in 1918 (Act of October 15, 1918, § 1, 40 Stat. 1012) and periodically thereafter. The present law is discussed in The Naturalization of Aliens, *infra*.

[1322] *E.g.*, 77 Stat. 5 (1963) (making Sir Winston Churchill an "honorary citizen of the United States").

[1323] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892); Contzen v. United States, 179 U.S. 191 (1900).

[1324] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 164, 168–69 (1892).

[1325] United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898).

[1326] 66 Stat. 235, 8 U.S.C. § 1401.

[1327] § 301(a)(1), 8 U.S.C. § 1401(a)(1).

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the birth, (6) a person of unknown parentage found in the United States while under the age of five unless prior to his twenty-first birthday he is shown not to have been born in the United States, and (7) a person born outside the United States of an alien parent and a citizen parent who has been resident in the United States for a period of ten years, provided the person is to lose his citizenship unless he resides continuously in the United States for a period of five years between his fourteenth and twenty-eighth birthdays.

Subsection (7) citizens must satisfy the condition subsequent of five years continuous residence within the United States between the ages of fourteen and twenty-eight, a requirement held to be constitutional,[1328] which means in effect that for constitutional purposes, according to the prevailing interpretation, there is a difference between persons born or naturalized in, that is, within, the United States and persons born outside the confines of the United States who are statutorily made citizens.[1329] The principal difference is that the former persons may not be involuntarily expatriated whereas the latter may be, subject only to due process protections.[1330]

The Naturalization of Aliens

Although, as has been noted, throughout most of our history there were significant racial and ethnic limitations upon eligibility for naturalization, the present law prohibits any such discrimination.

"The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[1331] However, any person "who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches . . . opposition to all organized government," or "who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches

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[1328] Rogers v. Bellei, 401 U.S. 815 (1971).

[1329] *Compare* Schneider v. Rusk, 377 U.S. 163 (1964); Afroyim v. Rusk, 387 U.S. 253 (1967). It will be noted that in practically all cases persons statutorily made citizens at birth will be dual nationals, having the citizenship of the country where they were born. Congress has never required a citizen having dual nationality to elect at some point one and forsake the other but it has enacted several restrictive statutes limiting the actions of dual nationals which have occasioned much litigation. *E.g.*, Savorgnan v. United States, 338 U.S. 491 (1950); Kawakita v. United States, 343 U.S. 717 (1952); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964); Rogers v. Bellei, 401 U.S. 815 (1971).

[1330] *Cf.* Rogers v. Bellei, 401 U.S. 815, 836 (1971); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Perez v. Brownell, 356 U.S. 44, 58–62 (1958).

[1331] § 311, 66 Stat. 239 (1952), 8 U.S.C. § 1422.

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the overthrow by force or violence or other unconstitutional means of the Government of the United States" or who is a member of or affiliated with the Communist Party, or other communist organizations, or other totalitarian organizations is ineligible.[1332] These provisions moreover are "applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be, within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes." [1333]

Other limitations on eligibility are also imposed. Eligibility may turn upon the decision of the responsible officials whether the petitioner is of "good moral character." [1334] The immigration and nationality laws themselves include a number of specific congressional determinations that certain persons do not possess "good moral character," including persons who are "habitual drunkards," [1335] adulterers,[1336] polygamists or advocates of polygamy,[1337] gamblers,[1338] convicted felons,[1339] and homosexuals.[1340] In order to petition for naturalization, an alien must have been resident for at least five years and to have possessed "good moral character" for all of that period.

The process of naturalization culminates in the taking in open court of an oath "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when re-

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[1332] § 313(a), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a). Whether "mere" membership is sufficient to constitute grounds for ineligibility is unclear. *Compare* Galvan v. Press, 347 U.S. 522 (1954), *with* Berenyi v. Immigration Director, 385 U.S. 630 (1967).

[1333] § 313(c), 66 Stat. 241 (1952), 8 U.S.C. § 1424(c).

[1334] § 316(a)(3), 66 Stat. 242, 8 U.S.C. § 1427(a)(3).

[1335] § 101(f)(1), 66 Stat. 172, 8 U.S.C. § 1101(f)(1).

[1336] § 101(f)(2), 66 Stat. 172, 8 U.S.C. § 1101(f)(2).

[1337] § 212(a)(11), 66 Stat. 182, 8 U.S.C. § 1182(a)(11).

[1338] § 101(f)(4) and (5), 66 Stat. 172, 8 U.S.C. § 1101(f)(4) and (5).

[1339] § 101(f)(7) and (8), 66 Stat. 172, 8 U.S.C. § 1101(f)(7) and (8).

[1340] § 212(a)(4), 66 Stat. 182, 8 U.S.C. § 1182(a)(4), barring aliens afflicted with "psychopathic personality," "a term of art intended to exclude homosexuals from entry into the United States." Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 119 (1967).

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quired by the law, or (C) to perform work of national importance under civilian direction when required by law."[1341]

Any naturalized person who takes this oath with mental reservations or conceals or misrepresents beliefs, affiliations, and conduct, which under the law disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled.[1342] Moreover, if within a year of his naturalization a person joins an organization or becomes in any way affiliated with one which was a disqualification for naturalization if he had been a member at the time, the fact is made *prima facie* evidence of his bad faith in taking the oath and grounds for instituting proceedings to revoke his admission to citizenship.[1343]

Rights of Naturalized Persons

Chief Justice Marshall early stated in dictum that "[a] naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[1344] A similar idea was expressed in *Knauer*

[1341] § 337(a), 66 Stat. 258 (1952), 8 U.S.C. § 1448(a). In United States v. Schwimmer, 279 U.S. 644 (1929), and United States v. MacIntosh, 283 U.S. 605 (1931), a divided Court held that clauses (3) and (4) of the oath, as then prescribed, required the candidate for naturalization to be willing to bear arms for the United States, thus disqualifying conscientious objectors. These cases were overturned, purely as a matter of statutory interpretation by Girouard v. United States, 328 U.S. 61 (1946), and Congress codified the result, 64 Stat. 1017 (1950), as it now appears in the cited statute.

[1342] § 340(a), 66 Stat. 260 (1952), 8 U.S.C. § 1451(a). *See* Kungys v. United States, 485 U.S. 759 (1988) (badly fractured Court opinion dealing with the statutory requirements in a denaturalization proceeding under this section). *See also* Johannessen v. United States, 225 U.S. 227 (1912). Congress has imposed no time bar applicable to proceedings to revoke citizenship, so that many years after naturalization has taken place a naturalized citizen remains subject to divestment upon proof of fraud. Costello v. United States, 365 U.S. 265 (1961); Polites v. United States, 364 U.S. 426 (1960); Knauer v. United States, 328 U.S. 654 (1946); Fedorenko v. United States, 449 U.S. 490 (1981).

[1343] 340(c), 66 Stat. 261 (1952), 8 U.S.C. § 1451(c). The time period had previously been five years.

[1344] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 827 (1824). One must be aware, however, that this language does not appear in any case having to do with citizenship or naturalization or the rights of naturalized citizens and its force may be therefore questioned. *Compare* Afroyim v. Rusk, 387 U.S. 253, 261 (1967) (Justice Black for the Court: "a mature and well-considered dictum . . . "), *with* id. at 275–76 (Justice Harlan dissenting: the dictum, "cannot have been intended to reach the question of citizenship"). The issue in *Osborn* was the right of the Bank to sue in federal court. Osborn had argued that the fact that the bank

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v. United States.[1345] "Citizenship obtained through naturalization is not a second-class citizenship. . . . [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."

Despite these dicta, it is clear that particularly in the past but currently as well a naturalized citizen has been and is subject to requirements not imposed on native-born citizens. Thus, as we have noted above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into and to lose his citizenship if lack of such faith is shown in proper proceedings.[1346] And the naturalized citizen within a year of his naturalization will join a questionable organization at his peril.[1347] In *Luria v. United States*,[1348] the Court sustained a statute making *prima facie* evidence of bad faith a naturalized citizen's assumption of residence in a foreign country within five years after the issuance of a certificate of naturalization. But in *Schneider v. Rusk*,[1349] the Court voided a statute that provided that a naturalized citizen should lose his United States citizenship if following naturalization he resided continuously for three years in his former homeland. "We start," Justice Douglas wrote for the Court, "from the premise that the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President."[1350] The failure of the statute, the Court held, was that it impermissibly distinguished between native-born and naturalized citizens, denying the latter the equal protection of the laws.[1351] "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less

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was chartered under the laws of the United States did not make any legal issue involving the bank one arising under the laws of the United States for jurisdictional purposes; to argue the contrary, Osborn contended, was like suggesting that the fact that persons were naturalized under the laws of Congress meant such persons had an automatic right to sue in federal courts, unlike natural-born citizens. The quoted language of Marshall's rejects this attempted analogy.

[1345] 328 U.S. 654, 658 (1946).

[1346] Johannessen v. United States, 225 U.S. 227 (1912); Knauer v. United States, 328 U.S. 654 (1946); Costello v. United States, 365 U.S. 265 (1961).

[1347] *See* 8 U.S.C. § 1451(c).

[1348] 231 U.S. 9 (1913). The provision has been modified to reduce the period to one year. 8 U.S.C. § 1451(d).

[1349] 377 U.S. 163 (1964).

[1350] 377 U.S. at 165.

[1351] Although there is no equal protection clause specifically applicable to the Federal Government, it is established that the Due Process Clause of the Fifth Amendment forbids discrimination in much the same manner as the Equal Protection Clause of the Fourteenth Amendment. In fact, "[e]qual protection analysis in the Fifth Amend-

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reliable and bear less allegiance to this country than do the native-born. This is an assumption that is impossible for us to make. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance."[1352]

The *Schneider* equal protection rationale was abandoned in the next case in which the Court held that the Fourteenth Amendment forbade involuntary expatriation of naturalized persons.[1353] But in *Rogers v. Bellei*,[1354] the Court refused to extend this holding to persons statutorily naturalized at birth abroad because one of their parents was a citizen and similarly refused to apply *Schneider*. Thus, one who failed to honor a condition subsequent had his citizenship revoked. "Neither are we persuaded that a condition subsequent in this area impresses one with 'second-class citizenship.' That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not 'second-class.'"[1355]

It is not clear where the progression of cases has left us in this area. Clearly, naturalized citizens are fully entitled to all the rights and privileges of those who are citizens because of their birth here. But it seems equally clear that with regard to retention of citizenship, naturalized citizens are not in the secure position of citizens born here.[1356]

On another point, the Court has held that, absent a treaty or statute to the contrary, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose

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ment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

[1352] Schneider v. Rusk, 377 U.S. 163, 168–69 (1964).

[1353] Afroyim v. Rusk, 387 U.S. 253 (1967).

[1354] 401 U.S. 815 (1971).

[1355] 401 U.S. at 835–36.

[1356] At least, there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well.

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his American citizenship and that it is not necessary for him to make an election and return to the United States.[1357] On still another point, it has been held that naturalization is so far retroactive as to validate an acquisition of land prior to naturalization as to which the alien was under a disability.[1358]

Expatriation: Loss of Citizenship

The history of the right of expatriation, voluntarily on the part of the citizen or involuntarily under duress of statute, is shadowy in United States constitutional law. Justice Story, in the course of an opinion,[1359] and Chancellor Kent, in his writings,[1360] accepted the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, a citizen being precluded from renouncing his allegiance without permission of that government. The pre-Civil War record on the issue is so vague because there was wide disagreement on the basis of national citizenship in the first place, with some contending that national citizenship was derivative from state citizenship, which would place the power of providing for expatriation in the state legislatures, and with others contending for the primacy of national citizenship, which would place the power in Congress.[1361] The citizenship basis was settled by the first sentence of § 1 of the Fourteenth Amendment, but expatriation continued to be a muddled topic. An 1868 statute specifically recognized "the right of expatriation" by individuals, but it was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized United States citizens.[1362] An 1865 law provided for the forfeiture of the "rights of citizenship" of draft-dodgers and deserters, but whether the statute meant to deprive such persons of citizenship or of their civil rights is unclear.[1363] Be-

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[1357] Perkins v. Elg, 307 U.S. 325 (1939). The qualifying phrase "absent a treaty or statute . . . " is error now, so long as *Afroyim* remains in effect. But note Rogers v. Bellei, 401 U.S. 815, 832–833 (1971).

[1358] Governeur v. Robertson, 24 U.S. (11 Wheat.) 332 (1826); Osterman v. Baldwin, 73 U.S. (6 Wall.) 116 (1867); Manuel v. Wulff, 152 U.S. 505 (1894).

[1359] Shanks v. DuPont, 28 U.S. (3 Pet.) 242, 246 (1830).

[1360] 2 J. Kent, Commentaries 49–50 (1827).

[1361] J. Tenbroek, Anti-Slavery Origins of the Fourteenth Amendment 71–94 (1951); *see generally* J. Roche, The Early Development of United States Citizenship (1949).

[1362] Act of July 27, 1868, 15 Stat. 223. While the Act's preamble rhetorically proclaims the "natural and inherent right of all people" to expatriate themselves, its title is "An Act concerning the Rights of American Citizens in foreign States" and its operative parts are concerned with that subject. It has long been taken, however, as a general proclamation of United States recognition of the right of United States citizens to expatriate themselves. Mackenzie v. Hare, 239 U.S. 299, 309 (1915); Mandoli v. Acheson, 344 U.S. 133, 135–36 (1952). *Cf.* Savorgnan v. United States, 338 U.S. 491, 498 n.11 (1950).

[1363] The Enrollment Act of March 3, 1865, § 21, 13 Stat. 487, 490. The language of the section appears more consistent with a deprivation of civil rights than of citi-

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ginning in 1940, however, Congress did enact laws designed to strip of their citizenship persons who committed treason,[1364] deserted the armed forces in wartime,[1365] left the country to evade the draft,[1366] or attempted to overthrow the government by force or violence.[1367] In 1907, Congress provided that female citizens who married foreign citizens were to have their citizenship held "in abeyance" while they remained wedded but to be entitled to reclaim it when the marriage was dissolved.[1368]

About the simplest form of expatriation, the renunciation of citizenship by a person, there is no constitutional difficulty. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance."[1369] But while the Court has hitherto insisted on the voluntary character of the renunciation, it has sustained the power of Congress to prescribe conditions and circumstances the voluntary entering into of which constitutes renunciation; the person need not intend to renounce so long as he intended to do what he did in fact do.[1370]

The Court first encountered the constitutional issue of forced expatriation in the rather anomalous form of the statute,[1371] which placed in limbo the citizenship of any American female who married a foreigner. Sustaining the statute, the Court relied on the congressional foreign relations power exercised in order to prevent the development of situations that might entangle the United States in embarrassing or hostile relationships with a foreign country. Noting too the fictional merging of identity of husband and wife, the Court thought it well within congressional power to attach certain consequences to these actions, despite the woman's contrary intent and understanding at the time she entered the relationship.[1372]

Beginning in 1958, the Court had a running encounter with the provisions of the 1952 Immigration and Nationality Act, which prescribed expatriation for a lengthy series of actions.[1373] In 1958, a

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zenship. Note also that § 14 of the Wade-Davis Bill, pocket-vetoed by President Lincoln, specifically provided that any person holding office in the Confederate Government "is hereby declared not to be a citizen of the United States." 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 223 (1899).

[1364] Nationality Act of 1940, 54 Stat. 1169.

[1365] Id.

[1366] 58 Stat. 746 (1944).

[1367] 68 Stat. 1146 (1954).

[1368] 34 Stat. 1228 (1907), repealed by 42 Stat. 1021 (1922).

[1369] Perkins v. Elg, 307 U.S. 325, 334 (1939).

[1370] Mackenzie v. Hare, 239 U.S. 299, 309, 311–12 (1915); Savorgnan v. United States, 338 U.S. 491, 506 (1950).

[1371] 34 Stat. 1228 (1907).

[1372] Mackenzie v. Hare, 239 U.S. 299 (1915).

[1373] *See generally* 8 U.S.C. §§ 1481–1489. Among the acts for which loss of citizenship is prescribed are (1) obtaining naturalization in a foreign state, (2) taking

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five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in an election in the other country of which he was a citizen.[1374] But at the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime.[1375] In the next case, the Court struck down another punitive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service.[1376] And, in the following year, the Court held unconstitutional a section of the law that expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years.[1377]

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an oath of allegiance to a foreign state, (3) serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality, (4) assuming public office under the government of a foreign state for which only nationals of that state are eligible, (5) voting in an election in a foreign state, (6) formally renouncing citizenship before a United States foreign service officer abroad, (7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional, as explained in the text.

[1374] Perez v. Brownell, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whittaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress's power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

[1375] Trop v. Dulles, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress's war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punishment and denied that it was punishment at all "in any valid constitutional sense." Id. at 124.

[1376] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress's war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.

[1377] Schneider v. Rusk, 377 U.S. 163 (1964).

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The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But, in *Afroyim v. Rusk*,[1378] a five-to-four majority overruled the 1958 decision permitting expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of United States citizenship. The majority ruled that the first sentence of § 1 of the Fourteenth Amendment constitutionally vested citizenship in every person "born or naturalized in the United States" and that Congress was powerless to take that citizenship away.[1379] The continuing vitality of this decision was called into question by another five-to-four decision in 1971, which technically distinguished *Afroyim* in upholding a congressionally prescribed loss of citizenship visited upon a person who was statutorily naturalized "outside" the United States, and held not within the protection of the first sentence of § 1 of the Fourteenth Amendment.[1380] Thus, although *Afroyim* was distinguished, the tenor of the majority opinion was hostile to its holding, and it may be that a future case will overrule it.

The issue, then, of the constitutionality of congressionally prescribed expatriation is unsettled.

ALIENS

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. . . . The United States, in their relation to foreign countries and their subjects or citizens, are one nation, in-

[1378] 387 U.S. 253 (1967).

[1379] Justice Harlan, for himself and Justices Clark, Stewart, and White, argued in dissent that there was no evidence that the drafters of the Fourteenth Amendment had at all the intention ascribed to them by the majority. He would have found in Afroyim's voluntary act of voting in a foreign election a voluntary renunciation of United States citizenship. 387 U.S. at 268.

[1380] Rogers v. Bellei, 401 U.S. 815 (1971). The three remaining *Afroyim* dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the *Afroyim* majority plus Justice Marshall made up the dissenters. The continuing vitality of *Afroyim* was assumed in Vance v. Terrazas, 444 U.S. 252 (1980), in which a divided Court upheld a congressionally imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.

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vested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."[1381]

Except for the Alien Act of 1798,[1382] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes[1383] and was followed by a series of exclusions based on health,

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[1381] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindienst v. Mandel, 408 U.S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' . . . but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Brennan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the government. Id. at 858. That there exists *some* limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), *aff'g by an equally divided Court*, 785 F.2d 1043 (D.C. Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community," Hampton v. Mow Sun Wong, 426 U.S. at 102, Congress may treat them in ways that would violate the Equal Protection Clause if a state should do it. *Diaz* (residency requirement for welfare benefits); *Fiallo* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong*, 426 U.S. at 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the Equal Protection Clause if adopted by a state, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978). *See* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

[1382] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[1383] Act of March 3, 1875, 18 Stat. 477.

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criminal, moral, economic, and subversion considerations.[1384] Another important phase was begun with passage of the Chinese Exclusion Act in 1882,[1385] which was not repealed until 1943.[1386] In 1924, Congress enacted into law a national origins quota formula which based the proportion of admittable aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry.[1387] This national origins quota system was in effect until it was repealed in 1965.[1388] The basic law remains the Immigration and Nationality Act of 1952,[1389] which retains its essential structure while undergoing several significant revisions. These revisions have included a temporary legalization program for certain unauthorized aliens, employer sanctions, a general expansion and tightening of rules for removal, changes in categories of aliens who may enter temporarily, and more express provisions on federal-state cooperation in immigration enforcement.

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport aliens by administrative process. For example, in *United States ex rel. Knauff v. Shaughnessy*,[1390] an order of the Attorney General excluding, on the basis of confidential information he would not disclose, a wartime bride, who was *prima facie* entitled to enter the United States,[1391] was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of

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[1384] 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

[1385] Act of May 6, 1882, 22 Stat. 58.

[1386] Act of December 17, 1943, 57 Stat. 600.

[1387] Act of May 26, 1924, 43 Stat. 153.

[1388] Act of October 3, 1965, Pub. L. 89–236, 79 Stat. 911.

[1389] Act of June 27, 1952, Pub. L. 82–414, 66 Stat. 163, 8 U.S.C. §§ 1101 *et seq*. as amended.

[1390] 338 U.S. 537 (1950). *See also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), in which the Court majority upheld the Government's power to exclude on the basis of information it would not disclose a permanent resident who had gone abroad for about nineteen months and was seeking to return on a new visa. But the Court will frequently read the applicable statutes and regulations strictly against the government for the benefit of persons sought to be excluded. *Cf.* Delgadillo v. Carmichael, 332 U.S. 388 (1947); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Rosenburg v. Fleuti, 374 U.S. 449 (1963).

[1391] Under the War Brides Act of 1945, 59 Stat. 659.

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exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent."[1392] However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.[1393]

Congress's power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid."[1394] This principle, however, has not precluded all state regulations dealing with aliens.[1395] The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations.[1396]

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940, Congress provided that all aliens in the United States, fourteen years of age and over, should submit to reg-

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[1392] 338 U.S. at 543.

[1393] *E.g.*, Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966).

[1394] Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976); Toll v. Moreno, 458 U.S. 1, 12–13 (1982). *See also* Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Graham v. Richardson, 403 U.S. 365, 376–380 (1971).

[1395] *E.g.*, Heim v. McCall, 239 U.S. 175 (1915); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927); Sugarman v. Dougall, 413 U.S. 634, 646–49 (1973); De Canas v. Bica, 424 U.S. 351 (1976); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Chamber of Commerce of the United States v. Whiting, 563 U.S. ___, No. 09–115, slip op. (2011).

[1396] Purporting to enforce this distinction, the Court voided a statute, which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. Keller v. United States, 213 U.S. 138 (1909).

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istration and finger printing and willful failure to comply was made a criminal offense against the United States.[1397] This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens.[1398]

An important benefit of this comprehensive, uniform regulation accruing to the alien is that it generally has precluded state regulation that may well be more severe and burdensome.[1399] For example, in *Hines v. Davidowitz*,[1400] the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently enacted federal law to require acquisition of an alien identification card that had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses.[1401]

Another decision voided a Pennsylvania law limiting those eligible to welfare assistance to citizens and an Arizona law prescrib-

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[1397] 54 Stat. 670, 8 U.S.C. §§ 1301–1306.

[1398] *See* Hines v. Davidowitz, 312 U.S. 52, 69–70 (1941).

[1399] In the 1990s, Congress began giving the states a larger role in the enforcement of federal immigration law. During this period, Congress also broadened the states' authority to deny aliens state benefits. Still, in the 2000s, states increasingly asserted greater independent authority to deter the presence of illegal aliens within their borders, both through curtailing benefits and assuming a more active role in direct immigration enforcement. Most of these efforts foundered under court challenge, but some did not, resulting, in at least one instance, in the imposition of more severe consequences under state law than under federal law for similar immigration violations. *See* Chamber of Commerce of the United States v. Whiting, 563 U.S. ___, No. 09–115, slip op. (2011). Nevertheless, the *Whiting* Court found a textual basis in federal statute for the state sanctions imposed there. Absent text-based authority for separate state penalties for federal immigration violations, those state penalties likely will fail on preemption grounds. Arizona v. United States, 567 U.S. ___, No. 11–182, slip op. (2012) (invalidating state sanctions on unauthorized aliens seeking work in violation of federal law and striking state penalties for violations of federal alien registration requirements). It would further appear that states must ground their efforts to detect, arrest, and remove unauthorized aliens in authority delegated by Congress. Id.

[1400] 312 U.S. 52 (1941).

[1401] 312 U.S. at 68. The Court did not squarely hold the state incapable of having such a law in the absence of federal law but appeared to lean in that direction. State sanctions for violating federal alien registration laws were overturned in Arizona v. United States, at least in part because the state penalties were greater than those under federal law for the same violation. *But see* De Canas v. Bica, 424 U.S. 351 (1976), in which the Court, ten years prior to enactment of federal employer sanctions, upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that states may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law. For examples of state sanctions against unauthorized aliens that have been struck on preemption grounds, see Arizona v. United States, 567 U.S. ___, No. 11–182, slip op. (2012).

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ing a fifteen-year durational residency period before an alien could be eligible for welfare assistance.[1402] Congress had provided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry.[1403] Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property and the states were disabled from denying aliens these benefits.[1404]

Deportation

Unlike the exclusion proceedings,[1405] deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination,[1406] protection against unreasonable searches and seizures,[1407] guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment,[1408] a right to bail,[1409] a right to procedural due process,[1410] a right to counsel,[1411] a right to notice of charges and hearing,[1412] and a right to cross-examine.[1413]

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not unconstitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[1414] Nor was it

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[1402] Graham v. Richardson, 403 U.S. 365 (1971). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[1403] 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), 1251(a)(8).

[1404] *See* 42 U.S.C. § 1981, applied in Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 n.7 (1948).

[1405] *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), where the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

[1406] Kimm v. Rosenberg, 363 U.S. 405 (1960).

[1407] Abel v. United States, 362 U.S. 217, 229 (1960).

[1408] Marcello v. Bonds, 349 U.S. 302 (1955).

[1409] Carlson v. Landon, 342 U.S. 524, 540 (1952).

[1410] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950). See discussion of aliens' due process rights under the Fifth Amendment, Aliens: Entry and Deportation.

[1411] 8 U.S.C. § 1252(b)(2).

[1412] 8 U.S.C. § 1252(b)(1).

[1413] 8 U.S.C. § 1252(b)(3).

[1414] Carlson v. Landon, 342 U.S. 524 (1952). In Reno v. Flores, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close rela-

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unconstitutional to deport under the Alien Registration Act of 1940 [1415] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto*, being but an exercise of the power of the United States to terminate its hospitality *ad libitum*.[1416] And a statutory provision [1417] making it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" was not on its face void for "vagueness." [1418] An alien unlawfully in the country "has no constitutional right to assert selective enforcement as a defense against his deportation." [1419]

BANKRUPTCY

Persons Who May Be Released From Debt

In an early case on circuit, Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." [1420] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors, and underwriters as well as traders.[1421] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.[1422]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*,[1423] it held valid the Bankruptcy Act of 1898, which provided that persons other than traders might become bankrupts and that this might be done on voluntary peti-

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tives, or legal guardians were available to accept release, as against a substantive due process attack.

[1415] 54 Stat. 670. For existing statutory provisions as to deportation, *see* 8 U.S.C. §§ 1251 *et seq*.

[1416] Carlson v. Landon, 342 U.S. 524 (1952).

[1417] 8 U.S.C. § 1252(e).

[1418] United States v. Spector, 343 U.S. 169 (1952).

[1419] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

[1420] Adams v. Storey, 1 Fed. Cas. 141, 142 (No. 66) (C.C.D.N.Y. 1817).

[1421] 2 Stat. 19 (1800).

[1422] 2 J. Story, Commentaries on the Constitution of the United States 1113 (1833).

[1423] 186 U.S. 181 (1902).

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tion. The Court has given tacit approval to the extension of the bankruptcy laws to cover practically all classes of persons and corporations,[1424] including even municipal corporations[1425] and wage-earning individuals. The Bankruptcy Act has, in fact been amended to provide a wage-earners' extension plan to deal with the unique problems of debtors who derive their livelihood primarily from salaries or commissions. In furthering the implementation of this plan, the Supreme Court has held that a wage earner may make use of it, notwithstanding the fact he has been previously discharged in bankruptcy within the last six years.[1426]

Liberalization of Relief Granted and Expansion of the Rights of the Trustee

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867, the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition that would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,[1427] as were later acts, which provided for the reorganization of corporations that are insolvent or unable to meet their debts as they mature,[1428] and for the composition and extension of debts in proceedings for the relief of individual farmer debtors.[1429]

Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.[1430] Moreover, the Court expanded the bankruptcy court's power over the prop-

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[1424] Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935).

[1425] United States v. Bekins, 304 U.S. 27 (1938), distinguishing Ashton v. Cameron County Dist., 298 U.S. 513 (1936).

[1426] Perry v. Commerce Loan Co., 383 U.S. 392 (1966).

[1427] *In re* Reiman, 20 Fed. Cas. 490 (No. 11,673) (D.C.S.D.N.Y. 1874), cited with approval in Continental Bank v. Rock Island Ry., 294 U.S. 648, 672 (1935).

[1428] Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935).

[1429] Wright v. Vinton Branch, 300 U.S. 440 (1937); Adair v. Bank of America Ass'n, 303 U.S. 350 (1938).

[1430] Wright v. Union Central Ins. Co., 304 U.S. 502 (1938).

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erty of the estate by affording the trustee affirmative relief on counterclaim against a creditor filing a claim against the estate.[1431]

Underlying most Court decisions and statutes in this area is the desire to achieve equity and fairness in the distribution of the bankrupt's funds.[1432] *United States v. Speers*,[1433] codified by an amendment to the Bankruptcy Act,[1434] furthered this objective by strengthening the position of the trustee as regards the priority of a federal tax lien unrecorded at the time of bankruptcy.[1435] The Supreme Court has held, in other cases dealing with the priority of various creditors' claims, that claims arising from the tort of the receiver is an "actual and necessary" cost of administration,[1436] that benefits under a nonparticipating annuity plan are not wages and are therefore not given priority,[1437] and that when taxes are allowed against a bankrupt's estate, penalties due because of the trustee's failure to pay the taxes incurred while operating a bankrupt business are also allowable.[1438] The Court's attitude with regard to these and other developments is perhaps best summarized in the opinion in *Continental Bank v. Rock Island Ry.*,[1439] where Justice Sutherland wrote, on behalf of a unanimous court: "[T]hese acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."[1440]

Constitutional Limitations on the Bankruptcy Power

In the exercise of its bankruptcy powers, Congress must not transgress the Fifth and Tenth Amendments. The Bankruptcy Act provides that use immunity may be granted "for persons required to submit to examination, to testify, or to provide information" in a bankruptcy case.[1441] Congress may not take from a creditor specific property previously acquired from a debtor, nor circumscribe the creditor's right to such an unreasonable extent as to deny him due process of law;[1442] this principle, however, is subject to the Supreme Court's finding that a bankruptcy court has summary jurisdiction for ordering the surrender of voidable preferences when the trustee

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[1431] Katchen v. Landy, 382 U.S. 323 (1966).
[1432] Bank of Marin v. England, 385 U.S. 99, 103 (1966).
[1433] 382 U.S. 266 (1965). *Cf.* United States v. Vermont, 337 U.S. 351 (1964).
[1434] Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501, repealed.
[1435] 382 U.S. at 271–72.
[1436] Reading Co. v. Brown, 391 U.S. 471 (1968).
[1437] Joint Industrial Bd. v. United States, 391 U.S. 224 (1968).
[1438] Nicholas v. United States, 384 U.S. 678 (1966).
[1439] 294 U.S. 648 (1935).
[1440] 294 U.S. at 671.
[1441] 11 U.S.C. § 344.
[1442] Louisville Bank v. Radford, 295 U.S. 555, 589, 602 (1935).

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successfully counterclaims to a claim filed by the creditor receiving such preferences.[1443]

Because Congress may not supersede the power of a state to determine how a corporation shall be formed, supervised, and dissolved, a corporation that has been dissolved by a decree of a state court may not file a petition for reorganization under the Bankruptcy Act.[1444] But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage.[1445] Although it may not subject the fiscal affairs of a political subdivision of a state to the control of a federal bankruptcy court,[1446] Congress may empower such courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the state has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[1447] Congress may recognize the laws of the state relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even though such recognition leads to different results from state to state;[1448] for, although bankruptcy legislation must be uniform, the uniformity required is geographic, not personal.

The power of Congress to vest the adjudication of bankruptcy claims in entities not having the constitutional status of Article III federal courts is unsettled. At least, it may not give to non-Article III courts the authority to hear state law claims made subject to federal jurisdiction only because of their relevance to a bankruptcy proceeding.[1449]

Constitutional Status of State Insolvency Laws: Preemption

Prior to 1898, Congress exercised the power to establish "uniform laws on the subject of bankruptcy" only intermittently. The first national bankruptcy law was not enacted until 1800 and was repealed in 1803; the second was passed in 1841 and was repealed

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[1443] Katchen v. Landy, 382 U.S. 323, 327–40 (1966).

[1444] Chicago Title and Trust Co. v. Wilcox Bldg. Corp., 302 U.S. 120 (1937).

[1445] *In re* Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181 (1902).

[1446] Ashton v. Cameron County Dist., 298 U.S. 513 (1936). *See also* United States v. Bekins, 304 U.S. 27 (1938).

[1447] United States v. Bekins, 304 U.S. 27 (1938).

[1448] Stellwagon v. Clum, 245 U.S. 605 (1918); Hanover National Bank v. Moyses, 186 U.S. 181, 190 (1902).

[1449] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (Seventh Amendment right to jury trial in bankruptcy cases).

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two years later; a third was enacted in 1867 and repealed in 1878.[1450] Thus, during the first eighty-nine years under the Constitution, a national bankruptcy law was in existence only sixteen years altogether. Consequently, the most important issue of interpretation that arose during that period concerned the effect of the clause on state law.

The Supreme Court ruled at an early date that, in the absence of congressional action, the states may enact insolvency laws, because it is not the mere existence of the power but rather its exercise that is incompatible with the exercise of the same power by the states.[1451] Later cases settled further that the enactment of a national bankruptcy law does not invalidate state laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without re-enactment.[1452]

A state, of course, has no power to enforce any law governing bankruptcies that impairs the obligation of contracts,[1453] extends to persons or property outside its jurisdiction,[1454] or conflicts with the national bankruptcy laws.[1455] Giving effect to the policy of the federal statute, the Court has held that a state statute regulating this distribution of property of an insolvent was suspended by that law,[1456] and that a state court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[1457] A state court injunction ordering a defendant to clean up a waste-disposal site was held to be a "liability on a claim" subject to discharge under the bankruptcy law, after the state had appointed a receiver to take charge of the defendant's property and comply with the injunction.[1458] A state law gov-

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[1450] Hanover National Bank v. Moyses, 186 U.S. 181, 184 (1902).

[1451] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827).

[1452] Tua v. Carriere, 117 U.S. 201 (1886); Butler v. Goreley, 146 U.S. 303, 314 (1892).

[1453] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[1454] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Denny v. Bennett, 128 U.S. 489, 498 (1888); Brown v. Smart, 145 U.S. 454 (1892).

[1455] *In re* Watts and Sachs, 190 U.S. 1, 27 (1903); International Shoe Co. v. Pinkus, 278 U.S. 261, 264 (1929).

[1456] International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

[1457] Kalb v. Feurerstein, 308 U.S. 433 (1940).

[1458] Ohio v. Kovacs, 469 U.S. 274 (1985). *Compare* Kelly v. Robinson, 479 U.S. 36 (1986) (restitution obligations imposed as conditions of probation in state criminal actions are nondischargeable in proceedings under chapter 7), *with* Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990) (restitution obligations imposed as condition of probation in state criminal actions are dischargeable in proceedings under chapter 13).

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erning fraudulent transfers was found to be compatible with the federal law.[1459]

Substantial disagreement has marked the actions of the Justices in one area, however, resulting in three five-to-four decisions first upholding and then voiding state laws providing that a discharge in bankruptcy was not to relieve a judgment arising out of an automobile accident upon pain of suffering suspension of his driver's license.[1460] The state statutes were all similar enactments of the Uniform Motor Vehicle Safety Responsibility Act, which authorizes the suspension of the license of any driver who fails to satisfy a judgment against himself growing out of a traffic accident; a section of the law specifically provides that a discharge in bankruptcy will not relieve the debtor of the obligation to pay and the consequence of license suspension for failure to pay. In the first two decisions, the Court majorities decided that the object of the state law was not to see that such judgments were paid but was rather a device to protect the public against irresponsible driving.[1461] The last case rejected this view and held that the Act's sole emphasis was one of providing leverage for the collection of damages from drivers and as such was in fact intended to and did frustrate the purpose of the federal bankruptcy law, the giving of a fresh start unhampered by debt.[1462]

If a state desires to participate in the assets of a bankruptcy, it must submit to the appropriate requirements of the bankruptcy court with respect to the filing of claims by a designated date. It cannot assert a claim for taxes by filing a demand at a later date.[1463]

Clauses 5 and 6. The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

* * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

[1459] Stellwagon v. Clum, 245 U.S. 605, 615 (1918).

[1460] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Perez v. Campbell, 402 U.S. 637 (1971).

[1461] Reitz v. Mealey, 314 U.S. 33, 37 (1941); Kesler v. Department of Public Safety, 369 U.S. 153, 169–74 (1962).

[1462] Perez v. Campbell, 402 U.S. 637, 644–48, 651–54 (1971). The dissenters, Justice Blackmun for himself and Chief Justice Burger and Justices Harlan and Stewart, argued, in line with the *Reitz* and *Kesler* majorities, that the provision at issue was merely an attempt to assure driving competence and care on the part of its citizens and had only tangential effect upon bankruptcy.

[1463] New York v. Irving Trust Co., 288 U.S. 329 (1933).

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FISCAL AND MONETARY POWERS OF CONGRESS

Coinage, Weights, and Measures

The power "to coin money" and "regulate the value thereof" has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes,[1464] and it may restrain the circulation of notes not issued under its own authority.[1465] To this end it may impose a prohibitive tax upon the circulation of the notes of state banks [1466] or of municipal corporations.[1467] It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[1468] Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power," [1469] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts,[1470] and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed.[1471] The power to coin money also imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting or exportation.[1472]

Punishment of Counterfeiting

In its affirmative aspect, this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin.[1473] At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon

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[1464] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[1465] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).
[1466] 75 U.S. at 548.
[1467] National Bank v. United States, 101 U.S. 1 (1880).
[1468] Nortz v. United States, 249 U.S. 317 (1935).
[1469] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 549 (1871); Juilliard v. Greenman, 110 U.S. 421, 449 (1884).
[1470] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).
[1471] Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).
[1472] Ling Su Fan v. United States, 218 U.S. 302 (1910).
[1473] United States v. Marigold, 50 U.S. (9 How.), 560, 568 (1850).

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either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a state may punish the issuance of forged coins.[1474] On the ground that the power of Congress to coin money imports "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation,"[1475] it has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[1476] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States.[1477] In short, the above clause is entirely superfluous. Congress would have had the power it purports to confer under the Necessary and Proper Clause; and the same is the case with the other enumerated crimes it is authorized to punish. The enumeration was unnecessary and is not exclusive.[1478]

Borrowing Power Versus Fiscal Power

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof—have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions,[1479] or making its treasury notes legal tender in the payment of antecedent debts.[1480] But, in 1935, the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress.[1481] In a concurring opinion, Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause,

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[1474] Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).

[1475] United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).

[1476] Id.

[1477] Baender v. Barnett, 255 U.S. 224 (1921).

[1478] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 536 (1871).

[1479] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 861 (1824); Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U.S. 29, 33 (1875); Smith v. Kansas City Title Co., 255 U.S. 180, 208 (1921).

[1480] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 540–47 (1871).

[1481] Perry v. United States, 294 U.S. 330, 353 (1935).

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its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds." [1482] However, with a view to inducing purchase of savings bonds, the sale of which is essential to successful management of the national debt, Congress is competent to authorize issuance of regulations creating a right of survivorship in such bonds registered in co-ownership form, and such regulations preempt provisions of state law prohibiting married couples from using the survivorship privilege whenever bonds are paid out of community property.[1483]

Clause 7. The Congress shall have Power * * * To establish Post Offices and post roads.

POSTAL POWER

"Establish"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to construct post offices and post roads, or only the power to designate from existing places and routes those that should serve as post offices and post roads? As late as 1855, Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water.[1484] A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged . . . with the transportation of the mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in the state.[1485] The debate on the question was terminated in 1876 by the decision in *Kohl v. United States*,[1486] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

Power To Protect the Mails

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the

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[1482] 294 U.S. at 361.

[1483] Free v. Bland, 369 U.S. 663 (1962).

[1484] United States v. Railroad Bridge Co., 27 Fed. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855).

[1485] Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845).

[1486] 91 U.S. 367 (1876).

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mails.[1487] And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[1488] Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any widespread disorder interfering with interstate commerce and the transmission of the mails.[1489]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern states through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection." In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[1490] On this point his reasoning would appear to be vindicated by such decisions as those denying the right of the states to prevent the importation of alcoholic beverages from other states.[1491]

Power To Prevent Harmful Use of the Postal Facilities

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*,[1492] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be ex-

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[1487] *Ex parte* Jackson, 96 U.S. 727, 732 (1878). *See* United States Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981), in which the Court sustained the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service.

[1488] Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).

[1489] *In re* Debs, 158 U.S. 564, 599 (1895).

[1490] Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).

[1491] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).

[1492] 96 U.S. 727 (1878).

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cluded." [1493] The leading fraud order case, decided in 1904, held to the same effect.[1494] Pointing out that it is "an indispensable adjunct to a civil government," to supply postal facilities, the Court restated its premise that the "legislative body in thus establishing a postal service may annex such conditions . . . as it chooses." [1495]

Later cases first qualified these sweeping assertions and then overturned them, holding government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[1496] Chief Justice White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning . . . the classification of the mails, or by the way of condition . . . ." [1497] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[1498]

A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*,[1499] in which it struck down a statute authorizing the Post Office to detain mail it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees.[1500] The statute violated the First Amendment be-

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[1493] 96 U.S. at 732.

[1494] Public Clearing House v. Coyne, 194 U.S. 497 (1904), followed in Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[1495] 194 U.S. at 506.

[1496] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[1497] 229 U.S. at 316.

[1498] United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). *See also* Hannegan v. Esquire, 327 U.S. 146 (1946), denying the Post Office the right to exclude Esquire Magazine from the mails on grounds of the poor taste and vulgarity of its contents.

[1499] 381 U.S. 301 (1965).

[1500] 381 U.S. at 305, quoting Justice Holmes in United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (dissenting opinion): "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." *See also* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (quoting same language). But for a different perspective on the meaning and appli-

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cause it inhibited the right of persons to receive any information that they wished to receive.[1501]

On the other hand, a statute authorizing persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver.[1502] But, as in other areas, postal censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[1503]

Exclusive Power as an Adjunct to Other Powers

The cases just reviewed involved attempts to close the mails to communication that were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[1504] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. Although it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[1505] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ."[1506]

State Regulations Affecting the Mails

In determining the extent to which state laws may impinge upon persons or corporations whose services are used by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court

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cation of Holmes' language, *see* United States Postal Service v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 127 n.5 (1981), although there too the Court observed that the postal power may not be used in a manner that abridges freedom of speech or press. Id. at 126. Notice, too, that first-class mail is protected against opening and inspection, except in accordance with the Fourth Amendment. *Ex parte* Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970). *But see* United States v. Ramsey, 431 U.S. 606 (1977) (border search).

[1501] Lamont v. Postmaster General, 381 U.S. 301, 306–07 (1965). *See also* id. at 308 (concurring opinion). This was the first federal statute ever voided for being in conflict with the First Amendment.

[1502] Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[1503] Blount v. Rizzi, 400 U.S. 410 (1971).

[1504] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

[1505] Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[1506] 303 U.S. at 442.

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has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, a state statute, which granted to one company an exclusive right to operate a telegraph business in the state, was found to be incompatible with a federal law, which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of state monopolies in a field Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.[1507]

An Illinois statute that, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause.[1508] But a Minnesota statute requiring intrastate trains to stop at county seats was found to be unobjectionable.[1509]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[1510] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[1511] have been held not to conflict with national legislation or policy in this field. Despite the interference *pro tanto* with the performance of a federal function, a state may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[1512] but it cannot punish a person for operating a mail truck over its highways without procuring a driver's license from state authorities.[1513]

Clause 8. The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

COPYRIGHTS AND PATENTS

Origins and Scope of the Power

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. As

[1507] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).
[1508] Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896).
[1509] Gladson v. Minnesota, 166 U.S. 427 (1897).
[1510] Price v. Pennsylvania R.R., 113 U.S. 218 (1895); Martin v. Pittsburgh & Lake Erie R.R., 203 U.S. 284 (1906).
[1511] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).
[1512] United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869).
[1513] Johnson v. Maryland, 254 U.S. 51 (1920).

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to patents, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years.[1514] Copyright law, in turn, traces back to the Statute of Anne of 1710, which secured to authors of books sole publication rights for designated periods.[1515] These English statutes curtailed the royal prerogative to bestow monopolies to Crown favorites over works and products they did not create and many of which had long been enjoyed by the public.[1516] Informed by these precedents and colonial practice, the Framers restricted the power to confer monopolies over the use of intellectual property through the Copyright and Patent Clause. For example, the "exclusive Right" conferred to the writings of authors and the discoveries of inventors must be time limited. Another fundamental limitation inheres in the phrase "[t]o promote the Progress of Science and useful Arts": To merit copyright protection, a work must exhibit originality, embody some creative expression;[1517] to merit patent protection, an invention must be an innovative advancement, "push back the frontiers."[1518] Also deriving from the phrase "promotion of science and the arts" is the issue of whether Congress may only provide for grants of protection that broaden the availability of new materials.[1519]

[1514] Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 17, 18 (1829).

[1515] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 656, 658 (1834).

[1516] *Cf.* Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966). *See also* Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. at 3 (2012) (Breyer, J., dissenting).

[1517] Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) (publisher of telephone directory, consisting of white pages and yellow pages, not entitled to copyright in white pages, which are only compilations). "To qualify for copyright protection, a work must be original to the author. . . . Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice." Id. at 345. First clearly articulated in The *Trade-Mark Cases*, 100 U.S. 82 (1879), and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–60 (1884), the requirement is expressed in nearly every copyright opinion, but its forceful iteration in *Feist* was noteworthy, because originality is a statutory requirement as well, 17 U.S.C. § 102(a), and it was unnecessary to discuss the concept in constitutional terms.

[1518] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). In a concurring opinion, Justice Douglas wrote, for himself and Justice Black: "Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted. . . . It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." 340 U.S. at 154–55 (Justice Douglas concurring).

[1519] Kendall v. Winsor, 62 U.S. (21 How.) 322, 328 (1859) ("[T]he inventor who designedly, and with the view of applying it indefinitely and exclusively for his own

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Acting within these strictures, Congress has broad leeway to determine how best to promote creativity and utility through temporary monopolies. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[1520] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question to be whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[1521] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."[1522] Moreover, the duration of copyrights and patents may be prolonged and, even then, the limits may not be easily enforced. The protection period may extend well beyond the life of the author or inventor.[1523] Also, in extending the duration of existing copyrights and patents, Congress may protect the rights of purchasers and assignees.[1524]

The copyright and patent laws do not, of their own force, have any extraterritorial operation.[1525]

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profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress.").

In Golan v. Holder, publishers and musicians challenged a law that allowed for copyright protection of certain foreign works theretofore in the public domain, in conformance with international practice. Plaintiffs alleged the provision was invalid because, *inter alia*, it failed to give incentives for creating new works. Though this view found support in Justice Breyer's dissent, the majority held the Copyright Clause does not require that every provision of copyright law be designed to encourage new works. Rather, Congress has broad discretion to determine the intellectual property regime that, in its judgment, best serves the overall purposes of the Clause, including broader dissemination of existing and future American works. 565 U.S. ___, No. 10–545, slip op. at 21 (2012).

[1520] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[1521] 537 U.S. at 204.

[1522] 537 U.S. at 205.

[1523] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. Although the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[1524] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

[1525] Brown v. Duchesne, 60 U.S. (19 How.) 183, 195 (1857); *see also* Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972) ("Our patent system makes no claim to extraterritorial effect . . . ."); Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 154 (1998) (Justice Ginsburg concurring) ("Copyright protection is territorial"); Microsoft Corp. v. AT&T, 550 U.S. 437, 454–55 (2007) ("The presumption that United States law governs domestically but does not rule the world applies with particualr force in patent law".). It is, however, the ultimate objective of many nations, including the United States, to develop a system of pat-

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Patentable Discoveries

The protection traditionally afforded by acts of Congress under this clause has been limited to new and useful inventions,[1526] and, although a patentable invention is a mental achievement,[1527] for an idea to be patentable it must have first taken physical form.[1528] Despite the fact that the Constitution uses the term "discovery" rather than "invention," a patent may not be issued for the discovery of a previously unknown phenomenon of nature. "If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end." [1529] In addition to refusing to allow patents for natural phenomena and laws of nature, the Court has held that abstract ideas and mathematical formulas may not be patented,[1530] for these are the "basic tools of scientific and technological work" [1531] that should be "free to all men and reserved to none." [1532]

As for the mental processes that traditionally must be evidenced, the Court has held that an invention must display "more ingenuity . . . than the work of a mechanic skilled in the art;" [1533] and, though combination patents have been at times sustained,[1534] the accumulation of old devices is patentable "only when the whole

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ent issuance and enforcement which transcends national boundaries; it has been recommended, therefore, that United States policy should be to harmonize its patent system with that of foreign countries so long as such measures do not diminish the quality of the United States patent standards. President's Commission on the Patent System, To Promote the Progress of Useful Arts, Report to the Senate Judiciary Committee, S. Doc. No. 5, 90th Cong., 1st sess. (1967), recommendation XXXV. Effectuation of this goal of transnational protection of intellectual property was begun with the United States agreement to the Berne Convention (the Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886), and Congress's conditional implementation of the Convention through legislation. The Berne Convention Implementation Act of 1988, Pub. L. 100–568, 102 Stat. 2853, 17 U.S.C. §§ 101 and notes.

[1526] Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 549 (1871). *Cf.* Collar Company v. Van Dusen, 90 U.S. (23 Wall.) 530, 563 (1875); Reckendorfer v. Faber, 92 U.S. 347, 356 (1876).

[1527] Smith v. Nichols, 89 U.S. (21 Wall.) 112, 118 (1875).

[1528] Rubber-Tip Pencil Co. v. Howard, 87 U.S. (20 Wall.) 498, 507 (1874); Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481, 489 (1891).

[1529] Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948); Diamond v. Diehr, 450 U.S. 175, 187 (1981) ("[A]n *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection".) (emphasis in original). *Cf.* Dow Co. v. Halliburton Co., 324 U.S. 320 (1945); Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 89 (1941).

[1530] Gottschalk v. Benson, 409 U.S. 63 (1972); Bilski v. Kappos, 561 U.S. ___, No. 08–964, slip op. (2010); Mayo Collaborative Servs. v. Prometheus Laboratories, Inc., 566 U.S. ___, No. 10–1150, slip op. (2012).

[1531] Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

[1532] Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948).

[1533] Sinclair Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945); Marconi Wireless Co. v. United States, 320 U.S. 1 (1943).

[1534] Keystone Mfg. Co. v. Adams, 151 U.S. 139 (1894); Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428 (1911).

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in some way exceeds the sum of its parts."[1535] Though "inventive genius" and slightly varying language have been appearing in judicial decisions for over a century,[1536] "novelty and utility" has been the primary statutory test since the Patent Act of 1793.[1537] Section 103 of the Patent Act of 1952, however, required that an innovation be of a "nonobvious" nature; that is, it must not be an improvement that would be obvious to a person having ordinary skill in the pertinent art.[1538] This alteration of the standard of patentability was perceived by some as overruling previous Supreme Court cases requiring perhaps a higher standard for obtaining a patent,[1539] but, in *Graham v. John Deere Co.*,[1540] the Court inter-

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[1535] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice Black: "It is not enough," says Justice Douglas, "that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." Id. at 154–155. He then quotes the following from an opinion of Justice Bradley's given 70 years earlier:

"It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (Atlantic Works v. Brady, 107 U.S. 192, 200 (1882))." Id. at 155.

The opinion concludes: "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances]." Id. at 156–58.

[1536] "Inventive genius"—Justice Hunt in Reckendorfer v. Faber, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in Smith v. Whitman Saddle Co., 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in Potts v. Creager, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in Concrete Appliances Co. v. Gomery, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in Mantle Lamp Co. v. Aluminum Co., 301 U.S. 544, 546 (1937); "the flash of creative genius, not merely the skill of the calling"—Justice Douglas in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).

[1537] Act of February 21, 1793, ch. 11, 1 Stat. 318. *See* Graham v. John Deere Co., 383 U.S. 1, 3–4, 10 (1966).

[1538] 35 U.S.C. § 103.

[1539] *E.g.*, A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Jungerson v. Ostby & Barton Co., 335 U.S. 560 (1949); and Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

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preted the provision as having codified its earlier holding in *Hotchkiss v. Greenwood*.[1541] The Court in *Graham* said: "Innovation, *advancement*, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored."[1542] Congressional requirements on patentability, then, are conditions and tests that must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access to and use of new items versus the interest of the country, as a whole, in encouraging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems to have been made less clear by the Supreme Court's rejuvenation of "invention" as a standard of patentability.[1543]

Procedure in Issuing Patents

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1544] Congress may authorize the issuance of a patent for an invention by a special, as well as by general, law, provided the question as to whether the patentee's device is in truth an invention is left open to investigation under the general law.[1545] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Com-

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[1540] 383 U.S. 1 (1966).

[1541] 52 U.S. (11 How.) 248 (1850).

[1542] 383 U.S. at 6 (first emphasis added, second emphasis by Court). For a thorough discussion, *see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–52 (1989).

[1543] Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969). "The question of invention must turn on whether the combination supplied the key requirement." Id. at 60. But the Court also appeared to apply the test of nonobviousness in the same decision: "We conclude that the combination was reasonably obvious to one with ordinary skill in the art." Id. *See also* McClain v. Ortmayer, 141 U.S. 419, 427 (1891), where, speaking of the use of "invention" as a standard of patentability the Court said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."

[1544] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn v. Harwood, 112 U.S. 354, 358 (1884). In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the courts. The Seventh Amendment does not require that such issues be tried to a jury.

[1545] Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 512 (1818).

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mission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[1546] The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office.[1547] The present system of "de novo" hearings before the Court of Appeals allows the applicant to present new evidence that the Patent Office has not heard,[1548] thus making somewhat amorphous the central responsibility.

Nature and Scope of the Right Secured for Copyright

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[1549] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume called 'Condensed Reports of Cases in the Supreme Court of the United States'";[1550] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[1551] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection.[1552] Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence."[1553] The Court found, however, that "the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right."[1554] Thus, the exclusive right that the Constitution authorizes Con-

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[1546] United States v. Duell, 172 U.S. 576, 586–89 (1899). *See also* Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884).

[1547] Graham v. John Deere Co., 383 U.S. 1, 18 (1966).

[1548] In Jennings v. Brenner, 255 F. Supp. 410, 412 (D.D.C. 1966), District Judge Holtzoff suggested that a system of remand be adopted.

[1549] 33 U.S. (8 Pet.) 591 (1834).

[1550] 33 U.S. (8 Pet.) at 595.

[1551] 33 U.S. (8 Pet.) at 657–58. The Court noted that the same principle applies to "an individual who has invented a most useful and valuable machine. . . . [I]t has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly." Id.

[1552] 33 U.S. (8 Pet.) at 667.

[1553] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[1554] 33 U.S. (8 Pet.) at 661.

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gress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose. The Court's "reluctance to expand [copyright] protection without explicit legislative guidance" controlled its decision in *Sony Corp. v. Universal City Studios*,[1555] which held that the manufacture and sale of video tape (or cassette) recorders for home use do not constitute "contributory" infringement of the copyright in television programs. Copyright protection, the Court reiterated, is "wholly statutory," and courts should be "circumspect" in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply through the supplying of the devices with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing "fair use," *e.g.*, time-shifting of television viewing.

Congress was within its powers in giving to authors the exclusive right to dramatize any of their works. Even as applied to pantomime dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed.[1556] But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent.[1557] Because copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was designed to produce.[1558] A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.[1559]

Power of Congress Over Patents and Copyrights

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention that cannot be appropriated or used by the government with-

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[1555] 464 U.S. 417, 431 (1984). Cf. Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (active encouragement of infringement by distribution of software for sharing of copyrighted music and video files can constitute infringement).

[1556] Kalem Co. v. Harper Bros., 222 U.S. 55 (1911). For other problems arising because of technological and electronic advancement, *see*, *e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

[1557] Baker v. Selden, 101 U.S. 99, 105 (1880).

[1558] Stevens v. Gladding, 58 U.S. (17 How.) 447 (1855).

[1559] Ager v. Murray, 105 U.S. 126 (1882).

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out just compensation.[1560] Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,[1561] but it does not follow that it may authorize an inventor to recall rights that he has granted to others or reinvest in him rights of property that he had previously conveyed for a valuable and fair consideration.[1562] Furthermore, the rights the present statutes confer are subject to the antitrust laws, though it can hardly be said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges that are forbidden by those acts are entirely consistent in their holdings.[1563]

Congress has the power to pass copyright laws that, in its political judgment, will serve the ends of the Copyright Clause. Congress may "promote the Progress of Science" (*i.e.*, the creation and dissemination of knowledge and learning) not only by providing incentives for new works, but also by conferring copyright protection to works in the public domain.[1564] The Copyright Clause also broadly empowers Congress to extend the terms of existing copyrights, so long as the extended terms are for determinable periods.[1565]

Copyright and the First Amendment

The Copyright Clause nominally restricts free speech by allowing for an author's monopoly to market his original work. The Court has "recognized that some restriction on expression is the inherent and intended effect of every grant of copyright."[1566] However, that the Copyright Clause and the First Amendment were adopted close in time reflects the Framers' belief that "copyright's limited monopolies are compatible with free speech principles."[1567] "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copy-

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[1560] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1871); Cammeyer v. Newton, 94 U.S. 225, 234 (1877); Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885); United States v. Palmer, 128 U.S. 262, 271 (1888); Belknap v. Schild, 161 U.S. 10, 16 (1896).

[1561] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).

[1562] Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553 (1852).

[1563] *See* Motion Picture Co. v. Universal Film Co., 243 U.S. 502 (1917); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952), where the Justices divided 6 to 3 as to the significance for the case of certain leading precedents; and Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

[1564] Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1565] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[1566] Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1567] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

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right supplies the economic incentive to create and disseminate ideas."[1568]

The Court has noted on several occasions that the copyright law contains two important First Amendment safeguards: (1) limiting copyright protection to an author's creative expression of ideas, but prohibiting protection of ideas in and of themselves; and (2) permitting fair use of a copyrighted work in certain circumstances, including for purposes of criticism, teaching, comment, news reporting, and parody. These traditional contours of copyright protection have foreclosed heightened First Amendmebnt scrutiny of copyright laws.[1569]

State Power Affecting Patents and Copyrights

Displacement of state police or taxing powers by federal patent or copyright has been a source of considerable dispute. Ordinarily, rights secured to inventors must be enjoyed in subordination to the general authority of the states over all property within their limits. A state statute requiring the condemnation of illuminating oils inflammable at less than 130 degrees Fahrenheit was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with state specifications.[1570] In the absence of federal legislation, a state may prescribe reasonable regulations for the transfer of patent rights, so as to protect its citizens from fraud. Hence, a requirement of state law that the words "given for a patent right" appear on the face of notes given in payment for such right is not unconstitutional.[1571] Royalties received from patents or copyrights are subject to nondiscriminatory state income taxes, a holding to the contrary being overruled.[1572]

State power to protect things not patented or copyrighted under federal law has been buffeted under changing Court doctrinal views. In two major cases, the Court held that a state could not use unfair competition laws to prevent or punish the copying of products not entitled to a patent. Emphasizing the necessity for a uniform national policy and adverting to the monopolistic effects of the state protection, the Court inferred that, because Congress had not extended the patent laws to the material at issue, federal policy

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[1568] Harper & Row Publishers, Inc., v. Nation Enterprises, 471 U.S. 539, 558 (1985).

[1569] Eldred v. Ashcroft, 537 U.S. 186 (2003); Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1570] Patterson v. Kentucky, 97 U.S. 501 (1879).

[1571] Allen v. Riley, 203 U.S. 347 (1906); John Woods & Sons v. Carl, 203 U.S. 358 (1906); Ozan Lumber Co. v. Union County Bank, 207 U.S. 251 (1907).

[1572] Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928).

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was to promote free access when the materials were thus in the public domain.[1573] But, in *Goldstein v. California*,[1574] the Court distinguished the two prior cases and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting others bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress "has left the area unattended."[1575] Similar analysis was used to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from use by a commercial rival, which had obtained the process from former employees of the company, all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[1576]

Returning to the *Sears* and *Compco* emphasis, the Court unanimously, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,[1577] reasserted that "efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions."[1578] At the same time, however, the Court attempted to harmonize *Goldstein*, *Kewanee*, and other

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[1573] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[1574] 412 U.S. 546 (1973). Informing the decisions were different judicial attitudes with respect to the preclusion of the states from acting in fields covered by the Copyright Clause, whether Congress had or had not acted. The latter case recognized permissible state interests, id. at 552–560, whereas the former intimated that congressional power was exclusive. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–31 (1964).

[1575] In the 1976 revision of the copyright law, Congress broadly preempted, with narrow exceptions, all state laws bearing on material subject to copyright. 17 U.S.C. § 301. The legislative history makes clear Congress's intention to overturn *Goldstein* and "to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law." H. Rep. No. 94–1476, 94th Congress, 2d Sess. (1976), 130. The statute preserves state tape piracy and similar laws as to sound recordings fixed before February 15, 1972, until February 15, 2067. (Pub. L. 105–298 (1998), § 102, extended this date from February 15, 2047.)

[1576] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *See also* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979).

[1577] 489 U.S. 141 (1989).

[1578] 489 U.S. at 156.

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decisions: there is room for state regulation of the use of unpatented designs if those regulations are "necessary to promote goals outside the contemplation of the federal patent scheme."[1579] What states are forbidden to do is to "offer *patent-like protection* to intellectual creations which would otherwise remain unprotected as a matter of federal law."[1580] A state law "aimed directly at preventing the exploitation of the [unpatented] design" is invalid as impinging on an area of pervasive federal regulation.[1581]

Trade-Marks and Advertisements

In the famous *Trade-Mark Cases*,[1582] decided in 1879, the Supreme Court held void acts of Congress that, in apparent reliance upon this clause, extended the protection of the law to trademarks registered in the Patent Office. "The ordinary trade mark," Justice Miller wrote for the Court, "has no necessary relation to invention or discovery"; nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain."[1583] Not many years later, the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyrighted,[1584] and still later the Court held a circus poster to be entitled to the same protection. In answer to the objection of the circuit court that a lithograph that "has no other use than that of a mere advertisement" would not be within the meaning of the Constitution, Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pictorial illustrations outside the narrowest and most obvious limits.[1585]

Clause 9. The Congress shall have Power * * * To constitute Tribunals inferior to the supreme Court; (see Article III).

IN GENERAL

See discussion "The Power of Congress to Control the Federal Courts" under Article III, § 2, cl. 2, infra.

[1579] 489 U.S. at 166. As examples of state regulation that might be permissible, the Court referred to unfair competition, trademark, trade dress, and trade secrets laws. Perhaps by way of distinguishing *Sears* and *Compco*, both of which invalidated use of unfair competition laws, the Court suggested that prevention of "consumer confusion" is a permissible state goal that can be served in some instances by application of such laws. Id. at 154.

[1580] 489 U.S. at 156 (emphasis added).

[1581] 489 U.S. at 158.

[1582] 100 U.S. 82 (1879).

[1583] 100 U.S. at 94.

[1584] Burrow-Giles Lithographic Co. v. Saroney, 111 U.S. 53 (1884).

[1585] Bleisten v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

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Clause 10. The Congress shall have Power * * * To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

PIRACIES, FELONIES, AND OFFENSES AGAINST THE LAW OF NATIONS

Origin of the Clause

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ." [1586] These words of the Chancellor Kent expressed the view of the binding character of international law that was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[1587] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[1588] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations." [1589] In the debate on the floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations.[1590]

Definition of Offenses

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must under-

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[1586] 1 J. Kent, Commentaries on American Law 1 (1826).

[1587] 19 Journals of the Continental Congress 315, 361 (1912); 20 id. at 762; 21 id. at 1136–37, 1158.

[1588] Article IX.

[1589] 2 M. Farrand, The Records of the Federal Convention of 1787 168, 182 (Rev. ed. 1937).

[1590] Id. at 316.

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take to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations punishing the" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1591] Similarly, in *Ex parte Quirin*,[1592] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . . ," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." [1593] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments.[1594]

Extraterritorial Reach of the Power

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932 [1595] that the general grant of admiralty and maritime jurisdiction by Article III, § 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the

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[1591] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160, 162 (1820). *See also The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40–41 (1826); United States v. Brig Malek Abhel, 43 U.S. (2 How.) 210, 232 (1844).

[1592] 317 U.S. 1 (1942).

[1593] 317 U.S. at 28.

[1594] United States v. Arjona, 120 U.S. 479, 487, 488 (1887).

[1595] United States v. Flores, 3 F. Supp. 134 (E.D. Pa. 1932).

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states, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters."[1596] Within the meaning of this section, an offense is committed on the high seas even when the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[1597]

Clauses 11, 12, 13, and 14. The Congress shall have power * * * ;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

THE WAR POWER

Source and Scope

Three Theories.—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in *The Federalist*,[1598] Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was

[1596] United States v. Flores, 289 U.S. 137, 149–50 (1933).
[1597] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 200 (1820).
[1598] The Federalist, No. 23 (J. Cooke ed. 1937), 146–51.

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advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[1599] Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In *McCulloch v. Maryland*,[1600] he listed the power "to declare and conduct a war"[1601] as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War, the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns."[1602] In another case, adopting the terminology used by Lincoln in his Message to Congress on July 4, 1861,[1603] the Court referred to "the war power" as a single unified power.[1604]

An Inherent Power.—Thereafter, we find the phrase, "the war power," being used by both Chief Justice White[1605] and Chief Justice Hughes,[1606] the former declaring the power to be "complete and undivided."[1607] Not until 1936, however, did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In *United States v. Curtiss-Wright Corp.*,[1608] the reasons for this conclusion were stated by Justice Sutherland as follows: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . It results that the investment of the Federal Government with the pow-

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[1599] Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795).

[1600] 17 U.S. (4 Wheat.) 316 (1819).

[1601] 17 U.S. at 407. (emphasis supplied).

[1602] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); *see also* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871); and United States v. MacIntosh, 283 U.S. 605, 622 (1931).

[1603] Cong. Globe, 37th Congress, 1st Sess., App. 1 (1861).

[1604] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 86 (1875).

[1605] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).

[1606] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[1607] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).

[1608] 299 U.S. 304 (1936).

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ers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality." [1609]

A Complexus of Granted Powers.—In *Lichter v. United States*,[1610] on the other hand, the Court speaks of the "war powers" of Congress. Upholding the Renegotiation Act, it declared that: "In view of this power 'To raise and support Armies, . . . and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers', . . . the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies." [1611] In a footnote, it listed the Preamble, the Necessary and Proper Clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander-in-Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war. . . ." [1612]

Declaration of War

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war." [1613] Although there were solitary suggestions that the power should better be vested in the President alone,[1614] in the Senate alone,[1615] or in the President and the Senate,[1616] the sentiment of the Convention, as best we can determine from the limited notes of

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[1609] 299 U.S. at 316, 318. On the controversy respecting *Curtiss-Wright*, *see* The Curtiss-Wright Case, *infra*.

[1610] 334 U.S. 742 (1948).

[1611] 334 U.S. at 757–58.

[1612] 334 U.S. at 755 n.3.

[1613] 2 M. Farrand, The Records of the Federal Convention of 1787 313 (rev. ed. 1937).

[1614] Mr. Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Id. at 318.

[1615] Mr. Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the states equally represented in the Senate, the interests of all would be safeguarded. Id.

[1616] Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate . . . ." 1 id. at 300.

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the proceedings, was that the potentially momentous consequences of initiating armed hostilities should be called up only by the concurrence of the President and both Houses of Congress.[1617] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual;[1618] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions.[1619]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to "declare war."[1620] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks[1621] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.[1622]

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hos-

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[1617] 2 id., 318–319. In THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465, Hamilton notes: "[T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature." (Emphasis in original). *See also* id. at No. 26, 164–171. *Cf.* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES ch. V (1921).

[1618] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 464–465, 470. During the Convention, Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (rev. ed. 1937).

[1619] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

[1620] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318–319 (rev. ed. 1937).

[1621] Jointly introducing the amendment to substitute "declare" for "make," Madison and Gerry noted the change would "leav[e] to the Executive the power to repel sudden attacks." Id. at 318.

[1622] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed. . . ." Id. at 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf.* Talbot v. Seeman, 5 U.S. ()1 Cr., 1, 28 (1801) (Chief Justice Marshall: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

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tilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.[1623] Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed.[1624] Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli "and also to cause to be done all such other acts of precaution or hostility as *the state of war will* justify . . . ."[1625] But no formal declaration of war was passed, Congress apparently accepting Hamilton's view.[1626]

Sixty years later, the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session.[1627] Congress had subsequently ratified Lincoln's action,[1628] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[1629] The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp

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[1623] Messages and Papers of the Presidents 326, 327 (J. Richardson ed., 1896).

[1624] 7 Works of Alexander Hamilton 746–747 (J. Hamilton ed., 1851).

[1625] 2 Stat. 129, 130 (1802) (emphasis supplied).

[1626] Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[1627] *Prize Cases*, 67 U.S. (2 Bl.) 635 (1863).

[1628] 12 Stat. 326 (1861).

[1629] *Prize Cases*, 67 U.S. (2 Bl.) 635, 669 (1863).

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an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[1630]

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second." [1631]

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnam War has been whether the President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.[1632] The Supreme Court studiously refused to consider the issue in any of the forms in which it was presented,[1633] and the lower courts generally refused, on "political question" grounds, to adjudicate the matter.[1634] In the absence of judicial elucidation, the Congress and the President have

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[1630] 67 U.S. at 682.

[1631] *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872).

[1632] The controversy, not susceptible of definitive resolution in any event, was stilled for the moment, when in 1973 Congress set a cut-off date for United States military activities in Indochina, Pub. L. 93–52, 108, 87 Stat. 134, and subsequently, over the President's veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force. Pub. L. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548.

[1633] In Atlee v. Richardson, 411 U.S. 911 (1973), aff'g 347 F. Supp. 689 (E.D. Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. *See also* Massachusetts v. Laird, 400 U.S. 886 (1970); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied certiorari in all cases on its discretionary docket.

[1634] *E.g.*, Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F.2d 862 (D.C., 1967), *cert. denied*, 389 U.S. 934 (1968); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), and Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), *consolidated and aff'd*, 443

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been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant.[1635]

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Purpose of Specific Grants

The clauses of the Constitution, which give Congress authority to raise and support armies, and so forth, were not inserted to endow the national government rather than the States with the power to do these things but to designate the department of the Federal Government, which would exercise the powers. As we have noted above, the English king was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1636] Aware historically that these powers had been used to the detriment of the liberties and well-being of Englishmen and aware that in the English Declaration of Rights of 1688 it was insisted that standing armies could not be maintained without the consent of Parliament, the Framers vested these basic powers in Congress.[1637]

Time Limit on Appropriations for the Army

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904, the question arose whether this provision would be violated if the government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations lim-

F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

During the 1980s, the courts were no more receptive to suits, many by Members of Congress, seeking to obtain a declaration of the President's powers. The political question doctrine as well as certain discretionary authorities were relied on. *See*, *e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984) (invasion of Grenada), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (reflagging and military escort operation in Persian Gulf), *aff'd.* No. 87–5426 (D.C. Cir. 1988); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (U.S. Saudia Arabia/Persian Gulf deployment).

[1635] For further discussion, *see* section on President's commander-in-chief powers.

[1636] W. Blackstone, Commentaries 263 (St. G. Tucker ed., 1803).

[1637] 3 J. Story, Commentaries on the Constitution of the United States 1187 (1833).

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ited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ."[1638] Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."[1639]

Conscription

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service.[1640] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[1641] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[1642] Not so the Selective Service Act of 1917.[1643] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[1644]

Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the fol-

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[1638] 25 Ops. Atty. Gen. 105, 108 (1904).

[1639] 40 Ops. Atty. Gen. 555 (1948).

[1640] *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918); Cox v. Wood, 247 U.S. 3 (1918).

[1641] 245 U.S. at 385.

[1642] 245 U.S. at 386–88. The measure was upheld by a state court. Kneedler v. Lane, 45 Pa. St. 238 (1863).

[1643] Act of May 18, 1917, 40 Stat. 76.

[1644] *Selective Draft Law Cases*, 245 U.S. 366, 381, 382 (1918).

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lowing words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." [1645] Accordingly, in the *Selective Draft Law Cases*,[1646] it dismissed the objection under that amendment as a contention that was "refuted by its mere statement." [1647]

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[1648] its opinions leave no doubt of the constitutional validity of the act. In *United States v. O'Brien*,[1649] upholding a statute prohibiting the destruction of selective service registration certificates, the Court, speaking through Chief Justice Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'" [1650] In noting Congress's "broad constitutional power" to raise and regulate armies and navies,[1651] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12–14.[1652]

Care of the Armed Forces

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the judiciary. The Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [mili-

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[1645] Butler v. Perry, 240 U.S. 328, 333 (1916) (upholding state law requiring able-bodied men to work on the roads).

[1646] 245 U.S. 366 (1918).

[1647] 245 U.S. at 390.

[1648] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription was precluded as of July 1, 1973, Pub. L. 92–129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued on March 29, 1975. Pres. Proc. No. 4360, 3 C.F.R. 462 (1971–1975 Compilation), 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. Pub. L. 96–282, 94 Stat. 552 (1980).

[1649] 391 U.S. 367 (1968).

[1650] 391 U.S. at 377, quoting Lichter v. United States, 334 U.S. 742, 756 (1948).

[1651] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[1652] Rostker v. Goldberg, 453 U.S. 57, 59 (1981). *See* id. at 64–65. *See also* Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft).

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tary society] shall be governed than it is when prescribing rules for [civilian society]."[1653] Denying that Congress or military authorities are free to disregard the Constitution when acting in this area,[1654] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" about military affairs,[1655] so that, while constitutional guarantees apply, "the different character of the military community and of the military mission requires a different application of those protections."[1656]

In reliance upon this deference to congressional judgment about the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide for registration of males only for possible future conscription.[1657] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[1658] On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[1659] And the statements of a military officer urging disobedience to certain or-

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[1653] Parker v. Levy, 417 U.S. 733, 743–52 (1974). *See also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Schlesinger v. Councilman, 420 U.S. 738, 746–48 (1975); Greer v. Spock, 424 U.S. 828, 837–38 (1976); Middendorf v. Henry, 425 U.S. 25, 45–46 (1976); Brown v. Glines, 444 U.S. 348, 353–58 (1980); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981).

[1654] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[1655] 453 U.S. at 66. "[P]erhaps in no other area has the Court accorded Congress greater deference." Id. at 64–65. *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[1656] Parker v. Levy, 417 U.S. 733, 758 (1974). "[T]he tests and limitations [of the Constitution] to be applied may differ because of the military context." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[1657] Rostker v. Goldberg, 453 U.S. 57 (1981). *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973), *with* Schlesinger v. Ballard, 419 U.S. 498 (1975).

[1658] Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).

[1659] Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects the right of members of the armed forces to communicate with a Member of Congress, but which the Court interpreted narrowly.

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ders could be punished under provisions that would have been of questionable validity in a civilian context.[1660] Reciting the considerations previously detailed, the Court has refused to allow enlisted men and officers to sue to challenge or set aside military decisions and actions.[1661]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall serve, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the government.[1662] Because the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[1663] Likewise, Congress may bar a state from taxing the tangible, personal property of a soldier, assigned for duty in the state, but domiciled elsewhere.[1664] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.[1665]

[1660] Parker v. Levy, 417 U.S. 733 (1974).

[1661] Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort action for damages). These considerations are also the basis of the Court's construction of the Federal Tort Claims Act as not reaching injuries arising incident to military service. Feres v. United States, 340 U.S. 135 (1950). In United States v. Johnson, 481 U.S. 681 (1987), four Justices urged reconsideration of *Feres*, but that has not occurred.

[1662] United States v. Williams, 302 U.S. 46 (1937). *See also In re* Grimley, 137 U.S. 147, 153 (1890); *In re* Morrissey, 137 U.S. 157 (1890).

[1663] Wissner v. Wissner, 338 U.S. 655 (1950); Ridgway v. Ridgway, 454 U.S. 46 (1981). In the absence of express congressional language, like that found in *Wissner*, the Court nonetheless held that a state court division under its community property system of an officer's military retirement benefits conflicted with the federal program and could not stand. McCarty v. McCarty, 453 U.S. 210 (1981). *See also* Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (exemption from creditors' claims of disability benefits deposited by a veteran's guardian in a savings and loan association).

[1664] Dameron v. Brodhead, 345 U.S. 322 (1953). *See also* California v. Buzard, 382 U.S. 386 (1966); Sullivan v. United States, 395 U.S. 169 (1969).

[1665] McKinley v. United States, 249 U.S. 397 (1919).

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Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1666] The drafters of these congressional enactments conceived of a military justice system with application to all servicemen wherever they are, to reservists while on inactive duty training, and to certain civilians in special relationships to the military. In recent years, all these conceptions have been restricted.

Servicemen.—Although there had been extensive disagreement about the practice of court-martial trial of servicemen for nonmilitary offenses,[1667] the matter never was raised in substantial degree until the Cold War period when the United States found it essential to maintain both at home and abroad a large standing army in which great numbers of servicemen were draftees. In *O'Callahan v. Parker*,[1668] the Court held that court-martial jurisdiction was lacking to try servicemen charged with a crime that was not "service connected." The Court did not define "service connection," but among the factors it found relevant were that the crime in question was committed against a civilian in peacetime in the United States off-base while the serviceman was lawfully off duty.[1669] *O'Callahan* was overruled in *Solorio v. United States*,[1670] the Court holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[1671] Chief Justice Rehnquist's opinion for the Court insisted that *O'Callahan* had been based on erroneous readings of English and

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[1666] The Uniform Code of Military Justice of 1950, 64 Stat. 107, as amended by the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. §§ 801 *et seq*. For prior acts, *see* 12 Stat. 736 (1863); 39 Stat. 650 (1916). *See* Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ).

[1667] *Compare* Solorio v. United States, 483 U.S. 435, 441–47 (1987) (majority opinion), *with* id. at 456–61 (dissenting opinion), and O'Callahan v. Parker, 395 U.S. 258, 268–72 (1969) (majority opinion), with id. at 276–80 (Justice Harlan dissenting). *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

[1668] 395 U.S. 258 (1969).

[1669] 395 U.S. at 273–74. *See also* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[1670] 483 U.S. 435 (1987).

[1671] 483 U.S. at 450–51.

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American history, and that "the service connection approach . . . has proved confusing and difficult for military courts to apply."[1672]

It is not clear what provisions of the Bill of Rights and other constitutional guarantees apply to court-martial trials. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision, and there is an implication that these cases are also excepted from the Sixth Amendment.[1673] The double jeopardy provision of the Fifth Amendment appears to apply.[1674] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military.[1675] The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so it is unlikely that many issues necessitating constitutional will arise.[1676] However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence,[1677] and the Court of Military Appeals is limited on the scope of its review,[1678] thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[1679] This difference has resulted in a military Code regulating aspects of the conduct of members of the military that in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court,

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[1672] 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio's military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule *O'Callahan* altogether.

[1673] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138–39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in Middendorf v. Henry, 425 U.S. 25 (1976).

[1674] *See* Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* Grafton v. United States, 206 U.S. 333 (1907).

[1675] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in Middendorf v. Henry, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding, *see* United States v. Booker, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

[1676] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[1677] *Cf.* O'Callahan v. Parker, 395 U.S. 258, 263–64 (1969).

[1678] 10 U.S.C. § 867.

[1679] Parker v. Levy, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman," and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

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while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[1680] Nor did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, as the speech was unprotected, and, even though it might reach protected speech, the officer here was unable to raise that issue.[1681]

Military courts are not Article III courts, but are agencies established pursuant to Article I.[1682] In the 19th century, the Court established that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[1683] Until August 1, 1984, the Supreme Court had no jurisdiction to review by writ of certiorari the proceedings of a military commission, but as of that date Congress conferred appellate jurisdiction of decisions of the Court of Military Appeals.[1684] Prior to that time, civil court review of court-martial decisions was possible through *habeas corpus* jurisdiction,[1685] an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged.[1686] In *Burns v. Wilson*,[1687] however, at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a fed-

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[1680] 417 U.S. at 756.

[1681] 417 U.S. at 757–61.

[1682] Kurtz v. Moffitt, 115 U.S. 487 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). Judges of Article I courts do not have the independence conferred by security of tenure and of compensation.

[1683] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[1684] Military Justice Act of 1983, Pub. L. 98–209, 97 Stat. 1393, 28 U.S.C. § 1259.

[1685] *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869); *Ex parte* Reed, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. Schlesinger v. Councilman, 420 U.S. 738 (1975).

[1686] *Ex parte* Reed, 100 U.S. 13 (1879); Swaim v. United States, 165 U.S. 553 (1897); Carter v. Roberts, 177 U.S. 496 (1900); Hiatt v. Brown, 339 U.S. 103 (1950).

[1687] 346 U.S. 137 (1953).

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eral court in such litigation[1688] and the lower federal courts have divided several possible ways.[1689]

Civilians and Dependents.—In recent years, the Court rejected the view of the drafters of the Code of Military Justice with regard to the persons Congress may constitutionally reach under its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all.[1690] After first leaning the other way,[1691] the Court on rehearing found court-martial jurisdiction lacking, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.[1692] Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes[1693] and to civilian employees of the military charged with either capital or noncapital crimes.[1694]

WAR LEGISLATION

War Powers in Peacetime

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that "[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . . It will be in vain to oppose constitu-

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[1688] *Cf.* Fowler v. Wilkinson, 353 U.S. 583 (1957); United States v. Augenblick, 393 U.S. 348, 350 n.3, 351 (1969); Parker v. Levy, 417 U.S. 733 (1974); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974).

[1689] *E.g.*, Calley v. Callaway, 519 F.2d 184 (5th Cir., 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

[1690] United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). *See also* Lee v. Madigan, 358 U.S. 228 (1959).

[1691] Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956).

[1692] Reid v. Covert, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). Chief Justice Warren and Justices Black, Douglas, and Brennan were of the opinion Congress's power under clause 14 could not reach civilians. Justices Frankfurter and Harlan concurred, limited to capital cases. Justices Clark and Burton dissented.

[1693] Kinsella v. United States, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime committed overseas by civilian wife of soldier). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[1694] Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

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tional barriers to the impulse of self-preservation."[1695] Authoritative judicial recognition of the power is found in *Ashwander v. TVA*,[1696] upholding the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916.[1697] The Court noted that the assurance of an abundant supply of electrical energy and of nitrates, which would be produced at the site, "constitute national defense assets," and the project was justifiable under the war powers.[1698]

Perhaps the most significant example of legislation adopted pursuant to the war powers when no actual "shooting war" was in progress was the Atomic Energy Act of 1946, establishing a body to oversee and further the research into and development of atomic energy for both military and civil purposes.[1699] Congress has also authorized a vast amount of highway construction, pursuant to its conception of their "primary importance to the national defense,"[1700] and the first extensive program of federal financial assistance in the field of education was the National Defense Education Act.[1701] These measures, of course, might also be upheld under the power to spend for the "common defense."[1702] The post-World War II years, though nominally peacetime, constituted the era of the Cold War and the occasions for several armed conflicts, notably in Korea and Indochina, in which the Congress enacted much legislation designed to strengthen national security, including an apparently permanent draft,[1703] authorization of extensive space exploration,[1704] authorization for wage and price controls,[1705] and continued extension of the Renegotiation Act to recapture excess profits on defense

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[1695] 3 J. Story, Commentaries on the Constitution of the United States 1180 (1833).

[1696] 297 U.S. 288 (1936).

[1697] 39 Stat. 166 (1916).

[1698] 297 U.S. at 327–28.

[1699] 60 Stat. 755 (1946), 42 U.S.C. §§ 1801 *et seq*.

[1700] 108(a), 70 Stat. 374, 378 (1956), 23 U.S.C. § 101(b), naming the Interstate System the "National System of Interstate and Defense Highways."

[1701] 72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.

[1702] Article I, § 8, cl.1.

[1703] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription has been precluded as of July 1, 1973, Pub. L. 92–129, 85 Stat. 353, 50 U.S.C. App. § 467(c), although registration for possible conscription is in effect. Pub. L. 96–282, 94 Stat. 552 (1980).

[1704] National Aeronautics and Space Act of 1958, 72 Stat. 426, as amended, codified in various sections of Titles 5, 18, and 50.

[1705] Title II of the Defense Production Act Amendments of 1970, 84 Stat. 799, as amended, provided temporary authority for wage and price controls, a power which the President subsequently exercised. E.O. 11615, 36 Fed Reg. 15727 (August 16, 1971). Subsequent legislation expanded the President's authority. 85 Stat. 743, 12 U.S.C. § 1904 note.

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contracts.[1706] Additionally, the period saw extensive regulation of matter affecting individual rights, such as loyalty-security programs,[1707] passport controls,[1708] and limitations on members of the Communist Party and associated organizations,[1709] all of which are dealt with in other sections.

Other legislation is designed to effect a transition from war to peace. The war power "is not limited to victories in the field. . . . It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[1710] This principle was given a much broader application after the First World War in *Hamilton v. Kentucky Distilleries, Co.*,[1711] where the War Time Prohibition Act[1712] adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. The Court was unable to conclude that the war emergency had passed with the cessation of hostilities.[1713] But in 1924, it held that a rent control law for the District of Columbia, which had been previously upheld,[1714] had ceased to operate because the emergency which justified it had come to an end.[1715]

A similar issue was presented after World War II, and the Court held that the authority of Congress to regulate rents by virtue of the war power did not end with the presidential proclamation terminating hostilities on December 31, 1946.[1716] However, the Court cautioned that "[w]e recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely

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[1706] Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. §§ 1211 *et seq*.

[1707] *E.g.*, Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Peters v. Hobby, 349 U.S. 331 (1955).

[1708] Zemel v. Rusk, 381 U.S. 1 (1965); United States v. Laub, 385 U.S. 475 (1967).

[1709] United States v. Robel, 389 U.S. 258 (1967); United States v. Brown, 381 U.S. 437 (1965).

[1710] Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871) (upholding a federal statute that tolled the limitations period for state causes of action for the period during which the Civil War prevented the bringing of an action). *See also* Mayfield v. Richards, 115 U.S. 137 (1885).

[1711] 251 U.S. 146 (1919). *See also* Ruppert v. Caffey, 251 U.S. 264 (1920).

[1712] Act of November 21, 1918, 40 Stat. 1046.

[1713] 251 U.S. at 163.

[1714] Block v. Hirsh, 256 U.S. 135 (1921).

[1715] Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

[1716] Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948). *See also* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

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obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision." [1717]

In the same year, the Court sustained by only a five-to-four vote the Government's contention that the power which Congress had conferred upon the President to deport enemy aliens in times of a declared war was not exhausted when the shooting stopped.[1718] "It is not for us to question," said Justice Frankfurter for the Court, "a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites [sic] do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come." [1719]

Delegation of Legislative Power in Wartime

During wartime, Congress has been prone to delegate more powers to the President than at other times.[1720] The Court, however, has insisted that, "[i]n peace or war it is essential that the Constitution be scrupulously obeyed, and particularly that as in times of peace the respective branches of the government keep within the power assigned to each by the Constitution. On the other hand, . . . [i]n time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending its national safety." [1721] Few cases, however, actually discuss when a wartime delegation of legislative power might be excessive.[1722] Two theories have been advanced at times when the delegation doctrine carried more force than it has in recent years. First, has been suggested that, because the war power is inherent in the Federal Government, and one shared by the legislative and executive branches, Congress does not really delegate legislative power when it authorizes the President to exercise the war power in a prescribed manner. But this view overlooks the fact that the Constitution expressly vests the war power as a legislative power in

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[1717] 333 U.S. at 143–44.

[1718] Ludecke v. Watkins, 335 U.S. 160 (1948).

[1719] 335 U.S. at 170.

[1720] For an extensive consideration of this subject in the context of the President's redelegation of it, *see* N. Grundstein, Presidential Delegation of Authority in Wartime (1961).

[1721] Lichter v. United States, 334 U.S. 742, 779–80 (1948).

[1722] In the *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918), a "contention that an act [was] void as a delegation of federal power to state officials" was dismissed as "too wanting in merit to require further notice." Likewise, "the contention that . . . vesting administrative officers with legislative discretion [is unconstitutional] has been so completely adversely settled as to require reference only to some of the decided cases." Id. (citing three cases). A wartime delegation was upheld by reference to peacetime precedents in Yakus v. United States, 321 U.S. 414, 424 (1944).

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Congress. Second, it has been suggested that Congress's power to delegate in wartime is as limited as in other situations, but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton v. Dillin*,[1723] upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised "does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government. . . ."[1724]

Both theories found expression in different passages of Chief Justice Stone's opinion in *Hirabayashi v. United States*,[1725] upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, "acting in cooperation," to impose the curfew,[1726] while, on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carrying-out of the policy, is permissible delegation.[1727]

A similar ambiguity is found in *Lichter v. United States*,[1728] upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. "The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. . . . Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind."[1729] The Court then examined the exigencies of war and concluded that the delegation was valid.[1730]

[1723] 88 U.S. (21 Wall.) 73 (1875).
[1724] 88 U.S. at 96–97. *Cf.* United States v. Chemical Foundation, 272 U.S. 1 (1926).
[1725] 320 U.S. 81 (1943).
[1726] 320 U.S. at 91–92, 104.
[1727] 320 U.S. at 104.
[1728] 334 U.S. 742 (1948).
[1729] 334 U.S. at 778–79, 782.
[1730] 334 U.S. at 778–83.

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CONSTITUTIONAL RIGHTS IN WARTIME

Constitution and the Advance of the Flag

Theater of Military Operations.—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in *Ex parte Milligan*,[1731] in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The point of disagreement was over which department of the government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning, and in which there were no hostilities, does not qualify.[1732] The minority argued that the question was for Congress's determination.[1733] The entire Court rejected the Government's contention that the President's determination was conclusive in the absence of restraining legislation.[1734]

Similarly, in *Duncan v. Kahanamoku*,[1735] the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare martial law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor's order.

Enemy Country.—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by the Congress and the President.[1736] "What is the law which governs an army invading an enemy's country?" the Court asked in *Dow v. Johnson*.[1737] "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the

[1731] 71 U.S. (4 Wall.) 2 (1866).
[1732] 71 U.S. at 127.
[1733] 71 U.S. at 132, 138.
[1734] 71 U.S. at 121, 139–42.
[1735] 327 U.S. 304 (1946).
[1736] New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874); Santiago v. Nogueras, 214 U.S. 260 (1909); Madsen v. Kinsella, 343 U.S. 341 (1952).
[1737] 100 U.S. 158, 170 (1880).

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protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

These conclusions follow not only from the usual necessities of war but also from the Court's doctrine that the Constitution is not automatically applicable in all territories acquired by the United States. The question turns upon whether Congress has made the area "incorporated" or "unincorporated" territory.[1738] In *Reid v. Covert*,[1739] however, Justice Black asserted in a plurality opinion that wherever the United States acts it must do so only "in accordance with all the limitations imposed by the Constitution. . . . [C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home."[1740] The case, however, involved the trial of a United States citizen abroad and the language quoted was not subscribed to by a majority of the Court; thus, it must be regarded as a questionable rejection of the previous line of cases.[1741]

Enemy Property.—In *Brown v. United States*,[1742] Chief Justice Marshall dealt definitively with the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but the right of Congress by further action to subject such property to confiscation was asserted in the most positive terms. As an exercise of the war power, such confiscation was held not subject to the restrictions of the Fifth and Sixth Amendments. Since such confiscation is unrelated to the personal guilt of the owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within his reach, whether within his territory or outside it, impairs his ability to resist the confiscating government and at

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[1738] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).

[1739] 354 U.S. 1 (1957).

[1740] 354 U.S. at 6, 7.

[1741] For a comprehensive treatment, preceding Reid v. Covert, of the matter in the context of the post-War war crimes trials, *see* Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

[1742] 12 U.S. (8 Cr.) 110 (1814). *See also* Conrad v. Waples, 96 U.S. 279 (1878).

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the same furnishes to that government means for carrying on the war.[1743]

Prizes of War.—The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1744] Nevertheless, since international law is a part of our law, the Court will administer it so long as it has not been modified by treaty or by legislative or executive action. Thus, during the Civil War, the Court found that the Confiscation Act of 1861, and the Supplementary Act of 1863, which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[1745] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of international law exempting unarmed fishing vessels from capture was applicable in the absence of any treaty provision, or other public act of the government in relation to the subject.[1746]

The Constitution at Home in Wartime

Personal Liberty.—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." [1747]

[1743] Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); Steehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); United States v. Chemical Foundation, 272 U.S. 1 (1926); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Cities Service Co. v. McGrath, 342 U.S. 330 (1952); Handelsbureau La Mola v. Kennedy, 370 U.S. 940 (1962); *cf.* Honda v. Clark, 386 U.S. 484 (1967).

[1744] *The Siren*, 80 U.S. (13 Wall.) 389 (1871).

[1745] *The Hampton*, 72 U.S. (5 Wall.) 372, 376 (1867).

[1746] *The Paquete Habana*, 175 U.S. 677, 700, 711 (1900).

[1747] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

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Ex parte Milligan, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis. The Court held that, except in areas in which armed hostilities have made enforcement of civil law impossible, constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet, the words were uttered after the cessation of hostilities, and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance.[1748] This pattern recurs with each critical period.

That the power of Congress to punish seditious utterances in wartime is limited by the First Amendment was assumed by the Court in a series of cases,[1749] in which it nonetheless affirmed conviction for violations of the Espionage Act of 1917.[1750] The Court also upheld a state law making it an offense for persons to advocate that citizens of the state should refuse to assist in prosecuting war against enemies of the United States.[1751] Justice Holmes matter-of-factly stated the essence of the pattern that we have mentioned: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." [1752]

By far, the most dramatic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western states, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that, in order to prevent espionage and sabotage, the authorities could restrict the movement of these persons by a curfew order [1753] and even exclude them from defined areas by regulation,[1754] but that a citizen of Japanese

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[1748] "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which were happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment." 71 U.S. (4 Wall.) at 109 (emphasis by Court).

[1749] Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Sugarman v. United States, 249 U.S. 182 (1919) ; Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[1750] 40 Stat. 217 (1917), as amended by 40 Stat. 553 (1918).

[1751] Gilbert v. Minnesota, 254 U.S. 325 (1920).

[1752] Schenck v. United States, 249 U.S. 47, 52 (1919).

[1753] Hirabayashi v. United States, 320 U.S. 81 (1943).

[1754] Korematsu v. United States, 323 U.S. 214 (1944). The five-Justice majority opinion in *Korematsu*was careful to state that it was ruling on exclusion only, and

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ancestry whose loyalty was conceded could not continue to be detained in a relocation camp.[1755]

A mixed pattern emerges from an examination of the Cold War period. Legislation designed to regulate and punish the organizational activities of the Communist Party and its adherents was at first upheld,[1756] and then in a series of cases was practically vitiated.[1757] Against a contention that Congress's war powers had been used to achieve the result, the Court struck down for the second time in history a congressional statute as an infringement of the First Amendment.[1758] It voided a law making it illegal for any member of a "communist-action organization" to work in a defense facility.[1759] The majority reasoned that the law overbroadly required a person to choose between his First Amendment-protected right of association and his right to hold a job, without attempting to distinguish between those persons who constituted a threat and those who did not.[1760]

On the other hand, in *New York Times Co. v. United States*,[1761] a majority of the Court agreed that in appropriate circumstances the First Amendment would not preclude a prior restraint of publication of information that might result in a sufficient degree of harm to the national interest, although a different majority concurred in denying the government's request for an injunction in that case.[1762]

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not on compelled reporting to and remaining in an assembly center or relocation camp, which were the highly likely consequences of obeying the exclusion order under the regulation. 323 U.S. at 222–23.

[1755] *Ex parte* Endo, 323 U.S. 283 (1944). The *Endo* Court expressly avoided a direct constitutional ruling, holding instead that continued detention could not be supported by the statute and executive orders that underlay the detention program. 323 U.S. at 297–300.

[1756] *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); American Communications Association v. Douds, 339 U.S. 382 (1950).

[1757] *E.g.*, Yates v. United States, 354 U.S. 298 (1957); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); United States v. Brown, 381 U.S. 437 (1965).

[1758] United States v. Robel, 389 U.S. 258 (1967); *cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964). *See also* Schneider v. Smith, 390 U.S. 17 (1968).

[1759] Section 5(a)(1)(D) of the Subversive Control Act of 1950, 64 Stat 992, 50 U.S.C. § 784(a)(1)(D).

[1760] 389 U.S. at 264–66. Justices Harlan and White dissented, contending that the right of association should have been balanced against the public interest and finding the weight of the latter the greater. Id. at 282.

[1761] 403 U.S. 713 (1971).

[1762] The result in the case was reached by a six-to-three majority. The three dissenters, Chief Justice Burger, 403 U.S. at 748, Justice Harlan, id. at 752, and Justice Blackmun, id. at 759, would have granted an injunction in the case; Justices Stewart and White, id. at 727, 730, would not in that case but could conceive of cases in which they would.

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Enemy Aliens.—The Alien Enemy Act of 1798 authorized the President to deport any alien or to license him to reside within the United States at any place to be designated by the President.[1763] Though critical of the measure, many persons conceded its constitutionality on the theory that Congress's power to declare war carried with it the power to treat the citizens of a foreign power against which war has been declared as enemies entitled to summary justice.[1764] A similar statute was enacted during World War I[1765] and was held valid in *Ludecke v. Watkins*.[1766]

During World War II, in *Ex parte Quirin*, the Court unanimously upheld the power of the President to order to trial before a military tribunal German saboteurs captured within the United States.[1767] Chief Justice Stone found that enemy combatants, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals. Because this use of military tribunals was sanctioned by Congress, the Court has found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress's in cases of 'controlling necessity.'"[1768]

Eminent Domain.—An oft-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.[1769] In *United States v. Russell*, decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States v. Pacific Railroad*,[1770] also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens taken for the use of the national forces. "In such cases," the Court said, "it has been the practice of the government to make compensation for the property taken. . . . although the seizure and appropriation of private prop-

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[1763] 1 Stat. 577 (1798).

[1764] 6 Writings of James Madison 360–361 (G. Hunt ed., 1904).

[1765] 40 Stat. 531 (1918), 50 U.S.C. § 21.

[1766] 335 U.S. 160 (1948).

[1767] 317 U.S. 1 (1942).

[1768] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006). But see, id. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.").

[1769] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852).

[1770] 120 U.S. 227 (1887).

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erty under such circumstances by the military authorities may not be within the terms of the constitutional clauses." [1771]

Meanwhile, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in the latter class of cases.[1772] In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings.[1773] But as to property seized and destroyed to prevent its use by the enemy, it has relied on the principle enunciated in *United States v. Pacific Railroad* as justification for the conclusion that owners thereof are not entitled to compensation.[1774]

Rent and Price Controls.—Even at a time when the Court was using substantive due process to void economic regulations, it generally sustained such regulations in wartime. Thus, shortly following the end of World War I, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not only limited permissible rent increases but also permitted existing tenants to continue in occupancy provided they paid rent and observed other stipulated conditions.[1775] Justice Holmes for the majority conceded in effect that in the absence of a war emergency the legislation might transcend constitutional limitations,[1776] but noted that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." [1777]

During World War II and thereafter, economic controls were uniformly sustained.[1778] An apartment house owner who complained

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[1771] 120 U.S. at 239.

[1772] H.R. Rep. No. 262, 43d Cong., 1st Sess. (1874), 39–40.

[1773] United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. Toronto Navigation Co., 338 U.S. 396 (1949); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Cors, 337 U.S. 325 (1949); United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[1774] United States v. Caltex, Inc., 344 U.S. 149, 154 (1952). Justices Douglas and Black dissented.

[1775] Block v. Hirsh, 256 U.S. 135 (1921).

[1776] But *quaere* in the light of Nebbia v. New York, 291 U.S. 502 (1934), Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941), and their progeny.

[1777] Block v. Hirsh, 256 U.S. 135, 156 (1921).

[1778] Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); Lichter v. United States, 334 U.S. 742 (1948).

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that he was not allowed a "fair return" on the property was dismissed with the observation that "a nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a 'fair return' on his property."[1779] The Court also held that rental ceilings could be established without a prior hearing when the exigencies of national security precluded the delay which would ensue.[1780]

But, in another World War I case, the Court struck down a statute that penalized the making of "any unjust or unreasonable rate or charge in handling . . . any necessaries"[1781] as repugnant to the Fifth and Sixth Amendments in that it was so vague and indefinite that it denied due process and failed to give adequate notice of what acts would violate it.[1782]

Clause 15. The Congress shall have Power * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Clause 16. The Congress shall have Power * * * To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

THE MILITIA CLAUSES

Calling Out the Militia

The states as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1783] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is

[1779] Bowles v. Willingham, 321 U.S. 503, 519 (1944).

[1780] 321 U.S. at 521. The Court stressed, however, that Congress had provided for judicial review after the regulations and orders were made effective.

[1781] Act of October 22, 1919, 2, 41 Stat. 297.

[1782] United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[1783] Moore v. Houston, 3 S. & R. (Pa.) 169 (1817), *aff'd*, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

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found in the power to suppress insurrection and to carry on war.[1784] The act of February 28, 1795,[1785] which delegated to the President the power to call out the militia, was held constitutional.[1786] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[1787]

Regulation of the Militia

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress. . . . The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government. . . ."[1788] Under the National Defense Act of 1916,[1789] the militia, which had been an almost purely state institution, was brought under the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the Na-

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[1784] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).

[1785] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[1786] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32 (1827).

[1787] Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[1788] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820). Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, Gilligan v. Morgan, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. Scheuer v. Rhodes, 416 U.S. 233 (1974).

[1789] 39 Stat. 166, 197, 198, 200, 202, 211 (1916), codified in sections of Titles 10 & 32. *See* Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

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tional Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."[1790]

The militia clauses do not constrain Congress in raising and supporting a national army. The Court has approved the system of "dual enlistment," under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restrictions in the first militia clause have no application to the federalized National Guard; there is no constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place.[1791]

Clause 17. Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

SEAT OF THE GOVERNMENT

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any state, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither municipal nor state authorities would take action to protect the members.[1792] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be in-

[1790] Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Federal Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).

[1791] Perpich v. Department of Defense, 496 U.S. 434 (1990).

[1792] J. Fiske, The Critical Period of American History, 1783–1789 112–113 (1888); W. Tindall, The Origin and Government of the District of Columbia 31–36 (1903).

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sulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy."[1793]

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.[1794] Maryland and Virginia both authorized the cession of territory[1795] and Congress accepted.[1796] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two states should continue in effect.[1797] It also established a circuit court and provided for the appointment of judicial and law enforcement officials.[1798]

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.[1799] Madison in *The Federalist* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . ."[1800] Although there was some dispute about the consti-

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[1793] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 288–289. *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1213, 1214 (1833).

[1794] W. TINDALL, THE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 5–30 (1903).

[1795] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[1796] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 50; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some 40 years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).

[1797] Act of February 27, 1801, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see* Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

[1798] Act of March 3, 1801, 2 Stat. 115.

[1799] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1215, 1216 (1833).

[1800] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 289.

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tutional propriety of permitting local residents a measure of "home rule," to use the recent term,[1801] almost from the first there were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874[1802] and replaced with a presidentially appointed Commission in 1878.[1803] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council.[1804] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election.[1805] District residents vote for President and Vice President[1806] and elect a nonvoting delegate to Congress.[1807] An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification.[1808]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government[1809] nor precluded from delegating its powers over the District to an elective local government.[1810] The Court has indicated that the "exclusive" jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.[1811]

[1801] Such a contention was cited and rebutted in 3 J. Story, Commentaries on the Constitution of the United States 1218 (1833).

[1802] Act of May 3, 1802, 2 Stat. 195; Act of May 15, 1820, 3 Stat. 583; Act of February 21, 1871, 16 Stat. 419; Act of June 20, 1874, 18 Stat. 116. The engrossing story of the postwar changes in the government is related in W. Whyte, The Uncivil War: Washington During the Reconstruction (1958).

[1803] Act of June 11, 1878, 20 Stat. 103.

[1804] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[1805] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93–198, 87 Stat. 774.

[1806] Twenty-third Amendment.

[1807] Pub. L. 91–405, 84 Stat. 848, D.C. Code, § 1–291.

[1808] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 states had ratified before the expiration of the proposal after seven years.

[1809] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922).

[1810] District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). The case upheld the validity of ordinances enacted by the District governing bodies in 1872 and 1873 prohibiting racial discrimination in places of public accommodations.

[1811] 346 U.S. at 109–10. *See also* Thompson v. Lessee of Carroll, 63 U.S. (22 How.) 422 (1860); Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

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Chief Justice Marshall for the Court held in *Hepburn v. Ellzey* [1812] that the District of Columbia was not a state within the meaning of the diversity jurisdiction clause of Article III. This view, adhered to for nearly a century and a half,[1813] was overturned in 1949, the Court upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and the citizens of a state.[1814] The decision was by a five to four division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without regard to Article III.[1815] Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it.[1816] But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury [1817] and of presentment by a grand jury.[1818] Legislation restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a state in the exercise of its police power.[1819]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[1820] This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers un-

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[1812] 6 U.S. (2 Cr.) 445 (1805); *see also* Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a state within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).

[1813] Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).

[1814] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

[1815] 337 U.S. at 588–600 (Justices Jackson, Black and Burton).

[1816] 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, id. at 626, joined by Justice Douglas, and by Justice Frankfurter, id. at 646, joined by Justice Reed.

[1817] Callan v. Wilson, 127 U.S. 540 (1888); Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

[1818] United States v. Moreland, 258 U.S. 433 (1922).

[1819] Wright v. Davidson, 181 U.S. 371, 384 (1901); *cf.* Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[1820] Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 619 (1838); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); O'Donoghue v. United States, 289 U.S. 516, 518 (1933).

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der clause 17 and need not create courts that comply with Article III court requirements.[1821] And when legislating for the District Congress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[1822]

AUTHORITY OVER PLACES PURCHASED

"Places"

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1823] It includes post offices,[1824] a hospital and a hotel located in a national park,[1825] and locks and dams for the improvement of navigation.[1826] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[1827] Nevertheless, the Supreme Court has held that a state may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a state, for purposes other than those enumerated in clause 17.[1828]

After exclusive jurisdiction over lands within a state has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[1829] Private property located thereon is not subject to taxation by the state,[1830] nor can state statutes enacted subsequent to the transfer have any op-

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[1821] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91–358, 111, 84 Stat. 475, D.C. Code, § 11–101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The Article I courts were sustained in Palmore v. United States, 411 U.S. 389 (1973). *See also* Swain v. Pressley, 430 U.S. 372 (1977). The latter, federal courts, while Article III courts, traditionally have had some non-Article III functions imposed on them, under the "hybrid" theory announced in O'Donoghue v. United States, 289 U.S. 516 (1933). *E.g.*, Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968) (power then vested in District Court to appoint school board members). *See also* Keller v. Potomac Elec. Co., 261 U.S. 428 (1923); Embry v. Palmer, 107 U.S. 3 (1883).

[1822] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[1823] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1824] Battle v. United States, 209 U.S. 36 (1908).

[1825] Arlington Hotel v. Fant, 278 U.S. 439 (1929).

[1826] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1827] Collins v. Yosemite Park Co., 304 U.S. 518, 530 (1938).

[1828] 304 U.S. at 528.

[1829] Battle v. United States, 209 U.S. 36 (1908); Johnson v. Yellow Cab Co., 321 U.S. 383 (1944); Bowen v. Johnston, 306 U.S. 19 (1939).

[1830] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

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eration therein.[1831] But the local laws in force at the date of cession that are protective of private rights continue in force until abrogated by Congress.[1832] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject to such jurisdiction may be annexed by a municipality.[1833]

Duration of Federal Jurisdiction

A state may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1834] Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.[1835] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the state had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put.[1836] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[1837]

The question arose whether the United States retains jurisdiction over a place that was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for sale to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in

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[1831] Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909); Arlington Hotel v. Fant, 278 U.S. 439 (1929); Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). The Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated entails no invalid delegation of legislative power to the state. United States v. Sharpnack, 355 U.S. 286, 294, 296–97 (1958).

[1832] Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542, 545 (1885); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

[1833] Howard v. Commissioners, 344 U.S. 624 (1953). As *Howard* recognized, such areas of federal property do not cease to be part of the state in which they are located and the residents of the areas are for most purposes residents of the state. Thus, a state may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).

[1834] Palmer v. Barrett, 162 U.S. 399 (1896).

[1835] United States v. Unzeuta, 281 U.S. 138 (1930).

[1836] Benson v. United States, 146 U.S. 325, 331 (1892).

[1837] Palmer v. Barrett, 162 U.S. 399 (1896).

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such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[1838] In separate concurring opinions, Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.[1839]

Reservation of Jurisdiction by States

For more than a century the Supreme Court kept alive, by repeated dicta,[1840] the doubt expressed by Justice Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[1841] But when the issue was squarely presented in 1937, the Court ruled that, when the United States purchases property within a state with the consent of the latter, it is valid for the state to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the state reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[1842] The holding logically renders the second half of clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[1843]

Clause 18. The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

[1838] S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946).

[1839] 327 U.S. at 570, 571.

[1840] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532 (1885); United States v. Unzeuta, 281 U.S. 138, 142 (1930); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

[1841] United States v. Cornell, 25 Fed. Cas. 646, 649 (No. 14,867) (C.C.D.R.I. 1819).

[1842] James v. Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[1843] Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937). *See also* Atkinson v. Tax Comm'n, 303 U.S. 20 (1938).

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NECESSARY AND PROPER CLAUSE

Scope and Operation

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland* [1844] set the standard in words that reverberate to this day. "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." [1845] Moreover, the provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments.[1846]

Practically every power of the National Government has been expanded in some degree by the Necessary and Proper Clause. Under the authority granted it by that clause, Congress has adopted measures requisite to discharge the treaty obligations of the nation,[1847] has organized the federal judicial system, and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a state to the extent necessary to protect and promote interstate commerce.[1848] The right of Congress to use all known and appropriate means for collecting revenue, including the distraint of property for federal taxes,[1849] and to exercise the power of eminent domain to acquire property for pub-

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[1844] 17 U.S. (4 Wheat.) 316 (1819).

[1845] 17 U.S. at 420. This decision had been clearly foreshadowed fourteen years earlier by Marshall's opinion in United States v. Fisher, 6 U.S. (2 Cr.) 358, 396 (1805). Upholding an act which gave priority to claims of the United States against the estate of a bankrupt he wrote: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittance, by bills or otherwise, and to take those precautions which will render the transaction safe."

[1846] See "Delegation of Legislative Power," supra.

[1847] Neely v. Henkel, 180 U.S. 109, 121 (1901). *See also* Missouri v. Holland, 252 U.S. 416 (1920).

[1848] See discussion of "Necessary and Proper Clause" under the commerce power, supra.

[1849] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281 (1856). Congress may also legislate to protect its spending power. Sabri v. United States, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

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lic use,[1850] have greatly extended the range of national power. But the widest application of the Necessary and Proper Clause has occurred in the field of monetary and fiscal controls. Because the various specific powers granted by Article I, § 8, do not add up to a general legislative power over such matters, the Court has relied heavily upon this clause to sustain the comprehensive control that Congress has asserted over this subject.[1851]

Definition of Punishment and Crimes

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.[1852] Illustrative of the offenses which have been punished under this power are the alteration of registered bonds,[1853] the bringing of counterfeit bonds into the country,[1854] conspiracy to injure prisoners in custody of a United States marshal,[1855] impersonation of a federal officer with intent to defraud,[1856] conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States,[1857] the receipt by government officials of contributions from government employees for political purposes,[1858] and advocating the overthrow of the government by force.[1859] Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States.[1860]

[1850] Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Fox, 95 U.S. 670 (1878).

[1851] See "Fiscal and Monetary Powers of Congress," supra.

[1852] United States v. Fox, 95 U.S. 670, 672 (1878); United States v. Hall, 98 U.S. 343, 357 (1879); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (1798); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That this power has been freely exercised is attested by the pages of the United States Code devoted to Title 18, entitled "Criminal Code and Criminal Procedure." In addition, numerous regulatory measures in other titles prescribe criminal penalties.

[1853] *Ex parte* Carll, 106 U.S. 521 (1883).

[1854] United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850).

[1855] Logan v. United States, 144 U.S. 263 (1892).

[1856] United States v. Barnow, 239 U.S. 74 (1915).

[1857] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 112 U.S. 76 (1884); *In re* Quarles and Butler, 158 U.S. 532, 537 (1895); Motes v. United States, 178 U.S. 458 (1900); United States v. Mosley, 238 U.S. 383 (1915). *See also* Rakes v. United States, 212 U.S. 55 (1909).

[1858] *Ex parte* Curtis, 106 U.S. 371 (1882).

[1859] 18 U.S.C. § 2385.

[1860] *See* National Commission on Reform of Federal Criminal Laws, Final Report (Washington: 1970); National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), 2 vols.

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One of the most expansive interpretations of the Necessary and Proper Clause arose in the context of the administration of the federal penal system. In *United States v. Comstock*,[1861] the Court evaluated a federal statute which allowed for the civil commitment of a federal prisoner past the term of his imprisonment if that prisoner would have serious difficulty in refraining from sexually violent conduct or child molestation.[1862] The statute contained no requirement that the threatened future conduct would fall under federal jurisdiction, raising the question of what constitutional basis could be cited for its enforcement. The majority opinion in *Comstock* upheld the statute after considering five factors: (1) the historic breadth of the Necessary and Proper Clause; (2) the history of federal involvement in this area; (3) the reason for the statute's enactment; (4) the statute's accommodation of state interests; and (5) whether the scope of statute was too attenuated from Article I powers.[1863]

In evaluating these factors, the Court noted that previous federal involvement in the area included not only the civil commitment of defendants who were incompetent to stand trial or who became insane during the course of their imprisonment, but, starting in 1949, the continued confinement of those adjudged incompetent or insane past the end of their prison term. In upholding the sex offender statute, the Court found that protection of the public and the probability that such prisoners would not be committed by the state represented a "rational basis" for the passage of such legislation.[1864] The Court further found that state interests were protected by the legislation, as the statute provided for transfer of the committed individuals to state authorities willing to accept them.

[1861] 560 U.S. ___, No. 08–1224, slip op. (May 17, 2010). Breyer wrote the opinion of the Court, joined by Justices Roberts, Stevens, Ginsburg and Sotomayor. Justices Kennedy and Alito concurred in the judgement, while Justices Thomas and Scalia dissented.

[1862] In *United States v. Kebodeaux*, 570 U.S. ___, No. 12–418, slip op. (2013), the Court concluded that a sex offender, convicted by the Air Force in a special court-martial, had, upon his release, been subject to state sex offender registration laws, violation of which was prohibited under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, 108 Stat. 2038–2042 (1994). Kebodeaux was later convicted of failing to register under the "very similar" provisions of the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109–248, Title I, 120 Stat. 587, 590, (2006) (codified at 42 U.S.C. §§ 16901 *et seq.*), which had superseded the Jacob Wetterling Act. The Court held Congress was well within its authority under the Necessary and Proper Clause to have modified the Jacob Wetterling Act's registration requirements, and Kebodeaux was properly subject to SORNA requirements, even if they were enacted after his release.

[1863] 560 U.S. ___, No. 08–1224, slip op. at 22.

[1864] Justice Kennedy, in concurrence, expressed concern that whether a statute is "rationally related" to the implementation of a power, *see* Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955) (Due Process Clause), is too deferential a standard to be used as regards the Necessary and Proper Clause. Justice Kennedy would use a more rigorous "rational basis" standard, found in Commerce Clause cases, where

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Finally, the Court found that the statute was not too attenuated from the Article I powers underlying the criminal laws which had been the basis for incarceration, as it related to the responsible administration of the United States prison system.

Chartering of Banks

As an appropriate means for executing "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies . . . ," Congress may incorporate banks and kindred institutions.[1865] Moreover, it may confer upon them private powers, which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such corporations.[1866] Where necessary to meet the competition of state banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business.[1867] The Court will not undertake to assess the relative importance of the public and private functions of a financial institution Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositories of public funds, was merely a pretext for chartering those banks for private purposes.[1868]

Currency Regulations

Reinforced by the necessary and proper clause, the powers "'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States and to coin money and regulate the value thereon . . . ,'"[1869] have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of state banks,[1870] the issuance of treasury notes impressed with the quality of legal tender in payment of pri-

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there must be shown a "demonstrated link in fact, based on empirical demonstration." *See Comstock*, 560 U.S. ___, No. 08–1224, slip op. at 3 (Kennedy, J., concurring).

[1865] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[1866] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 862 (1824). *See also* Pittman v. Home Owners' Corp., 308 U.S. 21 (1939).

[1867] First National Bank v. Follows ex rel. Union Trust Co., 244 U.S. 416 (1917); Missouri ex rel. Burnes Nat'l Bank v. Duncan, 265 U.S. 17 (1924).

[1868] Smith v. Kansas City Title Co., 255 U.S. 180 (1921).

[1869] Juilliard v. Greenman, 110 U.S. 421, 449 (1884).

[1870] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

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vate debts[1871] and the abrogation of clauses in private contracts, which called for payment in gold coin,[1872] were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

Power to Charter Corporations

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation,[1873] or a corporation to construct an interstate bridge,[1874] as instrumentalities for promoting commerce among the states, and to create corporations to manufacture aircraft[1875] or merchant vessels[1876] as incidental to the war power.

Courts and Judicial Proceedings

Because the Constitution "delineated only the great outlines of the judicial power . . . , leaving the details to Congress, . . . [t]he distribution and appropriate exercise of the judicial power must . . . be made by laws passed by Congress. . . ."[1877] As a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, § 2, Congress may direct the removal from a state to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,[1878] may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[1879] and may authorize the removal before trial of civil cases arising under the laws of the United States.[1880] It may prescribe the effect to be given to judicial proceedings of the federal courts[1881] and may make all laws necessary for carrying into execution the judgments of federal courts.[1882] When a territory is admitted as a state, Congress may designate the court to which the records of the territorial courts shall be transferred and may prescribe the mode for enforcement and review of judgments rendered by those courts.[1883] In the exer-

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[1871] Juilliard v. Greenman, 110 U.S. 421 (1884). *See also* Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

[1872] Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 303 (1935).

[1873] *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); California v. Pacific R.R., 127 U.S. 1, 39 (1888).

[1874] Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

[1875] Clallam County v. United States, 263 U.S. 341 (1923).

[1876] Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549 (1922).

[1877] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[1878] Tennessee v. Davis, 100 U.S. 257, 263 (1880).

[1879] Jinks v. Richland County, 538 U.S. 456 (2003).

[1880] Railway Company v. Whitton, 80 U.S. (13 Wall.) 270, 287 (1872).

[1881] Embry v. Palmer, 107 U.S. 3 (1883).

[1882] Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53 (1825).

[1883] Express Co. v. Kountze Bros., 75 U.S. (8 Wall.) 342, 350 (1869).

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cise of other powers conferred by the Constitution, apart from Article III, Congress may create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution."[1884]

Special Acts Concerning Claims

The Necessary and Proper Clause enables Congress to pass special laws to require other departments of the government to prosecute or adjudicate particular claims, whether asserted by the government itself or by private persons. In 1924,[1885] Congress adopted a Joint Resolution directing the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the government by fraud and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appointment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshore and Harbor Workers' Compensation Act,[1886] or conferring jurisdiction upon the Court of Claims, after it had denied recovery, to hear and determine certain claims of a contractor against the government, have been held constitutional.[1887]

Maritime Law

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law that existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.[1888] This power cannot be delegated to the states; hence, acts of Congress that purported to make state workers' compensation laws applicable to maritime cases were held unconstitutional.[1889]

SECTION 9. Clause 1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may

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[1884] *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929). *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–69 (1982).

[1885] 43 Stat. 5 (1924). *See* Sinclair v. United States, 279 U.S. 263 (1929).

[1886] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[1887] Pope v. United States, 323 U.S. 1 (1944).

[1888] Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934).

[1889] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

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be imposed on such Importation, not exceeding ten dollars for each Person.

IN GENERAL

This sanction for the importation of slaves by the states for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Art. IV, § 1, cl. 3, was held by Chief Justice Taney in *Scott v. Sandford*,[1890] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as an historical curiosity.

Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

IN GENERAL

This clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written[1891] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.[1892]

Only the Federal Government and not the states, it has been held obliquely, is limited by the clause.[1893] The issue that has always excited critical attention is the authority in which the clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ.[1894] The clause itself does

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[1890] 60 U.S. (19 How.) 393, 411 (1857).

[1891] R. Walker, The American Reception of the Writ of Liberty (1961).

[1892] See discussion under Article III, Habeas Corpus: Scope of Writ.

[1893] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

[1894] In form, of course, clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 M. Farrand, The Records of the Federal Convention of 1787 213 (Luther Martin ed., 1937); *Ex parte* Merryman, 17 Fed. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861); *but cf.* 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 464 (Edmund Randolph, 2d ed. 1836). At the Convention, Gouverneur Morris proposed the language of the present clause: the first section of the clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three states. 2 M. Farrand, op. cit., 438. It would hardly have been meaningful for those states opposing

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not specify, and although most of the clauses of § 9 are directed at Congress not all of them are.[1895] At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,[1896] but the author of this proposal did not retain this language when the matter was taken up,[1897] the present language then being adopted.[1898] Nevertheless, Congress's power to suspend was assumed in early commentary[1899] and stated in dictum by the Court.[1900] President Lincoln suspended the privilege on his own motion in the early Civil War period,[1901] but this met with such opposition[1902] that he sought and received congressional authorization.[1903] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[1904]

When suspension operates, what is suspended? In *Ex parte Milligan*,[1905] the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA's restrictions on successive petitions from state pris-

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any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

[1895] *Cf.* Clauses 7, 8.

[1896] 2 M. Farrand, The Records of the Federal Convention of 1787 341 (rev. ed. 1937).

[1897] Id. at 438.

[1898] Id.

[1899] 3 J. Story, Commentaries on the Constitution of the United States 1336 (1833).

[1900] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 101 (1807).

[1901] *Cf.* J. Randall, Constitutional Problems Under Lincoln 118–139 (rev. ed. 1951).

[1902] Including a finding by Chief Justice Taney on circuit that the President's action was invalid. *Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[1903] Act of March 3, 1863, 1, 12 Stat. 755. *See* Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. Wis. History Bull. 213 (1907).

[1904] The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. *Cf.* Fisher v. Baker, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). *Cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946). For the problem of *de facto* suspension through manipulation of the jurisdiction of the federal courts, *see infra* discussion under Article III, The Theory of Plenary Congressional Control.

[1905] 71 U.S. (4 Wall.) 2, 130–131 (1866).

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oners are "well within the compass" of an evolving body of principles restraining "abuse of the writ," and hence do not amount to a suspension of the writ within the meaning of the Clause.[1906] Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.[1907] "[At] the absolute minimum," the Court wrote, "the Suspension Clause protects the writ as it existed in 1789. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[1908]

Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

BILLS OF ATTAINDER

"Bills of attainder . . . are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. . . . In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions."[1909] The phrase "bill of attainder," as used in this clause and in clause 1 of § 10, applies to bills of pains and penalties as well as to the traditional bills of attainder.[1910]

The prohibition embodied in this clause is not to be narrowly construed in the context of traditional forms but is to be inter-

[1906] Felker v. Turpin, 518 U.S. 651 (1996).
[1907] INS v. St. Cyr, 533 U.S. 289 (2001).
[1908] 533 U.S. at 301 (internal quotation marks and citation omitted).
[1909] 3 J. Story, Commentaries on the Constitution of the United States 1338 (1833).
[1910] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *cf.* United States v. Brown, 381 U.S. 437, 441–442 (1965).

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preted in accordance with the designs of the framers so as to preclude trial by legislature, which would violate the separation of powers.[1911] The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." [1912] That the Court has applied the clause dynamically is revealed by a consideration of the three cases in which acts of Congress have been struck down as violating it.[1913] In *Ex parte Garland*,[1914] the Court struck down a statute that required attorneys to take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The statute, and a state constitutional amendment requiring a similar oath of persons before they could practice certain professions,[1915] were struck down as legislative acts inflicting punishment on a specific group the members of which had taken part in the rebellion and therefore could not truthfully take the oath. The clause then lay unused until 1946 when the Court used it to strike down a rider to an appropriations bill forbidding the use of money appropriated in the bill to pay the salaries of three named persons whom the House of Representatives wished discharged because they were deemed to be "subversive." [1916]

Then, in *United States v. Brown*,[1917] a sharply divided Court held void as a bill of attainder a statute making it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. Congress could, Chief Justice Warren wrote for the majority, under its commerce power, protect the economy from harm by enacting a prohibition generally applicable to any person who commits certain acts or possesses certain characteristics making him likely in Congress's view to initiate political strikes or other harmful deeds and leaving it to the courts to determine whether a particular person committed the specified acts or possessed the specified characteristics. It was impermissible, however, for Congress to designate a class of persons—members of the Communist Party—as

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[1911] United States v. Brown, 381 U.S. 437, 442–46 (1965). Four dissenting Justices, however, denied that any separation of powers concept underlay the clause. Id. at 472–73.

[1912] United States v. Lovett, 328 U.S. 303, 315 (1946).

[1913] For a rejection of the Court's approach and a plea to adhere to the traditional concept, *see* id. at 318 (Justice Frankfurter concurring).

[1914] 71 U.S. (4 Wall.) 333 (1867).

[1915] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

[1916] United States v. Lovett, 328 U.S. 303 (1946).

[1917] 381 U.S. 437 (1965).

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being forbidden to hold union office.[1918] The dissenters viewed the statute as merely expressing in shorthand the characteristics of those persons who were likely to utilize union responsibilities to accomplish harmful acts; Congress could validly conclude that all members of the Communist Party possessed those characteristics.[1919]

The majority's decision in *Brown* cast in doubt certain statutes and certain statutory formulations that had been held not to constitute bills of attainder. For example, a predecessor of the statute struck down in *Brown*, which had conditioned a union's access to the NLRB upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party, had been upheld,[1920] and although Chief Justice Warren distinguished the previous case from *Brown* on the basis that the Court in the previous decision had found the statute to be preventive rather than punitive,[1921] he then proceeded to reject the contention that the punishment necessary for a bill of attainder had to be punitive or retributive rather than preventive,[1922] thus undermining the prior decision. Of much greater significance was the effect of the *Brown* decision on "conflict-of-interest" legislation typified by that upheld in *Board of Governors v. Agnew*.[1923] The statute there forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank.[1924] Chief Justice Warren distinguished the prior decision and the statute on three grounds from the statute then under consideration. First, the union statute inflicted its deprivation upon the members of a suspect political group in typical bill-of-attainder fashion, unlike the statute in *Agnew*. Second, in the *Agnew* statute, Congress did not express a judgment upon certain men or members of a particular group; it rather concluded that any man placed in the two positions would suffer a temptation any man might yield to. Third, Congress established in the *Agnew* statute an objective standard of conduct expressed in shorthand which precluded persons from holding the two positions.

[1918] The Court of Appeals had voided the statute as an infringement of First Amendment expression and association rights, but the Court majority did not rely upon this ground. 334 F.2d 488 (9th Cir. 1964). However, in United States v. Robel, 389 U.S. 258 (1967), a very similar statute making it unlawful for any member of a "Communist-action organization" to be employed in a defense facility was struck down on First Amendment grounds and the bill of attainder argument was ignored.

[1919] United States v. Brown, 381 U.S. 437, 462 (1965) (Justices White, Clark, Harlan, and Stewart dissenting).

[1920] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[1921] *Douds*, 339 U.S. at 413, 414, cited in United States v. Brown, 381 U.S. 437, 457–458 (1965).

[1922] *Brown*, 381 U.S. at 458–61.

[1923] 329 U.S. 441 (1947).

[1924] 12 U.S.C. § 78.

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Apparently withdrawing from the *Brown* analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,[1925] the Court set out a rather different formula for deciding bill of attainder cases.[1926] The law specifically applied only to President Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law's specificity in referring to the former President by name and applying only to him did not condemn the act because he "constituted a legitimate class of one" on whom Congress could "fairly and rationally" focus.[1927] Second, even if the statute's specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon's materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish.[1928] That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect," concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

[1925] The Presidential Recordings and Materials Preservation Act, Pub. L. 93–526, 88 Stat. 1695 (1974), note following 44 U.S.C. § 2107. For an application of this statute, *see* Nixon v. Warner Communications, 435 U.S. 589 (1978).

[1926] Nixon v. Administrator of General Services, 433 U.S. 425, 468–84 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id. at 484, and Justice White, author of the dissent in *Brown*, merely noted he found the act nonpunitive. Id. at 487. Chief Justice Burger and Justice Rehnquist dissented. Id. at 504, 536–45. Adding to the impression of a departure from *Brown* is the quotation in the opinion of the Court at several points of the *Brown* dissent, id. at 470 n.31, 471 n.34, while the dissent quoted and relied on the opinion of the Court in *Brown*. Id. at 538, 542.

[1927] 433 U.S. at 472. Justice Stevens carried the thought further, although in the process he severely limited the precedential value of the decision. Id. at 484.

[1928] 433 U.S. at 473–84.

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The clause protects individual persons and groups who are vulnerable to nonjudicial determinations of guilt and does not apply to a state; nor does a state have standing to invoke the clause for its citizens against the Federal Government.[1929]

EX POST FACTO LAWS

Definition

Both federal and state governments are prohibited from enacting *ex post facto* laws,[1930] and the Court applies the same analysis whether the law in question is a federal or a state enactment. When these prohibitions were adopted as part of the original Constitution, many persons understood the term *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature."[1931] But in the early case of *Calder v. Bull*,[1932] the Supreme Court decided that the phrase, as used in the Constitution, was a term of art that applied only to penal and criminal statutes. But, although it is inapplicable to retroactive legislation of any other kind,[1933] the constitutional prohibition may not be evaded by giving a civil form to a measure that is essentially criminal.[1934] Every law that makes criminal an act that was innocent when done, or that inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.[1935] A prosecution under a temporary statute that was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto.[1936] Because this provision does not apply to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.[1937]

[1929] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[1930] The prohibition on state *ex post facto* legislation appears in Art. I, § 10, cl. 1.

[1931] 3 J. Story, Commentaries on the Constitution of the United States 1339 (1833).

[1932] 3 U.S. (3 Dall.) 386, 393 (1798).

[1933] Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923).

[1934] Burgess v. Salmon, 97 U.S. 381 (1878).

[1935] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867); Burgess v. Salmon, 97 U.S. 381, 384 (1878).

[1936] United States v. Powers, 307 U.S. 214 (1939).

[1937] Neely v. Henkel, 180 U.S. 109, 123 (1901). *Cf. In re* Yamashita, 327 U.S. 1, 26 (1946) (dissenting opinion of Justice Murphy); Hirota v. MacArthur, 338 U.S. 197, 199 (1948) (concurring opinion of Justice Douglas).

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What Constitutes Punishment

The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis.[1938] "A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."[1939] A statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual.[1940]

A variety of federal laws have been challenged as *ex post facto*. A statute that prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional because it operated as a punishment for past acts.[1941] But a statute that denied to polygamists the right to vote in a territorial election was upheld even as applied to one who had not contracted a polygamous marriage and had not cohabited with more than one woman since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter.[1942] A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto* because deportation is not a punishment.[1943] For this reason, a statute terminating payment of old-age benefits to an alien deported for Communist affiliation also is not *ex post facto*, for the denial of a non-contractual benefit to a deported alien is not a penalty but a regulation designed to relieve the Social Security System of administrative problems of supervision and enforcement likely to arise from disbursements to beneficiaries residing abroad.[1944] Likewise, an act permitting the cancel-

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[1938] Kansas v. Hendricks, 521 U.S. 346 (1997); Seling v. Young, 531 U.S. 250 (2001).

[1939] Seling v. Young, 531 U.S. 250, 261 (2001) (interpreting Art. I, § 10).

[1940] Seling v. Young, 531 U.S. at 263 (2001).

[1941] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

[1942] Murphy v. Ramsey, 114 U.S. 15 (1885).

[1943] Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Marcello v. Bonds, 349 U.S. 302 (1955). Justices Black and Douglas, reiterating in Lehman v. United States ex rel. Carson, 353 U.S. 685, 690–91 (1957), their dissent from the premise that the *ex post facto* clause is directed solely to penal legislation, disapproved a holding that an immigration law, enacted in 1952, 8 U.S.C. § 1251, which authorized deportation of an alien who, in 1945, had acquired a status of nondeportability under pre-existing law is valid. In their opinion, to banish, in 1957, an alien who had lived in the United States for almost 40 years, for an offense committed in 1936, and for which he already had served a term in prison, was to retrospectively subject him to a new punishment.

[1944] Flemming v. Nestor, 363 U.S. 603 (1960).

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lation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment, but instead simply to deprive the alien of his ill-gotten privileges.[1945]

Change in Place or Mode of Trial

A change of the place of trial of an alleged offense after its commission is not an *ex post facto* law. If no place of trial was provided when the offense was committed, Congress may designate the place of trial thereafter.[1946] A law that alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid,[1947] but a statute that simply enlarges the class of persons who may be competent to testify in criminal cases is not *ex post facto* as applied to a prosecution for a crime committed prior to its passage.[1948]

Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

DIRECT TAXES

The Hylton Case

The crucial problem under clause 4 is to distinguish "direct" from other taxes. In its opinion in *Pollock v. Farmers' Loan & Trust Co.*, the Court declared: "It is apparent . . . that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it."[1949] Against this confident dictum may be set the following brief excerpt from Madison's *Notes on the Convention*: "Mr. King asked what was the precise meaning of *direct* taxation? No one answered."[1950] The first case to come before the Court on this issue was *Hylton v. United States*,[1951] which was decided early in 1796. Congress has levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which were to be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the per-

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[1945] Johannessen v. United States, 225 U.S. 227 (1912).
[1946] Cook v. United States, 138 U.S. 157, 183 (1891).
[1947] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).
[1948] Hopt v. Utah, 110 U.S. 574, 589 (1884).
[1949] 157 U.S. 429, 573 (1895).
[1950] J. Madison, The Debates in the Federal Convention of 1787 435 (G. Hunt & J. Scott eds., Greenwood Press ed. 1970).
[1951] 3 U.S. (3 Dall.) 171 (1796).

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sonal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an "excise tax,"[1952] whereas Madison, both on the floor of Congress and in correspondence, attacked it as "direct" and therefore void, because it was levied without apportionment.[1953] The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought to be classified as "direct" that could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their "use" and therefore an "excise." Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that, at most, it might cover a general tax on the aggregate or mass of things that generally pervade all the states, especially if an assessment should intervene, while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern states that their Negroes and land should be subjected to a specific tax.[1954]

From the Hylton to the Pollock Case

The result of the *Hylton* case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes, but without result. The Court sustained successively, as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments,[1955] a tax on the circulating notes of state banks,[1956] an inheritance tax on real estate,[1957] and finally a general tax on incomes.[1958] In the last case, the Court took pains to state that it regarded the term "direct taxes" as having acquired a definite and fixed meaning, to wit, capitation taxes, and taxes on land.[1959] Then, almost one hundred years after the *Hylton* case, the famous case of *Pollock v. Farmers' Loan & Trust Co.*[1960] arose under the Income

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[1952] THE WORKS OF ALEXANDER HAMILTON 845 (J. Hamilton ed., 1851). "If the meaning of the word excise is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an excise, and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax."

[1953] 4 ANNALS OF CONGRESS 730 (1794); 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14 (1865).

[1954] 3 U.S. (3 Dall.) 171, 177 (1796).

[1955] Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1869).

[1956] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[1957] Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1875).

[1958] Springer v. United States, 102 U.S. 586 (1881).

[1959] 102 U.S. at 602.

[1960] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

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Tax Act of 1894.[1961] Undertaking to correct "a century of error," the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning of the Constitution and hence void because not apportioned according to the census.

Restriction of the Pollock Decision

The *Pollock* decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes that had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges,"[1962] it sustained as "excises" a tax on sales on business exchanges,[1963] a succession tax which was construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[1964] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[1965] Again, in *Thomas v. United States*,[1966] the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of "duties, imposts and excises." These terms, according to the Chief Justice, "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[1967] On the same day, in *Spreckels Sugar Refining Co. v. McClain*,[1968] it ruled that an exaction, denominated a special excise tax, that was imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of *Flint v. Stone Tracy Co.*[1969] was the same. In *Flint*, what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in *Stanton v. Baltic Mining Co.*,[1970] a tax on the annual production of mines was held to be "independently of the effect of the operation of the Sixteenth Amendment . . . not a tax upon property as such be-

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[1961] 28 Stat. 509, 553 (1894).
[1962] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Knowlton v. Moore, 178 U.S. 41, 80 (1900).
[1963] Nicol v. Ames, 173 U.S. 509 (1899).
[1964] Knowlton v. Moore, 178 U.S. 41 (1900).
[1965] Patton v. Brady, 184 U.S. 608 (1902).
[1966] 192 U.S. 363 (1904).
[1967] 192 U.S. at 370.
[1968] 192 U.S. 397 (1904).
[1969] 220 U.S. 107 (1911).
[1970] 240 U.S. 103 (1916).

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cause of its ownership, but a true excise levied on the results of the business of carrying on mining operations."[1971]

A convincing demonstration of the extent to which the *Pollock* decision had been whittled down by the time the Sixteenth Amendment was adopted is found in *Billings v. United States*.[1972] In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the *Hylton* case as construed by the Supreme Court—counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921, the Court cast aside the distinction drawn in *Knowlton v. Moore* between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. "Upon this point," wrote Justice Holmes for a unanimous Court, "a page of history is worth a volume of logic."[1973] Having established this proposition, the Court had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,[1974] or as tenants by the entirety,[1975] or the entire value of community property owned by husband and wife,[1976] or the proceeds of insurance upon the life of the decedent,[1977] did not amount to direct taxation of such property. Similarly, it upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another."[1978] Justice Sutherland, speaking for himself and two associates, urged that "the right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it."[1979]

Miscellaneous

The power of Congress to levy direct taxes is not confined to the states represented in that body. Such a tax may be levied in

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[1971] 240 U.S. at 114.
[1972] 232 U.S. 261 (1914).
[1973] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
[1974] Phillips v. Dime Trust & S.D. Co., 284 U.S. 160 (1931).
[1975] Tyler v. United States, 281 U.S. 497 (1930).
[1976] Fernandez v. Wiener, 326 U.S. 340 (1945).
[1977] Chase Nat'l Bank v. United States, 278 U.S. 327 (1929); United States v. Manufacturers Nat'l Bank, 363 U.S. 194, 198–201 (1960).
[1978] Bromley v. McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering v. Bullard, 303 U.S. 297 (1938).
[1979] Bromley v. McCaughn, 280 U.S. 124, 140 (1929).

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proportion to population in the District of Columbia.[1980] A penalty imposed for nonpayment of a direct tax is not a part of the tax itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent, which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars that was levied and apportioned among the states during the Civil War.[1981]

Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

TAXES ON EXPORTS

The prohibition on excise taxes applies only to the imposition of duties on goods by reason of exportation.[1982] The word "export" signifies goods exported to a foreign country, not to an unincorporated territory of the United States.[1983] A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation.[1984]

Continuing its refusal to modify its export clause jurisprudence,[1985] the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the export clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation's ports. The clause, said the Court, "categorically bars Congress from imposing any tax on exports."[1986] However, the clause does not interdict a "user fee," which is a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits; and it was that defense to which the government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from labels, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of ex-

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[1980] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

[1981] De Treville v. Smalls, 98 U.S. 517, 527 (1879).

[1982] Turpin v. Burgess, 117 U.S. 504, 507 (1886). *Cf.* Almy v. California, 65 U.S. (24 How.) 169, 174 (1861).

[1983] Dooley v. United States, 183 U.S. 151, 154 (1901).

[1984] Cornell v. Coyne, 192 U.S. 418, 428 (1904); Turpin v. Burgess, 117 U.S. 504, 507 (1886).

[1985] *See* United States v. IBM, 517 U.S. 843, 850–61 (1996).

[1986] United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998).

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port cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and tonnage of a vessel and the length of time it spent in port.[1987] The HMT was thus a tax, and therefore invalid.

Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity.[1988] The giving of a bond for exportation of distilled liquor was not the commencement of exportation so as to exempt from an excise tax spirits that were not exported pursuant to such bond.[1989] A tax on the income of a corporation derived from its export trade was not a tax on "articles exported" within the meaning of the Constitution.[1990]

In *United States v. IBM Corp.*,[1991] the Court rejected the government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the government contended that the Court should bring this clause in line with the Import-Export Clause[1992] and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the export clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

Stamp Taxes

A stamp tax imposed on foreign bills of lading,[1993] charter parties,[1994] or marine insurance policies,[1995] was in effect a tax or duty upon exports, and so void; but an act requiring the stamping of all

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[1987] 523 U.S. at 367–69.

[1988] Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

[1989] Thompson v. United States, 142 U.S. 471 (1892).

[1990] Peck & Co. v. Lowe, 247 U.S. 165 (1918); National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[1991] 517 U.S. 843 (1996).

[1992] Article I, § 10, cl. 2, applying to the states.

[1993] Fairbank v. United States, 181 U.S. 283 (1901).

[1994] United States v. Hvoslef, 237 U.S. 1 (1915).

[1995] Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915). In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to *Thames & Mersey*, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the government had chosen not to present that argument. Principles of *stare decisis* thus cautioned observance of the earlier case. Id. at 854–55. The dissenters argued that the issue had

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packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports.[1996]

Clause 6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

THE "NO PREFERENCE" CLAUSE

The no-preference clause was designed to prevent preferences between ports because of their location in different states. Discriminations between individual ports are not prohibited. Acting under the Commerce Clause, Congress may do many things that benefit particular ports and that incidentally result to the disadvantage of other ports in the same or neighboring states. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1997] A rate order of the Interstate Commerce Commission that allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[1998] Although there were a few early intimations that this clause was applicable to the states as well as to Congress,[1999] the Supreme Court declared emphatically in 1886 that state legislation was unaffected by it.[2000] After more than a century, the Court confirmed, over the objection that this clause was offended, the power that the First Congress had exercised[2001] in sanctioning the continued supervision and regulation of pilots by the states.[2002]

been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).

[1996] Pace v. Burgess, 92 U.S. 372 (1876); Turpin v. Burgess, 117 U.S. 504, 505 (1886).

[1997] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In Williams v. United States, 255 U.S. 336 (1921), the argument that an act of Congress which prohibited interstate transportation of liquor into states whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected.

[1998] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 132 (1931).

[1999] Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 282, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851).

[2000] Morgan v. Louisiana, 118 U.S. 455, 467 (1886). *See also* Munn v. Illinois, 94 U.S. 113, 135 (1877); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388, 400 (1886).

[2001] 1 Stat. 53, 54, § 4 (1789).

[2002] Thompson v. Darden, 198 U.S. 310 (1905).

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Clause 7. No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

APPROPRIATIONS

The restriction on drawing money from the Treasury "was intended as a restriction upon the disbursing authority of the Executive department," and "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[2003] Congress may recognize and pay a claim of an equitable, moral, or honorary nature. When it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[2004] In making appropriations to pay claims arising out of the Civil War, Congress could, the Court held, provide that certain persons, *i.e.*, those who had participated in the rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.[2005]

The Court has also recognized that Congress has wide discretion with regard to the extent to which it may prescribe details of expenditures for which it appropriates funds, and has approved the frequent practice of making "lump sum" appropriations, *i.e.*, general appropriations of large amounts to be allotted and expended as directed by designated government agencies. As an example, the Court cited the act of June 17, 1902,[2006] "where all moneys received from the sale and disposal of public lands in a large number of states and territories [were] set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories," and "[t]he expenditures [were] to be made under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable." The Court declared: "The constitutionality of this delegation of authority has never been seriously questioned."[2007]

[2003] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Knote v. United States, 95 U.S. 149, 154 (1877).

[2004] United States v. Price, 116 U.S. 43 (1885); United States v. Realty Co., 163 U.S. 427, 439 (1896); Allen v. Smith, 173 U.S. 389, 393 (1899).

[2005] Hart v. United States, 118 U.S. 62, 67 (1886).

[2006] 32 Stat. 388 (1902).

[2007] Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937).

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PAYMENT OF CLAIMS

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.[2008] Nor may a government employee, by erroneous advice to a claimant, bind the United States through equitable estoppel principles to pay a claim for which an appropriation has not been made.[2009]

After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,[2010] but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.[2011] It was within the competence of Congress to declare that the amount due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.[2012]

Clause 8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

IN GENERAL

In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power . . . but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which

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[2008] Reeside v. Walker, 52 U.S. (11 How.) 272 (1851).
[2009] OPM v. Richmond, 496 U.S. 414 (1990).
[2010] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
[2011] Knote v. United States, 95 U.S. 149, 154 (1877); Austin v. United States, 155 U.S. 417, 427 (1894).
[2012] Hart v. United States, 118 U.S. 62, 67 (1886).

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in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[2013]

SECTION 10. Clause 1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Treaties, Alliances, or Confederations

At the time of the Civil War, the Court relied on the prohibition on treaties, alliances, or confederations in holding that the Confederation formed by the seceding states could not be recognized as having any legal existence.[2014] Today, the prohibition's practical significance lies in the limitations that it implies upon the power of the states to deal with matters having a bearing upon international relations.

In the early case of *Holmes v. Jennison*,[2015] Chief Justice Taney invoked it as a reason for holding that a state had no power to deliver up a fugitive from justice to a foreign state. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, because the oil under the three-mile marginal belt along the California coast might well become the subject of international dispute, and because the ocean, including this three-mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[2016] In *Skiriotes v. Florida*,[2017] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared, "When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign

[2013] 13 Ops. Atty. Gen. 538 (1871).
[2014] Williams v. Bruffy, 96 U.S. 176, 183 (1878).
[2015] 39 U.S. (14 Pet.) 540 (1840).
[2016] United States v. California, 332 U.S. 19 (1947).
[2017] 313 U.S. 69 (1941).

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authority of the United States over its citizens in like circumstances."[2018]

Bills of Credit

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest-bearing certificates, in denominations not exceeding ten dollars, that were issued by loan offices established by the state of Missouri and made receivable in payment of taxes or other moneys due to the state, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[2019] The states are not forbidden, however, to issue coupons receivable for taxes,[2020] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[2021] Bills issued by state banks are not bills of credit;[2022] it is immaterial that the state is the sole stockholder of the bank,[2023] that the officers of the bank were elected by the state legislature,[2024] or that the capital of the bank was raised by the sale of state bonds.[2025]

Legal Tender[2026]

Relying on this clause, which applies only to the states and not to the Federal Government, the Supreme Court has held that, where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[2027] Because, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be made by draft, a state law

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[2018] 313 U.S. at 78–79.

[2019] Craig v. Missouri, 29 U.S. (4 Pet.) 410, 425 (1830); Byrne v. Missouri, 33 U.S. (8 Pet.) 40 (1834).

[2020] Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).

[2021] Houston & Texas Central R.R. v. Texas, 177 U.S. 66 (1900).

[2022] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[2023] Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15 (1851); Curran v. Arkansas, 56 U.S. (15 How.) 304, 317 (1854).

[2024] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[2025] Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851).

[2026] Juilliard v. Greenman, 110 U.S. 421, 446 (1884).

[2027] Gwin v. Breedlove, 43 U.S. (2 How.) 29, 38 (1844). *See also* Griffin v. Thompson, 43 U.S. (2 How.) 244 (1844).

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providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts, was held valid.[2028]

Bills of Attainder

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath that they had never given such aid, were held invalid as being bills of attainder, as well as *ex post facto* laws.[2029]

Other attempts to raise bill-of-attainder claims have been unsuccessful. A Court majority denied that a municipal ordinance that required all employees to execute oaths that they had never been affiliated with Communist or similar organizations, violated the clause, on the grounds that the ordinance merely provided standards of qualifications and eligibility for employment.[2030] A law that prohibited any person convicted of a felony and not subsequently pardoned from holding office in a waterfront union was not a bill of attainder because the "distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt" and the prohibition "embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction."[2031]

Ex Post Facto Laws

Scope of the Provision.—The prohibition against state *ex post facto* laws, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws that affect private rights adversely.[2032] Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[2033] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's en-

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[2028] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).

[2029] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1872); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1873).

[2030] Garner v. Board of Pub. Works, 341 U.S. 716, 722–723 (1951). *Cf.* Konigsberg v. State Bar of California, 366 U.S. 36, 47 n.9 (1961).

[2031] De Veau v. Braisted, 363 U.S. 144, 160 (1960). Presumably, United States v. Brown, 381 U.S. 437 (1965), does not qualify this decision.

[2032] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834); Baltimore and Susquehanna R.R. v. Nesbit, 51 U.S. (10 How.) 395, 401 (1850); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1855); Loche v. New Orleans, 71 U.S. (4 Wall.) 172 (1867); Orr v. Gilman, 183 U.S. 278, 285 (1902); Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911). In Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998) (concurring), Justice Thomas indicated a willingness to reconsider *Calder* to determine whether the clause should apply to civil legislation.

[2033] 538 U.S. 84 (2003).

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actment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there is "the clearest proof" of punitive effect.[2034] Here, the Court determined, the legislative intent was civil and non-punitive—to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment."[2035] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[2036] Nor is the act "excessive" in relation to its regulatory purpose.[2037] Rather, the "means chosen are reasonable in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[2038]

There are three categories of *ex post facto* laws: those "which punish[ ] as a crime an act previously committed, which was innocent when done; which make[ ] more burdensome the punishment for a crime, after its commission; or which deprive[ ] one charged with crime of any defense available according to law at the time when the act was committed."[2039] The bar is directed only against

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[2034] 538 U.S. at 92.

[2035] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

[2036] 538 U.S. at 102.

[2037] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[2038] 538 U.S. at 105. Unlike involuntary civil commitment, where "the magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[2039] Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169–70 (1925)). Alternatively, the Court described the reach of the clause as extending to laws that "alter the definition of crimes or increase the punishment

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legislative action and does not touch erroneous or inconsistent decisions by the courts.[2040]

The fact that a law is *ex post facto* and invalid as to crimes committed prior to its enactment does not affect its validity as to subsequent offenses.[2041] A statute that mitigates the rigor of the law in force at the time the crime was committed,[2042] or merely penalizes the continuance of conduct lawfully begun before its passage, is not *ex post facto*. Thus, measures penalizing the failure of a railroad to cut drains through existing embankments[2043] or making illegal the continued possession of intoxicating liquors which were lawfully acquired[2044] have been held valid.

Denial of Future Privileges to Past Offenders.—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony,[2045] or excluding convicted felons from waterfront union offices unless pardoned or in receipt of a parole board's good conduct certificate,[2046] may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, under which office holders, attorneys, teachers, clergymen, and others were required to swear that they had not participated in the rebellion or expressed sympathy for it, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional

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for criminal acts." Id. at 43. Justice Chase's oft-cited formulation has a fourth category: "every law that aggravates a crime, or makes it greater than it was, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), *cited in*, *e.g.*, Carmell v. Texas, 529 U.S. 513, 522 (2000).

[2040] Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913). However, an unforeseeable judicial enlargement of a criminal statute so as to encompass conduct not covered on the face of the statute operates like an *ex post facto* law if it is applied retroactively and violates due process in that event. Bouie v. City of Columbia, 378 U.S. 347 (1964). *See* Marks v. United States, 430 U.S. 188 (1977) (applying *Bouie* in context of § 9, cl. 3). *But see* Splawn v. California, 431 U.S. 595 (1977) (rejecting application of *Bouie*). The Court itself has not always adhered to this standard. *See* Ginzburg v. United States, 383 U.S. 463 (1966).

[2041] Jaehne v. New York, 128 U.S. 189, 194 (1888).

[2042] Rooney v. North Dakota, 196 U.S. 319, 325 (1905).

[2043] Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

[2044] Samuels v. McCurdy, 267 U.S. 188 (1925).

[2045] Hawker v. New York, 170 U.S. 189, 190 (1898). *See also* Reetz v. Michigan, 188 U.S. 505, 509 (1903); Lehmann v. State Board of Public Accountancy, 263 U.S. 394 (1923).

[2046] DeVeau v. Braisted, 363 U.S. 144, 160 (1960).

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duties, but rather was a punishment for past offenses.[2047] A similar oath required of suitors in the courts also was held void.[2048]

Changes in Punishment.—Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[2049]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution." Such a law, the Court ruled in *Stogner v. California*,[2050] is prohibited as *ex post facto*. Courts that had upheld extension of unexpired statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the *Ex Post Facto* Clause.

Illustrative of the second punishment category are statutes, all applicable to offenses committed prior to their enactment, that changed an indeterminate sentence law to require a judge to impose the maximum sentence,[2051] that required solitary confinement for prisoners previously sentenced to death,[2052] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[2053] Because it made more onerous the punishment for crimes committed before its enactment, a law that altered sentencing guidelines to make it more likely that the sentencing authority would impose on a defendant a more severe sentence than was previously likely and making it impossible for the defendant to challenge the sentence was *ex post facto* as to one who had committed the offense prior to the change.[2054] The Court adopted similar reasoning regarding changes in the U.S. Sentencing Guidelines: even though the Guide-

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[2047] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316 (1867).

[2048] Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 237–39 (1873).

[2049] 3 U.S. (3 Dall.) 386, 389 (1798).

[2050] 539 U.S. 607, 632–33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

[2051] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in Dobbert v. Florida, 432 U.S. 282, 298–301 (1977).

[2052] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[2053] *Medley, Petitioner*, 134 U.S. 160, 171 (1890).

[2054] Miller v. Florida, 482 U.S. 423 (1987). *But see* California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had held some laws impermissible because they operated to the disadvantage

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lines are advisory only, an increase in the applicable sentencing range is ex post facto if applied to a previously committed crime because of a significant risk of a lengthier sentence being imposed.[2055] But laws providing heavier penalties for new crimes thereafter committed by habitual criminals,[2056] "prescrib[ing] electrocution as the method of producing death instead of hanging, fix[ing] the place therefor within the penitentiary, and permitt[ing] the presence of more invited witnesses that had theretofore been allowed,"[2057] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[2058]

In *Dobbert v. Florida*,[2059] the Court may have formulated a new test for determining when the punishment provided by a criminal statute is *ex post facto*. The defendant murdered two of his children at a time when Florida law provided the death penalty upon conviction for certain takings of life. Subsequently, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be overturned,[2060] and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which had been enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether or not the old statute was constitutional, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State as-

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of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. at 506 n.3. *Accord*, Garner v. Jones, 529 U.S. 244 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

[2055] Peugh v. United States, 569 U.S. ___, No. 12–62, slip op. (2013).

[2056] Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912).

[2057] Malloy v. South Carolina, 237 U.S. 180, 183 (1915).

[2058] Rooney v. North Dakota, 196 U.S. 319, 324 (1905).

[2059] 432 U.S. 282, 297–98 (1977).

[2060] Furman v. Georgia, 408 U.S. 238 (1972). The new law was sustained in Proffitt v. Florida, 428 U.S. 242 (1976).

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cribed to the act of murder."[2061] Whether the "fair warning" standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question, but it is problematical whether the fact situation will occur often enough to make the principle applicable in many cases.

Changes in Procedure.—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.[2062] Laws shifting the place of trial from one county to another,[2063] increasing the number of appellate judges and dividing the appellate court into divisions,[2064] granting a right of appeal to the state,[2065] changing the method of selecting and summoning jurors,[2066] making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,[2067] and allowing a comparison of handwriting experts,[2068] have been sustained over the objection that they were *ex post facto*. It was suggested in a number of these cases, and two decisions were rendered precisely on the basis, that the mode of procedure might be changed only so long as the "substantial" rights of the accused were not curtailed.[2069] The Court has now disavowed this position.[2070] All that the language of most of these cases meant was that a legislature might not evade the *ex post facto* clause by labeling changes as alteration of "procedure." If a change labeled "procedural" effects a substantive change in the definition of a crime or increases punishment or denies a defense, the clause is invoked; however, if a law changes the procedures by which a criminal case is adjudicated, the clause is not implicated, regardless of the increase in the burden on a defendant.[2071]

[2061] 432 U.S. at 297.

[2062] Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

[2063] Gut v. Minnesota, 76 U.S. (9 Wall.) 35, 37 (1870).

[2064] Duncan v. Missouri, 152 U.S. 377 (1894).

[2065] Mallett v. North Carolina, 181 U.S. 589, 593 (1901).

[2066] Gibson v. Mississippi, 162 U.S. 565, 588 (1896).

[2067] Beazell v. Ohio, 269 U.S. 167 (1925).

[2068] Thompson v. Missouri, 171 U.S. 380, 381 (1898).

[2069] *E.g.*, Duncan v. Missouri, 152 U.S. 377, 382 (1894); Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Beazell v. Ohio, 269 U.S. 167, 171 (1925). The two cases decided on the basis of the distinction were Thompson v. Utah, 170 U.S. 343 (1898) (application to felony trial for offense committed before enactment of change from twelve-person jury to an eight-person jury void under clause), and Kring v. Missouri, 107 U.S. 221 (1883) (as applied to a case arising before change, a law abolishing a rule under which a guilty plea functioned as a acquittal of a more serious offense, so that defendant could be tried on the more serious charge, a violation of the clause).

[2070] Collins v. Youngblood, 497 U.S. 37, 44–52 (1990). In so doing, the Court overruled *Kring* and Thompson v. Utah.

[2071] 497 U.S. at 44, 52. *Youngblood* upheld a Texas statute, as applied to a person committing an offense and tried before passage of the law, that authorized crimi-

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Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the *ex post facto* clause. This principle was applied in the Court's invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim's testimony alone.[2072]

Obligation of Contracts

"Law" Defined.—The Contract Clause provides that no state may pass a "Law impairing the Obligation of Contracts," and a "law" in this context may be a statute, constitutional provision,[2073] municipal ordinance,[2074] or administrative regulation having the force and operation of a statute.[2075] But are judicial decisions within the clause? The abstract principle of the separation of powers, at least until recently, forbade the idea that the courts "make" law and the word "pass" in the above clause seemed to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.[2076] Nevertheless, there are important exceptions to this rule that are set forth below.

Status of Judicial Decisions.—Although the highest state court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the state, and federal courts will be bound by decisions of the highest state court on such matters, this rule does not hold when the contract is

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nal courts to reform an improper verdict assessing a punishment not authorized by law, which had the effect of denying defendant a new trial to which he would have been previously entitled.

[2072] Carmell v. Texas, 529 U.S. 513 (2000).

[2073] Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856); Ohio & M. R.R. v. McClure, 77 U.S. (10 Wall.) 511 (1871); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885); Bier v. McGehee, 148 U.S. 137, 140 (1893).

[2074] New Orleans Water-Works Co. v. Rivers, 115 U.S. 674 (1885); City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898); City of Vicksburg v. Waterworks Co., 202 U.S. 453 (1906); Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914); Cuyahoga Power Co. v. City of Akron, 240 U.S. 462 (1916).

[2075] Id. *See also* Grand Trunk Ry. v. Indiana R.R. Comm'n, 221 U.S. 400 (1911); Appleby v. Delaney, 271 U.S. 403 (1926).

[2076] Central Land Co. v. Laidley, 159 U.S. 103 (1895). *See also* New Orleans Water-Works Co. v. Louisiana Sugar Co., 125 U.S. 18 (1888); Hanford v. Davies, 163 U.S. 273 (1896); Ross v. Oregon, 227 U.S. 150 (1913); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); Long Sault Development Co. v. Call, 242 U.S. 272 (1916); McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918); Columbia Ry., Gas & Electric Co. v. South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. v. Flannagan, 263 U.S. 444 (1924).

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one whose obligation is alleged to have been impaired by state law.[2077] Otherwise, the challenged state authority could be vindicated through the simple device of a modification or outright nullification by the state court of the contract rights in issue. Similarly, the highest state court usually has final authority in construing state statutes and determining their validity in relation to the state constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the Contract Clause.[2078]

Suppose the following situation: (1) a municipality, acting under authority conferred by a state statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest state court; (3) later the state legislature repeals certain taxes to be used to pay off the bonds when they become due; (4) the repeal is sustained by a decision of the highest state court holding that the statute authorizing the bonds was unconstitutional *ab initio*. In such a case the Supreme Court would take an appeal from the state court and would reverse the latter's decision of unconstitutionality because of its effect in rendering operative the repeal of the tax.[2079]

Suppose, however, that the state court has held the statute authorizing the bonds unconstitutional *ab initio* in a suit by a creditor for payment without the state legislature's having repealed the taxes. In this situation, the Supreme Court would still afford relief if the case were one between citizens of different states, which reached it via a lower federal court.[2080] This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court in the

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[2077] Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436, 443 (1862); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 145 (1863); Wright v. Nagle, 101 U.S. 791, 793 (1880); McGahey v. Virginia, 135 U.S. 662, 667 (1890); Scott v. McNeal, 154 U.S. 34, 35 (1894); Stearns v. Minnesota, 179 U.S. 223, 232–33 (1900); Coombes v. Getz, 285 U.S. 434, 441 (1932); Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168, 170 (1947).

[2078] McCullough v. Virginia, 172 U.S. 102 (1898); Houston & Texas Central Rd. Co. v. Texas, 177 U.S. 66, 76, 77 (1900); Hubert v. New Orleans, 215 U.S. 170, 175 (1909); Carondelet Canal Co. v. Louisiana, 233 U.S. 362, 376 (1914); Louisiana Ry. & Nav. Co. v. New Orleans, 235 U.S. 164, 171 (1914).

[2079] State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854) (discussed below), and Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1854), are the leading cases. *See also* Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436 (1862); Louisiana v. Pilsbury, 105 U.S. 278 (1882); McGahey v. Virginia, 135 U.S. 662 (1890); Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894); Bacon v. Texas, 163 U.S. 207 (1896); McCullough v. Virginia, 172 U.S. 102 (1898).

[2080] Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175, 206 (1865); Havemayer v. Iowa County, 70 U.S. (3 Wall.) 294 (1866); Thomson v. Lee County, 70 U.S. (3 Wall.) 327 (1866); The City v. Lamson, 76 U.S. (9 Wall.) 477 (1870); Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678 (1873); Taylor v. Ypsilanti, 105 U.S. 60 (1882); Anderson v. Santa Anna, 116 U.S. 356 (1886); Wilkes County v. Coler, 180 U.S. 506 (1901).

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past has apparently regarded itself as free to pass upon the constitutionality of the state law authorizing the bonds even though there had been no prior decision by the highest state court sustaining them, the idea being that contracts entered into simply on the faith of the presumed constitutionality of a state statute are entitled to this protection.[2081]

In other words, in cases in which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes, and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground and by appeal from a state court, it has always adhered in terms to the doctrine that the word "laws" as used in Article I, § 10, does not include judicial decisions. Yet, even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment that is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—one possibly many years older than the contract rights involved—on which to pin its decision.[2082]

In 1922, Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to "any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States . . . ."[2083] This appeared to be an invitation to the Court to say frankly that the obligation of a contract can be impaired by a subsequent court decision. The Court, however, declined the invitation in an opinion by Chief Justice Taft that reviewed many of the cases covered in the preceding paragraphs.

Dealing with *Gelpcke* and subsequent decisions, Chief Justice Taft said: "These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what

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[2081] Great Southern Hotel Co. v. Jones, 193 U.S. 532, 548 (1904).

[2082] Sauer v. New York, 206 U.S. 536 (1907); Muhlker v. New York & Harlem R.R., 197 U.S. 544, 570 (1905).

[2083] 42 Stat. 366.

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the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess v. Seligman*, 107 U.S. 20 [1883]."[2084] Although doubtless this was an available explanation in 1924, the decision in 1938, in *Erie Railroad Co. v. Tompkins*,[2085] so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the Contract Clause or else abandon them.

"Obligation" Defined.—A contract is analyzable into two elements: the agreement, which comes from the parties, and the obligation, which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the civil law and its appearance in the Contract Clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a civilian. Actually, the term as used in the Contract Clause has been rendered more or less superfluous by the doctrine that "[t]he laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it."[2086] Hence, the Court sometimes recognizes the term in its decisions applying the clause, and sometimes ignores it. In *Sturges v. Crowninshield*,[2087] Chief Justice Marshall defined "obligation of contract" as the law that binds a party "to perform his undertaking," but a little later the same year, in *Dartmouth College v. Woodward*, he set forth the points presented for consideration to be: "1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"[2088] The word "obligation" undoubtedly implies that the Constitution was intended to protect only executory contracts—*i.e.*, contracts still awaiting performance—but this implication was rejected early on for a certain class of contracts, with immensely important result for the clause.

[2084] Tidal Oil Co. v. Flannagan, 263 U.S. 444, 452 (1924).

[2085] 304 U.S. 64 (1938).

[2086] Walker v. Whitehead, 83 U.S. (16 Wall.) 314, 317 (1873); Wood v. Lovett, 313 U.S. 362, 370 (1941).

[2087] 17 U.S. (4 Wheat.) 122, 197 (1819); *see also* Curran v. Arkansas, 56 U.S. (15 How.) 304 (1854).

[2088] 17 U.S. (4 Wheat.) 518, 627 (1819).

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"Impair" Defined.—"The obligations of a contract," said Chief Justice Hughes for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[2089] "are impaired by a law which renders them invalid, or releases or extinguishes them . . . , and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights."[2090] But he adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."[2091] In short, the law from which the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.[2092]

Vested Rights Not Included.—The term "contracts" is used in the Contract Clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the state and an individual, such as the right of recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under Article I, § 10.[2093]

Public Grants That Are Not "Contracts".—Not all grants by a state constitute "contracts" within the sense of Article I, § 10. In his *Dartmouth College* decision, Chief Justice Marshall conceded that "if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government . . . the subject is one in which the legislature of the State may act according to its own judgment," unrestrained by the

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[2089] 290 U.S. 398 (1934).

[2090] 290 U.S. at 431.

[2091] 290 U.S. at 435. *See also* City of El Paso v. Simmons, 379 U.S. 497 (1965).

[2092] "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in Wood v. Lovett, 313 U.S. 362, 383 (1941).

[2093] Crane v. Hahlo, 258 U.S. 142, 145–46 (1922); Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883); Morley v. Lake Shore Ry., 146 U.S. 162, 169 (1892). That the Contract Clause did not protect vested rights merely as such was stated by the Court as early as Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829); and again in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 539–40 (1837).

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Constitution[2094]—thereby drawing a line between "public" and "private" corporations that remained undisturbed for more than half a century.[2095]

It has been subsequently held many times that municipal corporations are mere instrumentalities of the state for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature.[2096] The same principle applies, moreover, to the property rights that the municipality derives either directly or indirectly from the state. This was first held as to the grant of a franchise to a municipality to operate a ferry and has since then been recognized as the universal rule.[2097] It was stated in a case decided in 1923 that the distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity, though it limited the legal liability of municipalities for the negligent acts or omissions of its officers or agents, did not, however, furnish ground for the application of constitutional restraints against the state in favor of its own municipalities.[2098] Thus, no contract rights were impaired by a statute relocating a county seat, even though the former location was by law to be "permanent" and the citizens of the community had donated land and furnished bonds for the erection of public buildings.[2099] Similarly, a statute changing the boundaries of a school district, giving to the new district the property within its limits that had belonged to the former district, and requiring the new district to assume the debts of the old district, did not impair the obligation of contracts.[2100] Nor was the Contract Clause violated by state legislation authorizing state control over insolvent communities through a Municipal Finance Commission.[2101]

On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of Article I,

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[2094] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819).

[2095] In Munn v. Illinois, 94 U.S. 113 (1877), a category of "business affected with a public interest" and whose property is "impressed with a public use" was recognized. A corporation engaged in such a business becomes a "quasi-public" corporation, and the power of the state to regulate it is larger than in the case of a purely private corporation. Because most corporations receiving public franchises are of this character, the final result of *Munn* was to enlarge the police power of the state in the case of the most important beneficiaries of the *Dartmouth College* decision.

[2096] Meriwether v. Garrett, 102 U.S. 472 (1880); Covington v. Kentucky, 173 U.S. 231 (1899); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[2097] East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511 (1851); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[2098] City of Trenton v. New Jersey, 262 U.S. 182, 191 (1923).

[2099] Newton v. Commissioners, 100 U.S. 548 (1880).

[2100] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[2101] Faitoute Co. v. City of Asbury Park, 316 U.S. 502 (1942).

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§ 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.[2102] Indeed, there can be no such thing in this country as property in office, although the common law sustained a different view sometimes reflected in early cases.[2103] When, however, services have once been rendered, there arises an implied contract that they shall be compensated at the rate in force at the time they were rendered.[2104] Also, an express contract between the state and an individual for the performance of specific services falls within the protection of the Constitution. Thus, a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the state, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.[2105] But a resolution of a local board of education reducing teachers' salaries for the school year 1933–1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.[2106] Similarly, the Court held that an Illinois statute that reduced the annuity payable to retired teachers under an earlier act did not violate the Contract Clause, because it had not been the intention of the earlier act to propose a contract but only to put into effect a general policy.[2107] On the other hand, the right a teacher whose position had become "permanent" under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.[2108]

Tax Exemptions: When Not "Contracts".—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned ear-

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[2102] Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Dodge v. Board of Education, 302 U.S. 74 (1937); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[2103] Butler v. Pennsylvania, 51 U.S. (10 How.) 420 (1850). *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) Hoke v. Henderson, 154 N.C. (4 Dev.) 1 (1833). *See also* United States v. Fisher, 109 U.S. 143 (1883); United States v. Mitchell, 109 U.S. 146 (1883); Crenshaw v. United States, 134 U.S. 99 (1890).

[2104] Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[2105] Hall v. Wisconsin, 103 U.S. 5 (1880). *Cf.* Higginbotham v. City of Baton Rouge, 306 U.S. 535 (1930).

[2106] Phelps v. Board of Education, 300 U.S. 319 (1937).

[2107] Dodge v. Board of Education, 302 U.S. 74 (1937).

[2108] Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

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lier, this has not always been easy to do. In pursuance of the precedent set in *New Jersey v. Wilson*,[2109] the legislature of a state "may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected," and such an exemption is frequently a contract within the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corporation by the clear terms of its charter.[2110] When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In *State Bank of Ohio v. Knoop*,[2111] a closely divided Court held that a general banking law of Ohio, which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of Article I, § 10. The provision was not, the Court said, "a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted."[2112] When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the state from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. "General encouragements," the Court wrote, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time."[2113] So far as exemption from taxation is concerned the difference between these two cases is obviously slight, but the later one

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[2109] 11 U.S. (7 Cr.) 164 (1812).

[2110] The *Delaware Railroad Tax*, 85 U.S. (18 Wall.) 206, 225 (1874); Pacific R.R. v. Maguire, 87 U.S. (20 Wall.) 36, 43 (1874); Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1873); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869).

[2111] 57 U.S. (16 How.) 369 (1854).

[2112] 57 U.S. at 383.

[2113] Salt Company v. East Saginaw, 80 U.S. (13 Wall.) 373, 379 (1872). *See also* Welch v. Cook, 97 U.S. 541 (1879); Grand Lodge v. New Orleans, 166 U.S. 143 (1897); Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903). *Cf.* Ettor v. Tacoma, 228 U.S. 148 (1913), in which it was held that the repeal of a statute providing for consequential damages caused by changes of grades of streets could not constitutionally affect an already accrued right to compensation.

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is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence.[2114] Yet the cases are not always easy to explain in relation to each other, except in light of the fact that the Court's point of view has altered from time to time.[2115]

"Contracts" Include Public Contracts and Corporate Charters.—The question, which was settled very early, was whether the clause was intended to be applied solely in protection of private contracts or in the protection also of public grants, or, more broadly, in protection of public contracts, in short, those to which a state is a party.[2116] Support for the affirmative answer accorded this question could be derived from the following sources. For one thing, the clause departed from the comparable provision in the Northwest Ordinance (1787) in two respects: first, in the presence of the word "obligation;" secondly, in the absence of the word "private." There is good reason for believing that James Wilson may have been responsible for both alterations, as two years earlier he had denounced a current proposal to repeal the Bank of North America's Pennsylvania charter in the following words: "If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, every precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will

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[2114] *See* Rector of Christ Church v. County of Philadelphia, 65 U.S. (24 How.) 300, 302 (1861); Seton Hall College v. South Orange, 242 U.S. 100 (1916).

[2115] *Compare* the above cases *with* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869); Illinois Cent, R.R. v. Decatur, 147 U.S. 190 (1893), with Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379 (1903).

[2116] According to Benjamin F. Wright, throughout the first century of government under the Constitution "the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation," and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation. However, the numerical prominence of such grants in the cases does not overrate their relative importance from the point of view of public interest. B. Wright, The Contract Clause of the Constitution 95 (1938).

Madison explained the clause by allusion to what had occurred "in the internal administration of the States" in the years preceding the Constitutional Convention, in regard to private debts. Violations of contracts had become familiar in the form of depreciated paper made legal tender, of property substituted for money, of installment laws, and of the occlusions of the courts of justice. 3 M. Farrand, The Records of the Federal Convention of 1787 548 (rev. ed. 1937); The Federalist, No. 44 (J. Cooke ed. 1961), 301–302.

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never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction."[2117]

Furthermore, in its first important constitutional case, *Chisholm v. Georgia*,[2118] the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of natural law notions and the resulting vague significance of the term "law." In *Sturges v. Crowninshield*, Chief Justice Marshall defined the obligation of contract as the law that binds a party "to perform his undertaking."[2119] Whence, however, comes this law? If it comes from the state alone, which Marshall was later to deny even as to private contracts,[2120] then it is hardly possible to hold that the states' own contracts are covered by the clause, which manifestly does not create an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises natural law and kindred principles, as well as law that springs from state authority, then, as the state itself is presumably bound by such principles, the state's own obligations, so far as harmonious with them, are covered by the clause.

Fletcher v. Peck[2121] has the double claim to fame that it was the first case in which the Supreme Court held a state enactment to be in conflict with the Constitution, and also the first case to hold that the Contract Clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795–1796, almost its first act was to revoke the sale made the previous year.

[2117] 2 The Works of James Wilson 834 (R. McCloskey ed., 1967).
[2118] 2 U.S. (2 Dall.) 419 (1793).
[2119] 17 U.S. (4 Wheat.) 122, 197 (1819).
[2120] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 338 (1827).
[2121] 10 U.S. (6 Cr.) 87 (1810).

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Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided *Fletcher v. Peck*, Hamilton characterized the repeal as contravening "the first principles of natural justice and social policy," especially so far as it was made "to the prejudice . . . of third persons . . . innocent of the alleged fraud or corruption; . . . moreover," he added, "the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so."[2122] Hamilton's views were quoted frequently in the congressional debate over the "Yazoo Land Frauds," as they were contemporaneously known.

So far as it invoked the Contract Clause, Marshall's opinion in *Fletcher v. Peck* performed two creative acts. It recognized that an obligatory contract was one still to be performed—in other words, was an executory contract, also that a grant of land was an executed contract—a conveyance. But, Marshall asserted, every grant is attended by "an implied contract" on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within Article I, § 10. But the question still remained of the nature of this obligation. Marshall's answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States."[2123]

[2122] B. Wright, The Contract Clause of the Constitution 22 (1938). Professor Wright dates Hamilton's pamphlet as from 1796.

[2123] 10 U.S. (6 Cr.) 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general

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The protection thus thrown about land grants was presently extended, in the case of *New Jersey v. Wilson*,[2124] to a grant of immunity from taxation that the State of New Jersey had accorded certain Indian lands, and several years after that, in *Dartmouth College*,[2125] to the charter privileges of an eleemosynary corporation.

In *City of El Paso v. Simmons*,[2126] the Court held, over a vigorous dissent by Justice Black, that Texas had not violated this clause when it amended its laws governing the sale of public lands so as to restrict the previously unlimited right of a delinquent to reinstate himself upon forfeited land by a single payment of all past interest due.

Corporate Charters: Different Ways of Regarding.—There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the state, like a liquor-seller's license or an auctioneer's license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the *Dartmouth College* decision. But, in 1819 charters were granted directly by the state legislatures in the form of special acts and there were very few profit-taking corporations in the country. The later extension of the benefits of the *Dartmouth College* decision to corporations organized under general law took place without discussion.

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early state courts did regard them at the outset.[2127] It is also the way in which

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principle, on the reason and nature of things; a principle which will impose laws even on the Deity." Id. at 143.

[2124] 11 U.S. (7 Cr.) 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years by the owners of the lands in the imposition of taxes upon these. Given v. Wright, 117 U.S. 648 (1886).

[2125] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[2126] 379 U.S. 497 (1965). *See also* Thorpe v. Housing Authority, 393 U.S. 268, 278–79 (1969).

[2127] In 1806, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the Contract Clause, declared that rights legally vested in a corporation cannot be "controlled of destroyed by a subsequent statute, unless a power [for that purpose] be reserved to the legislature in the act of incorporation," Wales v. Stetson, 2 Mass. 142 (1806). *See also* Stoughton v. Baker, 4 Mass. 521 (1808)

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Blackstone regarded them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament, and the same point of view found expression in Story's concurring opinion in *Dartmouth College v. Woodward*, as it did also in Webster's argument in that case.[2128]

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in *Dartmouth College v. Woodward*.[2129] This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, and the contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.[2130] Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the Contract Clause directly, and without further use of his fiction in *Fletcher v. Peck* of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract, before it can have obligation, must import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Moreover, the consideration, which induced the Crown to grant a charter to Dartmouth College, was not merely a speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needed. "The objects for which a corporation is created," he wrote, "are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant." In other words, the simple fact of the charter having been granted imports consideration from the point of view of the state.[2131] With this doctrine before it, the Court in *Provi-*

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to like effect; *cf.* Locke v. Dane, 9 Mass. 360 (1812), in which it is said that the purpose of the Contract Clause was to provide against paper money and insolvent laws. Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on "fundamental principles," rather than the Contract Clause.

[2128] 17 U.S. (4 Wheat.) at 577–95 (Webster's argument); id. at 666 (Story's opinion). *See also* Story's opinion for the Court in Terrett v. Taylor, 13 U.S. (9 Cr.) 43 (1815).

[2129] 17 U.S. (4 Wheat.) 518 (1819).

[2130] 17 U.S. at 627.

[2131] 17 U.S. at 637; *see also* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869).

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dence Bank v. Billings,[2132] and again in *Charles River Bridge v. Warren Bridge*,[2133] admitted, without discussion of the point, the applicability of the *Dartmouth College* decision to purely business concerns.

Reservation of Right to Alter or Repeal Corporate Charters.—There are four principles or doctrines by which the Court has broken down the force of the *Dartmouth College* decision in great measure in favor of state legislative power. By the logic of *Dartmouth College* itself, the state may reserve in a corporate charter the right to "amend, alter, and repeal" the same, and such reservation becomes a part of the contract between the state and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right.[2134] Later decisions recognize that the state may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date.[2135] There is, however, a difference between a reservation by a statute and one by constitutional provision. Although the former may be repealed as to a subsequent charter by the specific terms thereof, the latter may not.[2136]

Is the right reserved by a state to "amend" or "alter" a charter without restriction? When it is accompanied, as it generally is, by the right to "repeal," one would suppose that the answer to this question was self-evident. Nonetheless, there is judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant.[2137] Yet, although some state courts have applied tests of this nature to the disallowance of legislation, the U.S. Supreme Court has apparently never done so.[2138]

It is quite different with respect to the distinction that some cases point out between, on the one hand, the franchises and privi-

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[2132] 29 U.S. (4 Pet.) 514 (1830).

[2133] 36 U.S. (11 Pet.) 420 (1837).

[2134] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819) (Justice Story).

[2135] Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869); *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 213 (1872); Miller v. New York, 82 U.S. (15 Wall.) 478 (1873); Murray v. Charleston, 96 U.S. 432 (1878); Greenwood v. Freight Co., 105 U.S. 13 (1882); Chesapeake & Ohio Ry. v. Miller, 114 U.S. 176 (1885); Louisville Water Company v. Clark, 143 U.S. 1 (1892).

[2136] New Jersey v. Yard, 95 U.S. 104, 111 (1877).

[2137] *See* Holyoke Company v. Lyman, 82 U.S. (15 Wall.) 500, 520 (1873), *See also* Shields v. Ohio, 95 U.S. 319 (1877); Fair Haven R.R. v. New Haven, 203 U.S. 379 (1906); Berea College v. Kentucky, 211 U.S. 45 (1908). Also Lothrop v. Stedman, 15 Fed. Cas. 922 (No. 8519) (C.C.D. Conn. 1875), where the principles of natural justice are thought to set a limit to the power.

[2138] *See* in this connection the cases cited by Justice Sutherland in his opinion for the Court in Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).

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leges that a corporation derives from its charter, and, on the other hand, the rights of property and contract that accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the state. The primary heirs of the defunct organization are its creditors, but whatever of value remains after their valid claims are met goes to the former shareholders.[2139] By the earlier weight of authority, however, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk; any "such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter . . . ."[2140] But later holdings becloud this rule.[2141]

Corporation Subject to the Law and Police Power.—But suppose that the state neglects to reserve the right to amend, alter, or repeal. Is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the state, from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in *Providence Bank v. Billings*,[2142] which held that, in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the state's taxing power, notwithstanding that the power to tax is the power to destroy.

And of course the same principle is equally applicable to the exercise by the state of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that state had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle guards. In a matter of this nature, said the court, corporations are on a level with individuals engaged in the same business, unless, from

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[2139] Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853); Shields v. Ohio, 95 U.S. 319 (1877); Greenwood v. Freight Co., 105 U.S. 13 (1882); Adirondack Ry. v. New York, 176 U.S. 335 (1900); Stearns v. Minnesota, 179 U.S. 223 (1900); Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915); Coombes v. Getz, 285 U.S. 434 (1932).

[2140] *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 218 (1872). *See also* Calder v. Michigan, 218 U.S. 591 (1910).

[2141] Lake Shore & Mich. So. Ry. v. Smith, 173 U.S. 684, 690 (1899); Coombes v. Getz, 285 U.S. 434 (1932). Both these decisions cite Greenwood v. Freight Co., 105 U.S. 13, 17 (1882), but without apparent justification.

[2142] 29 U.S. (4 Pet.) 514 (1830).

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their charter, they can prove the contrary.[2143] Since then the rule has been applied many times in justification of state regulation of railroads,[2144] and even of the application of a state prohibition law to a company that had been chartered expressly to manufacture beer.[2145]

Strict Construction of Charters, Tax Exemptions.—Long before the cases last cited were decided, the principle that they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the state, or as it is otherwise often phrased, "nothing passes by implication in a public grant."

The leading case was *Charles River Bridge v. Warren Bridge*,[2146] which was decided by a substantially new Court shortly after Chief Justice Marshall's death. The question at issue was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the state's permitting another company of later date to operate a free bridge in the immediate vicinity. Because the first company could point to no clause in its charter specifically vesting it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story presented a vigorous dissent in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surround-

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[2143] Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (1854).

[2144] Thus a railroad may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of the public safety, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894), to make highway crossings reasonably safe and convenient for public use, Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918), to repair viaducts, Northern Pacific Railway v. Duluth, 208 U.S. 583 (1908), and to fence its right of way, Minneapolis & St. Louis Ry. v. Emmons, 149 U.S. 364 (1893). Though a railroad company owns the right of way along a street, the city may require it to lay tracks to conform to the established grade; to fill in tracks at street intersections; and to remove tracks from a busy street intersection, when the attendant disadvantage and expense are small and the safety of the public appreciably enhanced Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

Likewise the state, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with. Railroad Co. v. Hamersley, 104 U.S. 1 (1881). It may impose upon a railroad liability for fire communicated by its locomotives, even though the state had previously authorized the company to use said type of locomotive power, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1, 5 (1897), and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

[2145] Beer Co. v. Massachusetts, 97 U.S. 25 (1878). *See also* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 345 (1909).

[2146] 36 U.S. (11 Pet.) 420 (1837).

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ing its concession as perpetuity had been from the terms of the Dartmouth College charter and the ensuing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the police power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney's opinion evinces the influence of both these developments. The power of the state to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments, nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.[2147]

The Court has reiterated the rule of strict construction many times. In *Blair v. City of Chicago*,[2148] decided nearly seventy years after *Charles River Bridge*, the Court said: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . . The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State."[2149]

An excellent illustration of the operation of the rule in relation to tax exemptions was furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence, in the absence of express permission by the state, may not be passed on to a suc-

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[2147] 36 U.S. at 548–53.

[2148] 201 U.S. 400 (1906).

[2149] 201 U.S. at 471, 472, quoting *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 75 (1866).

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cessor.[2150] Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate, the new corporation was held to be subject to taxation.[2151] Again, a statute that granted a corporation all "the rights and privileges" of an earlier corporation was held not to confer the latter's "immunity" from taxation.[2152] Yet again, a legislative authorization of the transfer by one corporation to another of the former's "estate, property, right, privileges, and franchises" was held not to clothe the later company with the earlier one's exemption from taxation.[2153]

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one clearly entitled to it. Thus, the exemption conferred by its charter on a railway company was held not to extend to branch roads it constructed pursuant to a later statute.[2154] Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business.[2155] And, the charter exemption of the capital stock of a railroad from taxation "for ten years after completion of the said road" was held not to become operative until the completion of the road.[2156] So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation.[2157] Provisions in a statute that bonds of the state and its political subdivisions were not to be taxed and should not be taxed were held not to exempt interest on them from taxation as income of the owners.[2158]

Strict Construction and the Police Power.—The police power, too, has frequently benefitted from the doctrine of strict construction, although this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to de-

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[2150] Memphis & L.R. R.R. v. Comm'rs, 112 U.S. 609, 617 (1884). *See also* Morgan v. Louisiana, 93 U.S. 217 (1876); Wilson v. Gaines, 103 U.S. 417 (1881); Louisville & Nashville R.R. v. Palmes, 109 U.S. 244, 251 (1883); Norfolk & Western R.R. v. Pendleton, 156 U.S. 667, 673 (1895); Picard v. East Tennessee, V. & G. R.R., 130 U.S. 637, 641 (1889).

[2151] Atlantic & Gulf R.R. v. Georgia, 98 U.S. 359, 365 (1879).

[2152] Phoenix F. & M. Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

[2153] Rochester Ry. v. Rochester, 205 U.S. 236 (1907); followed in Wright v. Georgia R.R. & Banking Co., 216 U.S. 420 (1910); Rapid Transit Corp. v. New York, 303 U.S. 573 (1938). *Cf.* Tennessee v. Whitworth, 117 U.S. 139 (1886), the authority of which is respected in the preceding case.

[2154] Chicago, B. & K.C. R.R. v. Guffey, 120 U.S. 569 (1887).

[2155] Ford v. Delta and Pine Land Company, 164 U.S. 662 (1897).

[2156] Vicksburg, S. & P. R.R. v. Dennis, 116 U.S. 665 (1886).

[2157] Millsaps College v. City of Jackson, 275 U.S. 129 (1927).

[2158] Hale v. State Board, 302 U.S. 95 (1937).

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termine what charges were reasonable.[2159] However, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates.[2160] The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city.[2161] The promise by a city in the charter of a water company not to make a similar grant to any other person or corporation was held not to prevent the city itself from engaging in the business.[2162] A municipal concession to a water company to run for thirty years, and accompanied by the provision that the "said company shall charge the following rates," was held not to prevent the city from reducing such rates.[2163] But more broadly, the grant to a municipality of the power to regulate the charges of public service companies was held not to bestow the right to contract away this power.[2164] Indeed, any claim by a private corporation that it received the ratemaking power from a municipality must survive a two-fold challenge: first, as to the right of the municipality under its charter to make such a grant, secondly, as to whether it has actually done so, and in both respects an affirmative answer must be based on express words and not on implication.[2165]

Doctrine of Inalienability as Applied to Eminent Domain, Taxing, and Police Powers.—The second of the doctrines mentioned above, whereby the principle of the subordination of all persons, corporate and individual alike, to the legislative power of the state has been fortified, is the doctrine that certain of the state's powers are inalienable, and that any attempt by a state to alienate them, upon any consideration whatsoever, is *ipso facto* void and hence

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[2159] Railroad Comm'n Cases (Stone v. Farmers' Loan & Trust Co.), 116 U.S. 307, 330 (1886), extended in Southern Pacific Co. v. Campbell, 230 U.S. 537 (1913) to cases in which the word "reasonable" does not appear to qualify the company's right to prescribe tolls. *See also* American Bridge Co. v. Railroad Comm'n, 307 U.S. 486 (1939).

[2160] Georgia Ry. v. Town of Decatur, 262 U.S. 432 (1923). *See also* Southern Iowa Elec. Co. v. City of Chariton, 255 U.S. 539 (1921).

[2161] City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 15 (1898).

[2162] Skaneateles Water Co. v. Skaneateles, 184 U.S. 354 (1902); Water Co. v. City of Knoxville, 200 U.S. 22 (1906); Madera Water Works v. City of Madera, 228 U.S. 454 (1913).

[2163] Rogers Park Water Co. v. Fergus, 180 U.S. 624 (1901).

[2164] Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Wyandotte Gas Co. v. Kansas, 231 U.S. 622 (1914).

[2165] *See also* Puget Sound Traction Co. v. Reynolds, 244 U.S. 574 (1917). "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed." Justice Black for the Court in Keefe v. Clark, 322 U.S. 393, 396–397 (1944).

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incapable to producing a "contract" within the meaning of Article I, § 10. One of the earliest cases to assert this principle was decided in New York in 1826. The corporation of the City of New York, having conveyed certain lands for the purposes of a church and cemetery together with a covenant for quiet enjoyment, later passed a by-law forbidding their use as a cemetery. In denying an action against the city for breach of covenant, the state court said the defendants "had no power as a party, [to the covenant] to make a contract which should control or embarrass their legislative powers and duties." [2166]

The Supreme Court first applied similar doctrine in 1848 in a case involving a grant of exclusive right to construct a bridge at a specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain.[2167] This reasoning was reinforced by an appeal to the theory of state sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a state.

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the state to forego the exercise of the power will avail against it.[2168] Conversely, the state may revoke an improvident grant of public property without recourse to the power of eminent domain, such a grant being inherently beyond the power of the state to make. Thus, when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the state's right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to repeal the grant, the Court, a four-to-three decision, sustained an action by the state to recover the lands in question. Justice Field wrote for the majority: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . Any

[2166] Brick Presbyterian Church v. New York, 5 Cow. (N.Y.) 538, 540 (1826).

[2167] West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). *See also* Backus v. Lebanon, 11 N.H. 19 (1840); White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590 (1849); and Bonaparte v. Camden & A.R. Co., 3 Fed. Cas. 821 (No. 1617) (C.C.D.N.J. 1830).

[2168] Pennsylvania Hospital v. City of Philadelphia, 245 U.S. 20 (1917).

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grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." [2169]

On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability, though at times supported by powerful minorities on the Bench, have failed.[2170] As recently as January 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia's Revenue Commission to compel it to pay ad valorem taxes contrary to the terms of its special charter issued in 1833. In answer to the argument that this was a suit contrary to the Eleventh Amendment, the Court declared that the immunity from federal jurisdiction created by the Amendment "does not extend to individuals who act as officers without constitutional authority." [2171]

The leading case involving the police power is *Stone v. Mississippi*.[2172] In 1867, the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later, the state adopted a new Constitution which contained a provision forbidding lotteries, and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights," and these agencies can neither give away nor sell their discretion. All that one can get by a charter permitting the business of conducting a lottery "is suspension of certain governmental rights in his favor, subject to withdrawal at will." [2173]

The Court shortly afterward applied the same reasoning in a case challenging the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of cattle in New Orleans by granting another company the right to engage in the same business. Although the state did not offer to compensate the older

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[2169] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453, 455 (1892).

[2170] *See especially* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869), and The Washington University v. Rouse, 75 U.S. (8 Wall.) 439 (1869).

[2171] Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 305–06 (1952). The Court distinguished *In re* Ayers, 123 U.S. 443 (1887) on the ground that the action there was barred "as one in substance directed at the State merely to obtain specific performance of a contract with the State." 342 U.S. at 305.

[2172] 101 U.S. 814 (1880).

[2173] 101 U.S. at 820–21.

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company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health.[2174] When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved.[2175]

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise."[2176]

It would scarcely suffice today for a company to rely upon its charter privileges or upon special concessions from a state in resisting the application to it of measures alleged to have been enacted under the police power thereof; if this claim is sustained, the obligation of the contract clause will not avail, and if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy that once existed between the Court's theory of an overriding police power in these two adjoining fields of constitutional law is today apparently at an end. Indeed, there is usually no sound reason why rights based on public grant should be regarded as more sacrosanct than rights that involve the same subject matter but are of different provenance.

Private Contracts.—The term "private contract" is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution,[2177] nor is mar-

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[2174] Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746 (1884).

[2175] New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885).

[2176] Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917); where the police power and eminent domain are treated on the same basis in respect of inalienability; Wabash R.R. v. Defiance, 167 U.S. 88, 97 (1897); Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

[2177] Morley v. Lake Shore Ry., 146 U.S. 162 (1892); New Orleans v. New Orleans Water-Works Co., 142 U.S. 79 (1891); Missouri & Ark. L. & M. Co. v. Sebastian County, 249 U.S. 170 (1919). *But cf.* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469, 549 (1833); and Garrison v. New York, 88 U.S. (21 Wall.) 196, 203 (1875), suggesting that a different view was earlier entertained in the case of judgments in actions of debt.

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riage.[2178] And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.[2179]

The question of the nature and source of the obligation of a contract, which went by default in *Fletcher v. Peck* and the *Dartmouth College* case, with such vastly important consequences, had eventually to be met and answered by the Court in connection with private contracts. The first case involving such a contract to reach the Supreme Court was *Sturges v. Crowninshield*,[2180] in which a debtor sought escape behind a state insolvency act of later date than his note. The act was held inoperative, but whether this was because of its retroactivity in this particular case or for the broader reason that it assumed to excuse debtors from their promises was not at the time made clear. As noted earlier, Chief Justice Marshall's definition on this occasion of the obligation of a contract as the law that binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term "law."[2181]

These obscurities were finally cleared up for most cases in *Ogden v. Saunders*,[2182] in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Chief Justice Marshall contended unsuccessfully that the statute was void because it purported to release the debtor from that original, intrinsic obligation that always attaches under natural law to the acts of free agents. "When," he wrote, "we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contracts," and that they took their views on these subjects from those sources. He also posed the question of what would happen to the Contract Clause if states might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.[2183]

[2178] Maynard v. Hill, 125 U.S. 190 (1888); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819). *Cf.* Andrews v. Andrews, 188 U.S. 14 (1903). The question whether a wife's rights in the community property under the laws of California were of a contractual nature was raised but not determined in Moffit v. Kelly, 218 U.S. 400 (1910).

[2179] New Orleans v. New Orleans Water-Works Co., 142 U.S. 79 (1891); Zane v. Hamilton County, 189 U.S. 370, 381 (1903).

[2180] 17 U.S. (4 Wheat.) 122 (1819).

[2181] 17 U.S. (4 Wheat.) at 197.

[2182] 25 U.S. (12 Wheat.) 213 (1827).

[2183] 25 U.S. at 353–54.

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For the first and only time, a majority of the Court abandoned the Chief Justice's leadership. Speaking by Justice Washington, it held that the obligation of private contracts is derived from the municipal law—state statutes and judicial decisions—and that the inhibition of Article I, § 10, is confined to legislative acts made after the contracts affected by them, subject to the following exception. By a curiously complicated line of reasoning, the Court also held in the same case that, when the creditor is a nonresident, then a state by an insolvency law may not alter the former's rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the municipal law in existence when the contract is made, a further question presents itself, namely, what part of the municipal law is referred to? No doubt, the law which determines the validity of the contract itself is a part of such law. Also part of such law is the law which interprets the terms used in the contract, or which supplies certain terms when others are used, as for instance, constitutional provisions or statutes which determine what is "legal tender" for the payment of debts, or judicial decisions which construe the term "for value received" as used in a promissory note, and so on. In short, any law which at the time of the making of a contract goes to measure the rights and duties of the parties to it in relation to each other enters into its obligation.

Remedy a Part of the Private Obligation.—Suppose, however, that one of the parties to a contract fails to live up to his obligation as thus determined. The contract itself may now be regarded as at an end, but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. In the case of a mortgage, he may foreclose; in the case of a promissory note, he may sue; and in certain cases, he may demand specific performance. Hence the further question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since as we have just seen, this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is extremely important—indeed, indispensable. In due course it became the accepted doctrine that part of the law which supplies one party to a contract with a remedy if the other party does not live up to his agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the Court's own words: "Nothing can be more material to the obligation than the means of

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enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable. . . ."[2184]

This rule was first definitely announced in 1843 in *Bronson v. Kinzie*.[2185] Here, an Illinois mortgage giving the mortgagee an unrestricted power of sale in case of the mortgagor's default was involved, along with a later act of the legislature that required mortgaged premises to be sold for not less than two-thirds of the appraised value and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the pre-existing remedies to such an extent, violated the constitutional prohibition and hence was void. The year following a like ruling was made in *McCracken v. Hayward*,[2186] as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

But the rule illustrated by these cases does not signify that a state may make no changes in its remedial or procedural law that affect existing contracts. "Provided," the Court has said, "a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure."[2187] Thus, states are constantly remodelling their judicial systems and modes of practice unembarrassed by the Contract Clause.[2188] The right of a state to abolish imprisonment for debt was early asserted.[2189] Again, the right of a state to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.[2190] On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.[2191] In the words of the Court: "Every case must be determined upon its own circumstances";[2192] and it later added: "In all

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[2184] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 552 (1867).

[2185] 42 U.S. (1 How.) 311 (1843).

[2186] 43 U.S. (2 How.) 608 (1844).

[2187] Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895).

[2188] Antoni v. Greenhow, 107 U.S. 769 (1883).

[2189] The right was upheld in Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827), and again in *Penniman's Case*, 103 U.S. 714 (1881).

[2190] McGahey v. Virginia, 135 U.S. 662 (1890).

[2191] Louisiana v. New Orleans, 102 U.S. 203 (1880).

[2192] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 554 (1867).

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such cases the question becomes . . . one of reasonableness, and of that the legislature is primarily the judge."[2193]

Contracts involving municipal bonds merit special mention. While a city is from one point of view but an emanation from the government's sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity and so to be suable on its contracts. Furthermore, as was held in the leading case of *United States ex rel. Von Hoffman v. Quincy*,[2194] "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.[2195] Nor may a state by dividing an indebted municipality among others enable it to escape its obligations. The debt follows the territory and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.[2196] But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government's function is exercised once more by the state directly, the Court has thus far found itself powerless to frustrate a program of repu-

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[2193] Antoni v. Greenhow, 107 U.S. 769, 775 (1883). Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830); Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831); Crawford v. Branch Bank of Mobile, 48 U.S. (7 How.) 279 (1849); Curtis v. Whitney, 80 U.S. (13 Wall.) 68 (1872); Railroad Co. v. Hecht, 95 U.S. 168 (1877); Terry v. Anderson, 95 U.S. 628 (1877); Tennessee v. Sneed, 96 U.S. 69 (1877); South Carolina v. Gaillard, 101 U.S. 433 (1880); Louisiana v. New Orleans, 102 U.S. 203 (1880); Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51 (1883); Vance v. Vance, 108 U.S. 514 (1883); Gilfillan v. Union Canal Co., 109 U.S. 401 (1883); Hill v. Merchant's Ins. Co., 134 U.S. 515 (1890); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895); Red River Valley Bank v. Craig, 181 U.S. 548 (1901); Wilson v. Standefer, 184 U.S. 399 (1902); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903); Waggoner v. Flack, 188 U.S. 595 (1903); Bernheimer v. Converse, 206 U.S. 516 (1907); Henley v. Myers, 215 U.S. 373 (1910); Selig v. Hamilton, 234 U.S. 652 (1914); Security Bank v. California, 263 U.S. 282 (1923); United States Mortgage Co. v. Matthews, 293 U.S. 232 (1934); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

Compare the following cases, where changes in remedies were deemed to be of such character as to interfere with substantial rights: Wilmington & Weldon R.R. v. King, 91 U.S. 3 (1875); Memphis v. United States, 97 U.S. 293 (1878); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270, 298, 299 (1885); Effinger v. Kenney, 115 U.S. 566 (1885); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Bradley v. Lightcap, 195 U.S. 1 (1904); Bank of Minden v. Clement, 256 U.S. 126 (1921).

[2194] 71 U.S. (4 Wall.) 535, 554–55 (1867).

[2195] *See also* Nelson v. St. Martin's Parish, 111 U.S. 716 (1884).

[2196] Mobile v. Watson, 116 U.S. 289 (1886); Graham v. Folsom, 200 U.S. 248 (1906).

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diation.[2197] However, there is no reason why the state should enact the role of *particeps criminis* in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus, in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors, the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is "the effectiveness of the city's taxing power," which the legislation under review was designed to conserve.[2198]

Private Contracts and the Police Power.—The increasing subjection of public grants to the police power of the states has been previously pointed out. That purely private contracts should be in any stronger situation in this respect obviously would be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy device of contracting with one another is, with an exception to be noted, even less than that of the state to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case that an act prohibiting the issuance of notes by unincorporated banking associations violated the Contract Clause because of its effect upon certain existing contracts of members of such association, the state Supreme Court answered: "But it is said, that the members had formed a contract between themselves, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these

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[2197] Heine v. Levee Commissioners, 86 U.S. (19 Wall.) 655 (1874). *Cf.* Virginia v. West Virginia, 246 U.S. 565 (1918).

[2198] Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: "For there is no remedy when resort is had to 'devices and contrivances' to nullify the taxing power which can be carried out only through authorized officials. See Rees v. City of Watertown, 19 Wall. [86 U.S.] 107, 124 [1874]. And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (see Raymond, State and Municipal Bonds, 342–343), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost v. Dallas County, 236 U.S. 50, 57 [1915]." Id. at 511.

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practices. . . .” Would the legislature then be powerless to prohibit them? The answer returned, of course, was no.[2199]

The prevailing doctrine was stated by the U.S. Supreme Court: “It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . . In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.” [2200]

So, in an early case, we find a state recording act upheld as applying to deeds dated before the passage of the act.[2201] Later cases have brought the police power in its more customary phases into contact with private as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business; [2202] contracts for the sale of beer, valid when entered into, were similarly nullified by a state prohibition law; [2203] and contracts of employment were modified by later laws regarding the liability of employers and workmen’s compensation.[2204] Likewise, a contract between plaintiff and defendant did not prevent the state from making the latter a concession that rendered the contract worthless; [2205] nor did a contract as to rates between two railway companies prevent the state from imposing different rates; [2206] nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the state.[2207] Similarly, a contract for the conveyance of water beyond the limits of a state did not prevent the state from prohibiting such conveyance.[2208]

But the most striking exertions of the police power touching private contracts, as well as other private interests within recent years,

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[2199] Myers v. Irwin, 2 S. & R. (Pa.) 367, 372 (1816); *see*, to the same effect, Lindenmuller v. The People, 33 Barb. (N.Y.) 548 (1861); Brown v. Penobscot Bank, 8 Mass. 445 (1812).

[2200] Manigault v. Springs, 199 U.S. 473, 480 (1905).

[2201] Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830). *See also* Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850).

[2202] Stone v. Mississippi, 101 U.S. 814 (1880).

[2203] Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

[2204] New York Cent. R.R. v. White, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.

[2205] Manigault v. Springs, 199 U.S. 473 (1905).

[2206] Portland Ry. v. Oregon R.R. Comm’n, 229 U.S. 397 (1913).

[2207] Midland Co. v. Kansas City Power Co., 300 U.S. 109 (1937).

[2208] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

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have been evoked by war and economic depression. Thus, in World War I, the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties, of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation on the basis of the Contract Clause, the Court said: "But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be."[2209] In a subsequent case, however, the Court added that, although the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change," and whether they have changed was always open to judicial inquiry.[2210]

Summing up the result of the cases referred to above, Chief Justice Hughes, speaking for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[2211] remarked in 1934: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. . . . The principle of this development is . . . that the reser-

[2209] Marcus Brown Co. v. Feldman, 256 U.S. 170, 198 (1921), followed in Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

[2210] Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924).

[2211] 290 U.S. 398 (1934).

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vation of the reasonable exercise of the protective power of the States is read into all contracts . . . ."[2212]

Evaluation of the Clause Today.—It should not be inferred that the Contract Clause is today totally moribund. Even prior to the most recent decisions, it still furnished the basis for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a state legislature of its police power, and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The Court's attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like, has always been that they may not be given retroactive operation,[2213] and the general lesson of these earlier cases is confirmed by the Court's decisions between 1934 and 1945 in certain cases involving state moratorium statutes. In *Home Building & Loan Ass'n v. Blaisdell*,[2214] the leading case, a closely divided Court sustained the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State's police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935.

The act also left the mortgagor in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts that were not as considerate of creditor's rights, were set aside as violating the Contract Clause.[2215] "A State is free to regulate the procedure in its courts even with reference to contracts al-

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[2212] 290 U.S. at 442, 444. *See also* Veix v. Sixth Ward Ass'n, 310 U.S. 32 (1940), in which was sustained a New Jersey statute amending in view of the Depression the law governing building and loan associations. The authority of the state to safeguard the vital interests of the people, said Justice Reed, "extends to economic needs as well." Id. at 39. In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531–32 (1949), the Court dismissed out-of-hand a suggestion that a state law outlawing union security agreements was an invalid impairment of existing contracts, citing *Blaisdell* and *Veix*.

[2213] *See* Edwards v. Kearzey, 96 U.S. 595 (1878); Barnitz v. Beverly, 163 U.S. 118 (1896).

[2214] 290 U.S. 398 (1934).

[2215] W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

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ready made," said Justice Cardozo for the Court, "and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. . . . What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." [2216] On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court found reason to believe that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." [2217]

In the meantime, the Court had sustained New York State legislation under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.[2218] "Mortgagees," the Court said, "are constitutionally entitled to no more than payment in full. . . . To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. . . . The contract clause does not protect such a strategical, procedural advantage." [2219]

More important, the Court has been at pains most recently to reassert the vitality of the clause, although one may wonder whether application of the clause will be more than episodic.

"[T]he Contract Clause remains a part of our written Constitution." [2220] So saying, the Court struck down state legislation in two

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[2216] 295 U.S. at 62.

[2217] East New York Bank v. Hahn, 326 U.S. 230, 235 (1945), quoting New York Legislative Document (1942), No. 45, p. 25.

[2218] Honeyman v. Jacobs, 306 U.S. 539 (1939). *See also* Gelfert v. National City Bank, 313 U.S. 221 (1941).

[2219] 313 U.S. at 233–34.

[2220] United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977). "It is not a dead letter." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Jus-

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instances, one law involving the government's own contractual obligation and the other affecting private contracts.[2221] A finding that a contract has been "impaired" in some way is merely the preliminary step in evaluating the validity of the state action.[2222] But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a "narrow class."[2223]

The approach in any event is one of balancing. "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[2224] Having determined that a severe impairment had resulted in both cases,[2225] the Court moved on to assess the justification for the state action.

In *United States Trust*, the Court ruled that an impairment would be upheld only if it were "necessary" and "reasonable" to serve an important public purpose. But the two terms were given restrictive meanings. Necessity is shown only when the state's objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test.[2226]

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tices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in *United States Trust* while Justice Stewart wrote the opinion in *Spannaus* and Justice Powell joined it.

[2221] *United States Trust* involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority's ability to subsidize rail passenger transportation. *Spannaus* involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in the state, a law that greatly altered the company's liabilities under its contractual pension plan.

[2222] 431 U.S. at 21; 438 U.S. at 244.

[2223] 431 U.S. at 22–26; 438 U.S. at 248.

[2224] 438 U.S. at 245.

[2225] 431 U.S. at 17–21 (the Court was unsure of the value of the interest impaired but deemed it "an important security provision"); 438 U.S. 244–47 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).

[2226] 431 U.S. at 25–32 (state could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id. at 30 n.28,

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In *Spannaus*, the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found that the challenged law did not possess any of these attributes and thus struck it down.[2227]

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[2228]

Clause 2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

DUTIES ON EXPORTS OR IMPORTS

Scope

Only articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation," are comprehended by the terms "imports" and "exports."[2229] With respect to

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and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and state could not claim that unforeseen circumstances had arisen.)

[2227] 438 U.S. at 244–51. *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (emphasizing the first but relying on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax).

[2228] 438 U.S. at 242 (emphasis by Court).

[2229] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673 (1945). Goods brought from another State are not within the clause. Woodruff v. Parham, 75 U.S. (8 Wall.) 123

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exports, the exemption from taxation "attaches to the export and not to the article before its exportation,"[2230] requiring an essentially factual inquiry into whether there have been acts of movement toward a final destination constituting sufficient entrance into the export stream as to invoke the protection of the clause.[2231] To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of *Brown v. Maryland*. "When the importer has so acted upon the thing imported," wrote Chief Justice Marshall, "that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution."[2232] A box, case, or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each loses its character as an import and becomes subject to taxation as a part of the general mass of property in the state.[2233] Imports for manufacture cease to be such when the intended processing takes place,[2234] or when the original packages are broken.[2235] Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs.[2236] The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country.[2237] A state franchise tax measured by properly apportioned gross re-

(1869). Justice Thomas has called recently for reconsideration of *Woodruff* and the possible application of the clause to interstate imports and exports. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609, 621 (1997) (dissenting).

[2230] Cornell v. Coyne, 192 U.S. 418, 427 (1904).

[2231] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); Empress Siderurgica v. County of Merced, 337 U.S. 154 (1947); Kosydar v. National Cash Register Co., 417 U.S. 62 (1974).

[2232] 25 U.S. (12 Wheat.) 419, 441–42 (1827).

[2233] May v. New Orleans, 178 U.S. 496, 502 (1900).

[2234] 178 U.S. at 501; Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928); McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).

[2235] Low v. Austin, 80 U.S. (13 Wall.) 29 (1872); May v. New Orleans, 178 U.S. 496 (1900).

[2236] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 667 (1945). *But see* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) (overruling the earlier decision).

[2237] 324 U.S. at 664.

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ceipts may be imposed upon a railroad company in respect of the company's receipts for services in handling imports and exports at its marine terminal.[2238]

Privilege Taxes

A state law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is unconstitutional.[2239] Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages,[2240] a tax on sales by brokers[2241] and auctioneers[2242] of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales,[2243] have been held invalid. On the other hand, pilotage fees,[2244] a tax upon the gross sales of a purchaser from the importer,[2245] a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports,[2246] an annual license fee imposed on persons engaged in buying and selling foreign bills of exchange,[2247] and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person[2248] have been held not to be duties on imports or exports.

Property Taxes

Overruling a line of prior decisions that it thought misinterpreted the language of *Brown v. Maryland*, the Court now holds that the clause does not prevent a state from levying a nondiscriminatory, *ad valorem* property tax upon goods that are no longer in import transit.[2249] Thus, a company's inventory of imported tires main-

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[2238] Canton R.R. v. Regan, 340 U.S. 511 (1951).

[2239] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447 (1827).

[2240] Anglo-Chilean Corp. v. Alabama, 288 U.S. 218 (1933).

[2241] Low v. Austin, 80 U.S. (13 Wall.) 29, 33 (1872).

[2242] Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).

[2243] Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).

[2244] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 313 (1851).

[2245] Waring v. The Mayor, 75 U.S. (8 Wall.) 110, 122 (1869). *See also* Pervear v. Massachusetts. 72 U.S. (5 Wall.) 475, 478 (1867); Schollenberger v. Pennsylvania, 171 U.S. 1, 24 (1898).

[2246] Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

[2247] Nathan v. Louisiana, 49 U.S. (8 How.) 73, 81 (1850).

[2248] Mager v. Grima, 49 U.S. (8 How.) 490 (1850).

[2249] Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), overruling Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), expressly, and, necessarily, Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), among others. The latter case was expressly overruled in Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984), involving the same tax and the same parties. In Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), property taxes were sustained on the basis that the materials taxed had lost their character as imports. On exports, *see* Selliger v. Kentucky, 213 U.S. 200 (1909)

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tained at its whole distribution warehouse could be included in the state's tax upon the entire inventory. The clause does not prohibit every "tax" with some impact upon imports or exports but reaches rather exactions directed only at imports or exports or commercial activity therein as such.[2250]

Inspection Laws

Inspection laws "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption."[2251] In *Turner v. Maryland*,[2252] the Court listed as recognized elements of inspection laws, the "quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds . . . "[2253] It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the state and intended for export, which the law required to be brought to a state warehouse to be inspected and branded. The Court has cited this section as a recognition of a general right of the states to pass inspection laws, and to bring within their reach articles of interstate, as well as of foreign, commerce.[2254] But on the ground that, "it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse," it held that a state law forbidding the importation of intoxicating liquors into the state could not be sustained as an inspection law.[2255]

(property tax levied on warehouse receipts for whiskey exported to Germany invalid). *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76–78 (1993), *and see* id. at 81–82 (Justice Scalia concurring).

[2250] Michelin Tire Corp. v. Wages, 423 U.S. 276, 290–94 (1976). *Accord*, R. J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) (tax on imported tobacco stored for aging in customs-bonded warehouse and destined for domestic manufacture and sale); *but cf.* Xerox Corp. v. County of Harris, 459 U.S. 145, 154 (1982) (similar tax on goods stored in customs-bonded warehouse is preempted "by Congress's comprehensive regulation of customs duties;" case, however, dealt with goods stored for export).

[2251] Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 488 (1888).

[2252] 107 U.S. 38 (1883).

[2253] 107 U.S. at 55.

[2254] Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 361 (1898).

[2255] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888). The Twenty-first Amendment has had no effect on this principle. Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

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Clause 3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

TONNAGE DUTIES

The purpose of the Tonnage Clause is "to 'restrai[n] the states themselves from the exercise' of the taxing power 'injuriously to the interests of each other.' . . . In writing the Tonnage Clause, the Framers recognized that, if 'the states had been left free to tax the privilege of access by vessels to their harbors the prohibition [in Article I, § 10, clause 2] against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.'"[2256] The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, that, in effect, are charges for the privilege of entering, trading in, or lying in a port.[2257] The Tonnage Clause, however, does not ban all "taxes which fall on vessels that use a State's port, harbor, or other waterways. Such a radical proposition would transform the Tonnage Clause from one that protects vessels, and their owners, from discrimination by seaboard States, to one that gives vessels preferential treatment vis-à-vis all other property, and its owners, in a seaboard State."[2258] But it does not extend to charges made by state authority, even if graduated according to tonnage,[2259] for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage.[2260]

For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the state, a municipal corpora-

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[2256] Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310, slip op. at 3, 4 (2009).

[2257] Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265 (1935); Cannon v. City of New Orleans, 87 U.S. (20 Wall.) 577, 581 (1874); Transportation Co. v. Wheeling, 99 U.S. 273, 283 (1879); Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310 (2009).

[2258] Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310, slip op. at 6 (2009) (citation omitted).

[2259] Packet Co. v. Keokuk, 95 U.S. 80 (1877); Transportation Co. v. Parkersburg, 107 U.S. 691 (1883); Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887).

[2260] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872); Inman Steamship Co. v. Tinker, 94 U.S. 238, 243 (1877); Packet Co. v. St. Louis, 100 U.S. 423 (1880); City of Vicksburg v. Tobin, 100 U.S. 430 (1880); Packet Co. v. Catlettsburg, 105 U.S. 559 (1882).

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tion, or an individual. Where the wharf was owned by a city, the fact that the city realized a profit beyond the amount expended did not render the toll objectionable.[2261] The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void.[2262] A state may not levy a tonnage duty to defray the expenses of its quarantine system,[2263] but it may exact a fixed fee for examination of all vessels passing quarantine.[2264] A state license fee for ferrying on a navigable river is not a tonnage tax but rather is a proper exercise of the police power and the fact that a vessel is enrolled under federal law does not exempt it.[2265] In the *State Tonnage Tax Cases*,[2266] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

KEEPING TROOPS

This provision contemplates the use of the state's military power to put down an armed insurrection too strong to be controlled by civil authority,[2267] and the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[2268]

INTERSTATE COMPACTS

Background of Clause

Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the states to make compacts with each other was not surrendered under the Constitution.[2269] "The Compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."[2270] In American history, the compact technique can be traced back to the numerous controversies that arose over the ill-defined boundaries of the original colonies.

[2261] Huse v. Glover, 119 U.S. 543, 549 (1886).

[2262] Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867).

[2263] Peete v. Morgan, 86 U.S. (19 Wall.) 581 (1874).

[2264] Morgan v. Louisiana, 118 U.S. 455, 462 (1886).

[2265] Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326, 338 (1887); Osborne v. City of Mobile, 83 U.S. (16 Wall.) 479, 481 (1873).

[2266] 79 U.S. (12 Wall.) 204, 217 (1871).

[2267] Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

[2268] Presser v. Illinois, 116 U.S. 252 (1886).

[2269] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837).

[2270] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938).

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These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[2271] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more states over boundaries or "any cause whatever"[2272] and required the approval of Congress for any "treaty confederation or alliance" to which a state should be a party.[2273]

The Framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation," and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in *Holmes v. Jennison*:[2274] "[A]s these words ['agreement' and 'compact'] could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal[,] positive or implied, by the mutual understanding of the parties."[2275] But, in *Virginia v. Tennessee*,[2276] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between states without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contracting states or to encroach upon the just supremacy of the United States. Adhering to this later understand-

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[2271] Frankfurter and Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 Yale L.J. 685, 691 (1925).

[2272] Article IX.

[2273] Article VI.

[2274] 39 U.S. (14 Pet.) 540 (1840).

[2275] 39 U.S. at 571, 572.

[2276] 148 U.S. 503, 518 (1893). *See also* Stearns v. Minnesota, 179 U.S. 223, 244 (1900).

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ing of the clause, the Court found no enhancement of state power in relation to the Federal Government through entry into the Multistate Tax Compact, and thus sustained the agreement among participating states without congressional consent.[2277]

Subject Matter of Interstate Compacts

For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the states. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for state cooperation in carrying out affirmative programs for solving common problems.[2278] The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means. Another important use of this device was recognized by Congress in the act of June 6, 1934,[2279] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which most of the states have given adherence.[2280] Subsequently, Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, many states have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, and the framing of uniform state legislation for dealing with some of these.[2281]

Consent of Congress

The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form

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[2277] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). *See also* New Hampshire v. Maine, 426 U.S. 363 (1976).

[2278] Frankfurter and Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925); F. Zimmerman and M. Wendell, Interstate Compacts Since 1925 (1951); F. Zimmerman and M. Wendell, The Law and Use of Interstate Compacts (1961).

[2279] 48 Stat. 909 (1934).

[2280] F. Zimmerman and M. Wendell, Interstate Compacts Since 1925 91 (1951).

[2281] 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. § 552; 33 U.S.C. §§ 11, 567–567b.

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by which it shall be signified.[2282] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[2283] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[2284] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[2285] The consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations."[2286] Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[2287]

Grants of Franchise to Corporations by Two States

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state that created it, to accept authority from another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between states.[2288]

Legal Effect of Interstate Compacts

Whenever, by the agreement of the states concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory states and are conclusive as to their rights.[2289] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judi-

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[2282] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85 (1823).

[2283] Virginia v. Tennessee, 148 U.S. 503 (1893).

[2284] Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1871).

[2285] Wharton v. Wise, 153 U.S. 155, 173 (1894).

[2286] James v. Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona v. California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact, 67 Stat. 541, Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating states. DeVeau v. Braisted, 363 U.S. 144, 145 (1960).

[2287] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856).

[2288] St. Louis & S.F. Ry. v. James, 161 U.S. 545, 562 (1896).

[2289] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838).

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cial determination of existing rights.[2290] Valid interstate compacts are within the protection of the Contract Clause,[2291] and a "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[2292] The Supreme Court in the exercise of its original jurisdiction may enforce interstate compacts following principles of general contract law.[2293] Congress also has authority to compel compliance with such compacts.[2294] Nor may a state read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the state's constitution as interpreted by the highest state court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the state constitution in such a case rests with the Supreme Court.[2295]

[2290] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104, 106 (1938).

[2291] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 13 (1823); Virginia v. West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1852); Olin v. Kitzmiller, 259 U.S. 260 (1922).

[2292] Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[2293] Texas v. New Mexico, 482 U.S. 124 (1987). If the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to apportion waters of interstate streams. In doing so, however, the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy. Texas v. New Mexico, 462 U.S. 554 (1983).

[2294] Virginia v. West Virginia, 246 U.S. 565, 601 (1918).

[2295] Dyer v. Sims, 341 U.S. 22 (1951).

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