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ARTICLE III

JUDICIAL DEPARTMENT

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ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES

The Constitution is almost completely silent concerning the organization of the federal judiciary. "That there should be a national judiciary was readily accepted by all."[1] But whether it was to consist of one high court at the apex of a federal judicial system or a high court exercising appellate jurisdiction over state courts that would initially hear all but a minor fraction of cases raising national issues was a matter of considerable controversy.[2] The Virginia Plan provided for a "National judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . ."[3] In the Committee of the Whole, the proposition "that a national judiciary be established" was unanimously adopted,[4] but the clause "to consist of One supreme tribunal, and of one or more inferior tribunals"[5] was first agreed to, then reconsidered. The provision for inferior tribunals was ultimately stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity.[6] Wil-

[1] M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79 (1913).

[2] The most complete account of the Convention's consideration of the judiciary is J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 1 ch. 5 (1971).

[3] 1 M. Farrand, supra at 21–22. It is possible that this version may not be an accurate copy, *see* 3 id. at 593–94.

[4] 1 id. at 95, 104.

[5] Id. at 95, 105. The words "One or more" were deleted the following day without recorded debate. Id. at 116, 119.

[6] Id. at 124–25.

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son and Madison thereupon moved to authorize Congress "to appoint inferior tribunals,"[7] which carried the implication that Congress could in its discretion either designate the state courts to hear federal cases or create federal courts. The word "appoint" was then adopted, but over the course of the Convention the phrasing was changed again so as to suggest somewhat more of an obligation to vest such powers in inferior federal courts.[8]

The requirement that judges hold their Officer during "good behavior" excited no controversy during the Convention,[9] although the lack of an enforcement mechanism for this provision resulted in impeachment under Article II becoming the primary mechanism for removal of a federal judge.[10] And finally, the only substantial dispute that arose regarding the denial to Congress of the power to reduce judicial salaries (a power which could be used to intimidate judges) came on Madison's motion to bar increases as well as decreases.[11]

One Supreme Court

While the Convention specified that the Chief Justice of the Supreme Court would preside over any Presidential impeachment trial in the Senate,[12] decisions on the size and composition of the Supreme Court, the time and place for sitting, its internal organization, and other matters were left to the Congress. The Congress soon provided these details in the Judiciary Act of 1789, one of the seminal statutes of the United States.[13] Originally, the Court consisted

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[7] Madison's notes use the word "institute" in place of "appoint," id. at 125, but the latter appears in the Convention Journal, id. at 118, and in Yates' notes, id. at 127, and when the Convention took up the draft reported by the Committee of the Whole "appoint" is used even in Madison's notes. 2 id. at 38, 45.

[8] On offering their motion, Wilson and Madison "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." 1 id. at 125. The Committee on Detail provided for the vesting of judicial power in one Supreme Court "and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States." 2 id. at 186. Its draft also authorized Congress "[t]o constitute tribunals inferior to the Supreme Court." Id. at 182. No debate is recorded when the Convention approved these two clauses, Id. at 315, 422–23, 428–30. The Committee on Style left the clause empowering Congress to "constitute" inferior tribunals as was, but it deleted "as shall, when necessary" from the Judiciary article, so that the judicial power was vested "in such inferior courts as Congress may from time to time"—and here deleted "constitute" and substituted the more forceful—"ordain and establish." Id. at 600.

[9] The provision was in the Virginia Plan and was approved throughout, 1 id. at 21.

[10] *See* Article II, Judges, *supra*.

[11] Id. at 121; 2 id. at 44–45, 429–430.

[12] Article I, § 3, cl. 6.

[13] Act of September 24, 1789, 1 Stat. 73. The authoritative works on the Act and its working and amendments are Felix Frankfurter & James Landis, The Busi-

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of a Chief Justice and five Associate Justices.[14] The number was gradually increased until it reached a total of ten under the act of March 3, 1863.[15] As one of the Reconstruction Congress's restrictions on President Andrew Johnson, the number was reduced to seven as vacancies should occur.[16] The number actually never fell below eight before the end of Johnson's term, and Congress thereupon made the number nine.[17]

Proposals have been made at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, but Chief Justice Hughes, in a letter to Senator Wheeler in 1937, expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts."[18] Congress has also determined the time and place of sessions of the Court. It exercised this power once to change the Court's term to forestall a constitutional attack on the repeal of the Judiciary Act of 1801, with the result that the Court did not convene for fourteen months.[19]

Inferior Courts

Congress also provided in the Judiciary Act of 1789 for the creation of courts inferior to the Supreme Court. Thirteen district courts were constituted to have four sessions annually,[20] and three circuit courts were established. The circuit courts were to consist of two Supreme Court justices each and one of the district judges of such districts, and were to meet twice annually in the various districts comprising the circuit.[21] This system had substantial faults in operation, not the least of which was the burden imposed on the Justices, who were required to travel thousands of miles each year under bad conditions.[22] Despite numerous efforts to change this system,

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NESS OF THE SUPREME COURT (1928); Charles Warren, *New Light on the History of the Federal Judicial Act of 1789*, 37 HARV. L. REV. 49 (1923); *see also* J. Goebel, supra at ch. 11.

[14] Act of September 24, 1789, 1 Stat. 73, § 1.

[15] 12 Stat. 794, § 1.

[16] Act of July 23, 1866, 14 Stat. 209, § 1.

[17] Act of April 10, 1869, 16 Stat. 44.

[18] *Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491. For earlier proposals to have the Court sit in divisions, *see* F. Frankfurter & J. Landis, supra at 74–85.

[19] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222–224 (rev. ed. 1926).

[20] Act of September 24, 1789, 1 Stat. 73, §§ 2–3.

[21] Id. at 74, §§ 4–5

[22] *Cf.*Frankfurter & Landis, supra at chs. 1–3; J. Goebel, supra at 554–560, 565–569. Upon receipt of a letter from President Washington soliciting suggestions regarding the judicial system, WRITINGS OF GEORGE WASHINGTON, (J. Fitzpatrick ed., 1943),

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it persisted, except for one brief period, until 1891.[23] Since then, the federal judicial system has consisted of district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

Abolition of Courts.—That Congress "may from time to time ordain and establish" inferior courts would seem to imply that the system may be reoriented from time to time and that Congress is not restricted to the *status quo* but may expand and contract the units of the system. But if the judges are to have life tenure, what is to be done with them when the system is contracted? Unfortunately, the first exercise of the power occurred in a highly politicized situation, and no definite answer emerged. By the Judiciary Act of February 13, 1801,[24] passed in the closing weeks of the Adams Administration, the districts were reorganized, and six circuit courts consisting of three circuit judges each were created. Although Adams appointed deserving Federalists to these so-called "midnight judge" positions just before the change in administration, the Jeffersonians soon set in motion plans to repeal the Act, which were carried out.[25] No provision was made for the displaced judges, however, apparently under the theory that if there were no courts there could be no judges to sit on them.[26] The validity of the repeal was questioned on related grounds in *Stuart v. Laird*,[27] but Justice Paterson rejected the challenge without directly addressing the issue of the displaced judges.

Not until 1913 did Congress again exercise its power to abolish a federal court, this time the unfortunate Commerce Court, which

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31, Chief Justice Jay prepared a letter for the approval of the other Justices, declining to comment on the policy questions but raising several issues of constitutionality, that the same man should not be appointed to two offices, that the offices were incompatible, and that the act invaded the prerogatives of the President and Senate. 2 G. McRee, Life and Correspondence of James Iredell 293–296 (1858). The letter was apparently never forwarded to the President. Writings of Washington, supra at 31–32 n.58. When the constitutional issue was raised in Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803), it was passed over with the observation that the practice was too established to be questioned.

[23] Act of March 3, 1891, 26 Stat. 826. The temporary relief came in the Act of February 13, 1801, 2 Stat. 89, which was repealed by the Act of March 8, 1802, 2 Stat. 132.

[24] Act of February 13, 1801, 2 Stat. 89.

[25] Act of March 8, 1802, 2 Stat. 132. Frankfurter & Landis, supra at 25–32; 1 C. Warren, supra at 185–215.

[26] This was the theory of John Taylor of Caroline, upon whom the Jeffersonians in Congress relied. W. Carpenter, Judicial Tenure in the United States 63–64 (1918). The controversy is recounted fully in id. at 58–78.

[27] 5 U.S. (1 Cr.) 299 (1803) (sustaining both the transfer of suits between circuits and the sitting of Supreme Court Justices on circuit courts without confirmation to those courts).

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had disappointed the expectations of most of its friends.[28] But this time Congress provided for the redistribution of the Commerce Court judges among the circuit courts as well as a transfer of its jurisdiction to the district courts.

Compensation

Diminution of Salaries.—"The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."[29] Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness Congress may repeal a promised increase. This latter holding was rendered in the context of a statutory salary plan for all federal officers and employees under which increases went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of this clause.[30]

Also implicating this clause was a Depression-era appropriations act reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)," by a fixed amount. Although this provision presented no constitutional questions, it required an interpretation as to which judges were excepted. Judges in the District of Columbia were held protected by Article III,[31] but the salaries of the judges of the Court of Claims, a legislative court, were held subject to the reduction.[32]

In *Evans v. Gore*,[33] the Court invalidated the application of a 1919 income tax law to a sitting federal judge, over the strong dis-

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[28] The Court was created by the Act of June 18, 1910, 36 Stat. 539, and repealed by the Act of October 22, 1913, 38 Stat. 208, 219. *See* Frankfurter & Landis, supra at 153–174; W. Carpenter, supra at 78–94.

[29] United States v. Will, 449 U.S. 200, 217–18 (1980). Hamilton, writing in THE FEDERALIST, No. 79 (J. Cooke ed., 1961), 531, emphasized that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."

[30] United States v. Will, 449 U.S. 200, 224–30 (1980). In one year, the increase took effect on October 1, although the President signed the bill reducing the amount during the day of October 1. The Court held that the increase had gone into effect by the time the reduction was signed. *Will* is also authority for the proposition that a general, nondiscriminatory reduction, affecting judges but not aimed solely at them, is covered by the clause. Id. at 226.

[31] O'Donoghue v. United States, 289 U.S. 516 (1933).

[32] Williams v. United States, 289 U.S. 553 (1933). *But see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[33] 253 U.S. 245 (1920).

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sent of Justice Holmes, joined by Justice Brandeis. This ruling was extended in *Miles v. Graham*[34] to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. *Evans v. Gore* was disapproved and *Miles v. Graham* was in effect overruled in *O'Malley v. Woodrough*,[35] where the Court upheld section 22 of the Revenue Act of 1932, which extended the application of the income tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.[36] To subject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court, "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[37]

Formally overruling *Evans v. Gore*, the Court in *United States v. Hatter* reaffirmed the principle that judges should "share the tax burdens borne by all citizens."[38] "[T]he potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax."[39] The Medicare tax, extended to all federal employees in 1982, is such a non-discriminatory tax that may be applied to federal judges, the Court held. The 1983 extension of a Social Security tax to then-sitting judges was "a different matter," however, because the judges were required to participate while almost all other federal employees were given a choice about participation.[40] Congress had not cured the constitutional violation by a subsequent enactment that raised judges' salaries by an amount greater than the amount of Social Security taxes that they were required to pay.[41]

Courts of Specialized Jurisdiction

By virtue of its power "to ordain and establish" courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction. These tribunals are like other Article III courts in that they exercise "the judicial power of the United States," and only that power, that their judges must be appointed by the Presi-

[34] 268 U.S. 501 (1925).
[35] 307 U.S. 277 (1939).
[36] 307 U.S. at 278–82.
[37] 307 U.S. at 282.
[38] 532 U.S. 557, 571 (2001).
[39] 532 U.S. at 571.
[40] 532 U.S. at 572.
[41] 532 U.S. at 578–81.

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dent and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such a court was the Commerce Court created by the Mann-Elkins Act of 1910,[42] which was given exclusive jurisdiction to enforce, *inter alia*, orders of the Interstate Commerce Commission (except those involving money penalties and criminal punishment). This court actually functioned for less than three years, being abolished in 1913.

Another court of specialized jurisdiction, but created for a limited time only, was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942.[43] By the terms of the statute, this court consisted of three or more judges designated by the Chief Justice from the judges of the United States district courts and circuit courts of appeal. The Court was vested with jurisdiction and the powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator. The Court had exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding, but the court was tightly constrained in its treatment of regulations. There was interplay with the district courts, which were charged with authority to enforce orders issued under the Act, although only the Emergency Court had jurisdiction to determine the validity of such orders.[44]

Other specialized courts are the Court of Appeals for the Federal Circuit, which is in many respects like the geographic circuits. Created in 1982,[45] this court has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims, from the Federal Merit System Protection Board, the Court of International Trade,

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[42] Ch. 309, 36 Stat. 539.

[43] 56 Stat. 23, §§ 31–33.

[44] In Lockerty v. Phillips, 319 U.S. 182 (1943), the limitations on the use of injunctions, except the prohibition against interlocutory decrees, was unanimously sustained.

A similar court was created to be used in the enforcement of the economic controls imposed by President Nixon in 1971. Pub. L. 92–210, 85 Stat. 743, 211(b). Although controls ended in 1974, *see* 12 U.S.C. § 1904 note, Congress continued the Temporary Emergency Court of Appeals and gave it new jurisdiction. Emergency Petroleum Allocation Act of 1973, Pub. L. 93–159, 87 Stat. 633, 15 U.S.C. § 754, incorporating judicial review provisions of the Economic Stabilization Act. The Court was abolished, effective March 29, 1993, by Pub. L. 102–572, 106 Stat. 4506.

Another similar specialized court was created by § 209 of the Regional Rail Reorganization Act, Pub. L. 93–226, 87 Stat. 999, 45 U.S.C. § 719, to review the final system plan under the Act. Regional Rail Reorganization Act Cases (Blanchette v. Connecticut Gen. Ins. Corp.), 419 U.S. 102 (1974).

[45] By the Federal Courts Improvement Act of 1982, Pub. L. 97–164, 96 Stat. 37, 28 U.S.C. § 1295. Among other things, this Court assumed the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals.

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the Patent Office in patent and trademark cases, and in various contract and tort cases. One of those courts, the Court of International Trade, began life as the Board of General Appraisers, became the United States Customs Court in 1926, was declared an Article III court in 1956, and came to its present form and name in 1980.[46] Finally, the Judicial Panel on Multidistrict Litigation, staffed by federal judges from other courts, is authorized to transfer actions pending in different districts to a single district for trial.[47]

To facilitate the gathering of foreign intelligence information, through electronic surveillance, search and seizure, as well as other means, Congress in 1978 authorized a special court, composed of seven regular federal judges appointed by the Chief Justice, to receive applications from the United States and to issue warrants for intelligence activities.[48] Even greater specialization was provided by the special court created by the Ethics in Government Act;[49] the court was charged, upon the request of the Attorney General, with appointing an independent counsel to investigate and prosecute charges of illegality in the Executive Branch. The court also had certain supervisory powers over the independent counsel.

Legislative Courts

Legislative courts, so-called because they are created by Congress pursuant to its general legislative powers, have comprised a significant part of the federal judiciary.[50] The distinction between constitutional courts and legislative courts was first made in *American Ins. Co. v. Canter*,[51] which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Chief Justice Marshall wrote for the Court: "These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in

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[46] Pub. L. 96–417, 94 Stat. 1727.

[47] 28 U.S.C. § 1407.

[48] Pub. L. 95–511, 92 Stat. 1788, 50 U.S.C. § 1803.

[49] Ethics in Government Act, Title VI, Pub. L. 95–521, 92 Stat. 1867, as amended, 28 U.S.C. §§ 591–599. The court is a "Special Division" of the United States Court of Appeals for the District of Columbia; composed of three regular federal judges, only one of whom may be from the D. C. Circuit, who are designated by the Chief Justice. 28 U.S.C. § 49. The constitutionality of the Special Division was upheld in Morrison v. Olson, 487 U.S. 654, 670–85 (1988). Authority for the court expired in 1999 under a sunset provision. Pub. L. 103–270, § 2, 108 Stat. 732 (1994).

[50] In Freytag v. Commissioner, 501 U.S. 868 (1991), the Court held Article I courts to be "Courts of Law" for purposes of the appointments clause. Art. II, § 2, cl. 2. *See id.* at 888–892 (majority opinion), and 901–914 (Justice Scalia dissenting).

[51] 26 U.S. (1 Pet.) 511 (1828).

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virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States."[52] The Court went on to hold that admiralty jurisdiction can be exercised in the states only in those courts that are established pursuant to Article III, but that the same limitation does not apply to the territorial courts, for in legislating for them "Congress exercises the combined powers of the general, and of a state government."[53]

Canter postulated a simple proposition: "Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot."[54] A two-fold difficulty attended this proposition, however. Admiralty jurisdiction is included within the "judicial power of the United States" specifically in Article III, requiring an explanation how this territorial court could receive and exercise it. Second, if territorial courts could not exercise Article III power, how might their decisions be subjected to appellate review in the Supreme Court, or indeed in other Article III courts, which could exercise only Article III judicial power?[55] Moreover, if in fact some "judicial power" may be devolved upon courts not having the constitutional security of tenure and salary, what prevents Congress from undermining those values intended to be protected by Article III's guarantees by giving jurisdiction to unprotected entities that, being subjected to influence, would be bent to the popular will?

Attempts to explain or to rationalize the predicament or to provide a principled limiting point have resulted from *Canter* to the present in "frequently arcane distinctions and confusing precedents" spelled out in cases comprising "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as Justice

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[52] 26 U.S. at 546.

[53] 26 U.S. at 546. In Glidden Co. v. Zdanok, 370 U.S. 530, 544–45 (1962), Justice Harlan asserted that Chief Justice Marshall in *Canter* "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. . . . All the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article. . . ."

[54] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (Justice White dissenting).

[55] That the Supreme Court could review the judgments of territorial courts was established in Durousseau v. United States, 10 U.S. (6 Cr.) 307 (1810). *See also* Benner v. Porter, 50 U.S. (9 How.) 235, 243 (1850); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872); Balzac v. Porto Rico, 258 U.S. 298 (1922).

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White apparently believes them to be."[56] Nonetheless, Article I courts are quite common entities in our judicial system.[57]

Power of Congress Over Legislative Courts.—In creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court; it may subject the judges of legislative courts to removal by the President;[58] and it may reduce their salaries during their terms.[59] Similarly, it follows that Congress can vest in legislative courts nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus, in *Gordon v. United States*,[60] there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise, in *United States v. Ferreira*,[61] the Court sustained the act conferring powers on the Florida territorial court to examine claims rising under the Spanish treaty and to report its decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. "A power of this description," the Court said, "may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."[62]

Review of Legislative Courts by Supreme Court.—Chief Justice Taney's view, which would have been expressed in *Gordon*,[63] that the judgments of legislative courts could never be reviewed by

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[56] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 91 (1982) (Justice Rehnquist concurring).

[57] In addition to the local courts of the District of Columbia, the bankruptcy courts, and the U.S. Court of Federal Claims, considered *infra*, these include the United States Tax Court, formerly an independent agency in the Treasury Department, but by the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U.S.C. § 7441, made an Article I court of record, the Court of Veterans Appeals, Act of Nov. 18, 1988, 102 Stat. 4105, 38 U.S.C. § 4051, and the courts of the territories of the United States. Magistrate judges are adjuncts of the District Courts, *see* infra, and perform a large number of functions, usually requiring the consent of the litigants. *See* Gomez v. United States, 490 U.S. 858 (1989); Peretz v. United States, 501 U.S. 923 (1991). The U.S. Court of Military Appeals, strictly speaking, is not part of the judiciary but is a military tribunal, 10 U.S.C. § 867, although Congress designated it an Article I tribunal and has given the Supreme Court *certiorari* jurisdiction over its decisions.

[58] McAllister v. United States, 141 U.S. 174 (1891).

[59] United States v. Fisher, 109 U.S. 143 (1883); Williams v. United States, 289 U.S. 553 (1933).

[60] 69 U.S. (2 Wall.) 561 (1864).

[61] 54 U.S. (13 How.) 40 (1852).

[62] 54 U.S. at 48.

[63] The opinion in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), had originally been prepared by Chief Justice Taney, but, following his death and reargu-

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the Supreme Court, was tacitly rejected in *De Groot v. United States*,[64] in which the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision in this case, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such a body.[65] But, in proceedings before a legislative court that are judicial in nature, admit of a final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court may be vested with appellate jurisdiction.[66]

The "Public Rights" Distinction.—A major delineation of the distinction between Article I courts and Article III courts appears in *Murray's Lessee v. Hoboken Land & Improvement Co.*[67] At issue was a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its own customs collectors. It was argued that the assessment and collection was a judicial act carried out by nonjudicial officers and was thus invalid under Article III. Accepting that the acts complained of were judicial, the Court nonetheless sustained the act by distinguishing between any act, "which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," which, in other words, is inherently judicial, and other acts that Congress may vest in courts or in other agencies. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[68]

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ment of the case, the Court issued the cited opinion. The Court later directed the publishing of Taney's original opinion at 117 U.S. 697. *See also* United States v. Jones, 119 U.S. 477, 478 (1886), in which the Court noted that the official report of Chief Justice Chase's *Gordon* opinion and the Court's own record showed differences and quoted the record.

[64] 72 U.S. (5 Wall.) 419 (1867). *See also* United States v. Jones, 119 U.S. 477 (1886).

[65] *E.g.*, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 576, 577–579 (1962).

[66] Pope v. United States, 323 U.S. 1, 14 (1944); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[67] 59 U.S. (18 How.) 272 (1856).

[68] 59 U.S. at 284.

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In essence, the Court distinguished between those acts that historically had been determined by courts and those that had both been historically resolved by executive or legislative acts and comprehended matters that arose between the government and others. Thus, Article I courts "may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control." [69] Among the matters susceptible of judicial determination, but not requiring it, are claims against the United States,[70] the disposal of public lands and claims arising therefrom,[71] questions concerning membership in the Indian tribes,[72] and questions arising out of the administration of the customs and internal revenue laws.[73] Other courts similar to territorial courts, such as consular courts and military courts martial, may be justified on like grounds.[74]

The impact of the "public rights" distinction, however, has varied dramatically over time. In *Crowell v. Benson*,[75] the Court approved an administrative scheme for determining, subject to judicial review, maritime employee compensation claims, although it acknowledged that the case involved "one of private right, that is, of the liability of one individual to another under the law as defined." [76] This scheme was permissible, the Court said, because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision on legal and constitutional questions, as long as there is adequate review in a constitutional court.[77] The "essential attributes" of decisions must remain in an Article III court, but so long as it does, Congress may use administrative decisionmakers in those private rights cases that arise in the context of a comprehensive federal

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[69] *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929).

[70] Gordon v. United States, 117 U.S. 697 (1864) (published 1885); McElrath v. United States, 102 U.S. 426 (1880); Williams v. United States, 289 U.S. 553 (1933). On the status of the then-existing Court of Claims, *see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[71] United States v. Coe, 155 U.S. 76 (1894) (Court of Private Land Claims).

[72] Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (Choctaw and Chickasaw Citizenship Court).

[73] Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

[74] *See In re* Ross, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858).

[75] 285 U.S. 22 (1932).

[76] 285 U.S. at 51. On the constitutional problems of assignment to an administrative agency, *see* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

[77] 301 U.S. at 51–65.

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statutory scheme.[78] In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, discussed *infra*, the Court reasserted that the distinction between "public rights" and "private rights" was still important in determining which matters could be assigned to legislative courts and administrative agencies and those that could not be, but there was much the Court plurality did not explain.[79]

The Court continued to waver with respect to the importance of the public rights/private rights distinction. In two cases following *Marathon*, it rejected the distinction as "a bright line test," and instead focused on "substance"—*i.e.*, on the extent to which the particular grant of jurisdiction to an Article I court threatened judicial integrity and separation of powers principles.[80] Nonetheless, the Court indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to a "searching" inquiry as to whether Congress is encroaching inordinately on judicial functions, whereas the concern is not so great where "public" rights are involved.[81]

However, in a subsequent case, *Granfinanciera, S.A. v. Nordberg*, the distinction was pronounced determinative not only of the issue whether a matter could be referred to a non-Article III tribunal, but whether Congress could dispense with civil jury trials.[82] In so

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[78] 301 U.S. at 50, 51, 58–63. Thus, Article III concerns were satisfied by a review of the agency fact finding upon the administrative record. Id. at 63–65. The plurality opinion denied the validity of this approach in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982), although Justice White in dissent accepted it. *Id.* at 115. The plurality, rather, rationalized *Crowell* and subsequent cases on an analysis seeking to ascertain whether agencies or Article I tribunals were "adjuncts" of Article III courts, that is, whether Article III courts were sufficiently in charge to protect constitutional values. Id. at 76–87.

[79] 458 U.S. 50, 67–70 (1982) (plurality opinion). Thus, Justice Brennan observes that "a matter of public rights must at a minimum arise 'between the government and others,'" but "that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *Id.* at 69 & n.23. Crowell v. Benson, however, remained an embarrassing presence.

[80] Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985); CFTC v. Schor, 478 U.S. 833 (1986). The cases also abandoned the principle that the Federal Government must be a party for the case to fall into the "public rights" category. *Thomas*, 473 U.S. at 586; *see also id.* at 596–99 (Justice Brennan concurring).

[81] "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 589 (1985) (quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion)).

[82] 492 U.S. 33, 51–55 (1989). A Seventh Amendment jury-trial case, the decision is critical to the Article III issue as well, because, as the Court makes clear what was implicit before, whether Congress can submit a legal issue to an Article I tribunal and whether it can dispense with a civil jury on that legal issue must be an-

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doing, however, the Court vitiated much of the core content of "private" rights as a concept and left resolution of the central issue to a balancing test. That is, "public" rights are, strictly speaking, those in which the cause of action inheres in or lies against the Federal Government in its sovereign capacity, the understanding since *Murray's Lessee*. However, to accommodate *Crowell v. Benson*, *Atlas Roofing*, and similar cases, seemingly private causes of action between private parties will also be deemed "public" rights when Congress, acting for a valid legislative purpose pursuant to its Article I powers, fashions a cause of action that is analogous to a common-law claim and integrates it so closely into a public regulatory scheme that it becomes a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[83]

In *Stern v. Marshall*,[84] the Court shifted away from the functionalism of previous cases and back towards the formalism of *Northern Pipeline*. Specifically, the *Stern* Court held that Article III prohibited a bankruptcy court from exercising jurisdiction over a common law claim concerning fraudulent interference with a gift because it did not fall under the public rights exception.[85] The Court limited the public rights exception to claims deriving from a "federal regulatory scheme" or claims in which "an expert Government agency is deemed essential to a limited regulatory objective."[86] In rejecting the application of the public rights exception to the fraudulent interference claim, the Court observed that the claim was not one that could be "pursued only by grace of the other branches" or could have been "determined exclusively" by the executive or legislative branches.[87] Additionally, the underlying claim did not "flow from a federal regulatory scheme" and was not limited to a "particularized area of law."[88] Because the claim involved the "most prototypical exercise of judicial power," adjudication of a common law cause of

swered by the same analysis. "[T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal . . . ." *Id.* at 52–53.

[83] 492 U.S. at 52–54. The Court reiterated that the government need not be a party as a prerequisite to a matter being of "public right." *Id.* at 54. Concurring, Justice Scalia argued that public rights historically were and should remain only those matters to which the Federal Government is a party. *Id.* at 65. *See also* Stern v. Marshall, 564 U.S. ___, No. 10–179, slip op. at 25 (2011) ("[W]hat makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action").

[84] *See* 564 U.S. 462 (2011).

[85] *Id.* at 487–88.

[86] *Id.* at 465.

[87] *Id.*

[88] *Id.*

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action not created by federal law, the Court rejected the bankruptcy courts' exercise of jurisdiction over the claim as violating Article III.[89]

Constitutional Status of the Court of Claims and the Courts of Customs and Patent Appeals.—Although the Supreme Court long accepted the Court of Claims as an Article III court,[90] it later ruled that court to be an Article I court and its judges without constitutional protection of tenure and salary.[91] Then, in the 1950s, Congress statutorily declared that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals were Article III courts,[92] a questionable act under the standards the Court had used to determine whether courts were legislative or constitutional.[93] In *Glidden Co. v. Zdanok*,[94] however, five of seven participating Justices united to find that indeed the Court of Claims and the Court of Customs and Patent Appeals, at least, were constitutional courts and their judges eligible to participate in judicial business in other constitutional courts. Three Justices would have overruled *Bakelite* and *Williams* and would have held that the courts in question were constitutional courts.[95] Whether a court is an Article III tribunal depends largely upon whether legislation establishing it is in harmony with the limitations of that Article, specifically, "whether . . . its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." When a court is created "to carry into effect [federal] powers . . . over subject matter . . . and not over localities," a presumption arises that the status of such a tribunal is constitutional rather than legislative.[96] The other four Justices expressly declared that *Bakelite* and *Williams* should not

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[89] *Id.*

[90] De Groot v. United States, 72 U.S. (5 Wall.) 419 (1866); United States v. Union Pacific Co., 98 U.S. 569, 603 (1878); Miles v. Graham, 268 U.S. 501 (1925).

[91] Williams v. United States, 289 U.S. 553 (1933); *cf. Ex parte* Bakelite Corp., 279 U.S. 438, 450–455 (1929).

[92] 67 Stat. 226, § 1, 28 U.S.C. § 171 (Court of Claims); 70 Stat. 532. § 1, 28 U.S.C. § 251 (Customs Court); 72 Stat. 848, § 1, 28 U.S.C. § 211 (Court of Customs and Patent Appeals).

[93] In *Ex parte* Bakelite Corp., 279 U.S. 438. 459 (1929), Justice Van Devanter refused to give any weight to the fact that Congress had bestowed life tenure on the judges of the Court of Customs Appeals because that line of thought "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred."

[94] 370 U.S. 530 (1962).

[95] Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962) (Justices Harlan, Brennan, and Stewart).

[96] 370 U.S. at 548, 552.

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be overruled,[97] but two of them thought that the two courts had attained constitutional status by virtue of the clear manifestation of congressional intent expressed in the legislation.[98] Two Justices maintained that both courts remained legislative tribunals.[99] Although the result is clear, no standard for pronouncing a court legislative rather than constitutional obtained the adherence of a majority of the Court.[100]

Status of Courts of the District of Columbia.—Through a long course of decisions, the courts of the District of Columbia were regarded as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth v. United States ex rel. Hoe*,[101] the Court sustained an act of Congress which conferred revisory powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utilities commission.[102] Not long after this the same rule was applied to the revisory powers of the District Supreme Court over orders of the Federal Radio Commission.[103] These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress pursuant to its plenary power to govern the District of Columbia. In dictum in *Ex parte Bakelite Corp.*,[104] while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.

In 1933, nevertheless, the Court abandoned all previous dicta on the subject and found the courts of the District of Columbia to be constitutional courts exercising the judicial power of the United

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[97] 370 U.S. at 585 (Justice Clark and Chief Justice Warren concurring), 589 (Justices Douglas and Black dissenting).

[98] 370 U.S. at 585 (Justice Clark and Chief Justice Warren).

[99] 370 U.S. at 589 (Justices Douglas and Black). The concurrence thought that the rationale of *Bakelite* and *Williams* was based on a significant advisory and reference business of the two courts, which the two Justices now thought insignificant, but what there was of it they thought nonjudicial and the courts should not entertain it. Justice Harlan left that question open. *Id.* at 583.

[100] Aside from doctrinal matters, Congress in 1982 created the United States Court of Appeals for the Federal Circuit, giving it, *inter alia*, the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals. 96 Stat. 25, title 1, 28 U.S.C. § 41. At the same time Congress created the United States Claims Court, now the United States Court of Federal Claims, as an Article I tribunal, with the trial jurisdiction of the old Court of Claims. 96 Stat. 26, as amended, § 902(a)(1), 106 Stat. 4516, 28 U.S.C. §§ 171–180.

[101] 112 U.S. 50 (1884).

[102] Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).

[103] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[104] 279 U.S. 438, 450–455 (1929).

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States,[105] with the result that it assumed the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was accomplished by the argument that, in establishing courts for the District, Congress performs dual functions pursuant to two distinct powers: the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. However, Article III, § 1, limits this latter power with respect to tenure and compensation, but not with respect to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts." [106]

In 1970, Congress formally recognized two sets of courts in the District: federal courts (the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia, created pursuant to Article III), and courts equivalent to state and territorial courts (including the District of Columbia Court of Appeals), created pursuant to Article I.[107] Congress's action was sustained in *Palmore v. United States*.[108] When legislating for the District, the Court held, Congress has the power of a local legislature and may, pursuant to Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concerns in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts, after all, could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas

[105] O'Donoghue v. United States, 289 U.S. 516 (1933).

[106] 289 U.S. at 545. Chief Justice Hughes in dissent argued that Congress's power over the District was complete in itself and the power to create courts there did not derive at all from Article III. *Id.* at 551. *See* the discussion of this point of *O'Donoghue* in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). *Cf.* Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) (three-judge court).

[107] Pub. L. 91–358, 84 Stat. 475, D.C. Code § 11–101.

[108] 411 U.S. 389 (1973).

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having particularized needs and warranting distinctive treatment."[109]

Bankruptcy Courts.—After extended and lengthy debate, Congress in 1978 revised the bankruptcy act and created a bankruptcy court as an "adjunct" of the district courts. The court was composed of judges vested with practically all the judicial power of the United States, serving for 14-year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change.[110] The bankruptcy courts were given jurisdiction over not only civil proceedings arising under the bankruptcy code, but all other proceedings arising in or related to bankruptcy cases, with review in Article III courts under a clearly erroneous standard.

This broad grant of jurisdiction, however, brought into question what kinds of cases could be heard by an Article I court. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, a case in which a company petitioning for reorganization made a claim against another company for breaches of contract and warranty—purely state law claims—the Court held that the conferral of jurisdiction upon Article I judges to hear state claims regarding traditional common law actions such as existed at the time of the drafting of the Constitution was unconstitutional.[111] Although the holding was extremely narrow, a plurality of the Court sought to rationalize and limit the Court's jurisprudence of Article I courts.

According to the plurality, a fundamental principle of separation of powers requires the judicial power of the United States to be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating this judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia, that is, geographi-

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[109] 411 U.S. at 407–08. *See also* Pernell v. Southall Realty Co., 416 U.S. 363, 365–365 (1974); Swain v. Pressley, 430 U.S. 372 (1977); Key v. Doyle, 434 U.S. 59 (1978). Under *Swain*, provision for hearing of motions for post-judgement relief by convicted persons in the District, the present equivalent of *habeas* for federal convicts, is placed in Article I courts. That there are limits to Congress's discretion is asserted in dictum in Territory of Guam v. Olsen, 431 U.S. 195, 201–202, 204 (1977).

[110] Bankruptcy Act of 1978, Pub. L. 95–598, 92 Stat. 2549, codified in titles 11, 28. The bankruptcy courts were made "adjuncts" of the district courts by § 201(a), 28 U.S.C. § 151(a). For citation to the debate with respect to Article III versus Article I status for these courts, *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 61 n.12 (1982) (plurality opinion).

[111] The statement of the holding is that of the two concurring Justices, 458 U.S. at 89 (Justices Rehnquist and O'Connor), with which the plurality agreed "at the least," while desiring to go further. *Id.* at 87 n.40.

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cal areas in which no state operated as sovereign and Congress exercised the general powers of government; courts martial, that is, the establishment of courts under a constitutional grant of power historically understood as giving the political branches extraordinary control over the precise subject matter; and the adjudication of "public rights," that is, the litigation of certain matters that historically were reserved to the political branches of government and that were between the government and the individual.[112] In bankruptcy legislation and litigation not involving any of these exceptions, the plurality would have held, the judicial power to process bankruptcy cases could not be assigned to the tribunals created by the act.[113]

The dissent argued that, although on its face Article III provided that judicial power could only be assigned to Article III entities, the history since *Canter* belied that simplicity. Rather, the precedents clearly indicated that there is no difference in principle between the work that Congress may assign to an Article I court and that which must be given to an Article III court. Despite this, the dissent contended that Congress did not possess plenary discretion in choosing between the two systems; rather, in evaluating whether jurisdiction was properly reposed in an Article I court, the Supreme Court must balance the values of Article III against both the strength of the interest Congress sought to further by its Article I investiture and the extent to which Article III values were undermined by the congressional action. This balancing would afford the Court, the dissent believed, the power to prevent Congress, were it moved to do so, from transferring jurisdiction in order to emasculate the constitutional courts of the United States.[114]

No majority could be marshaled behind a principled discussion of the reasons for and the limitation upon the creation of legislative courts, not that a majority opinion, or even a unanimous one, would necessarily presage the settling of the law.[115] But the breadth of the various opinions not only left unclear the degree of discre-

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[112] 458 U.S. at 63–76 (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens).

[113] The plurality also rejected an alternative basis, a contention that as "adjuncts" of the district courts, the bankruptcy courts were like United States magistrates or like those agencies approved in Crowell v. Benson, 285 U.S. 22 (1932), to which could be assigned fact-finding functions subject to review in Article III courts, the fount of the administrative agency system. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies, and it limited the review of Article III courts too much.

[114] 458 U.S. at 92, 105–13, 113–16 (Justice White, joined by Chief Justice Burger and Justice Powell).

[115] *Ex parte* Bakelite Corp., 279 U.S. 438 (1929), was, after all, a unanimous opinion and did not long survive.

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tion left in Congress to restructure the bankruptcy courts, but also placed in issue the constitutionality of other legislative efforts to establish adjudicative systems outside a scheme involving the creation of life-tenured judges.[116]

Congress responded to *Marathon* by enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[117] Bankruptcy courts were maintained as Article I entities, and overall their powers as courts were not notably diminished. However, Congress did establish a division between "core proceedings," which could be heard and determined by bankruptcy courts, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed *de novo* in the district court at the behest of any party, unless the parties had consented to bankruptcy-court jurisdiction in the same manner as core proceedings. A safety valve was included, permitting the district court to withdraw any proceeding from the bankruptcy court on cause shown.[118]

Notice, however, that in *Granfinanciera, S.A. v. Nordberg*[119] the Court, evaluating the related issue of when a jury trial is required under the Seventh Amendment,[120] found that a cause of action to avoid a fraudulent money transfer was founded on state law, and, although denominated a core proceeding by Congress, was actually a private right. Similarly, the Court in *Stern v. Marshall*[121] held that a counterclaim of tortuous interference with a gift, although made during a bankruptcy proceeding and statutorily deemed a core proceeding, was a state common law claim that did not fall under any of the public rights exceptions.[122] Nonetheless, as the Court later held in *Wellness International v. Sharif*,[123] a bankruptcy court may

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[116] In particular, the Federal Magistrates Act of 1968, under which judges may refer certain pretrial motions and the trial of certain matters to persons appointed to a specific term, was threatened. Pub. L. 90–578, 82 Stat. 1108, as amended, 28 U.S.C. §§ 631–639. *See* United States v. Radios, 447 U.S. 667 (1980); Mathews v. Weber, 423 U.S. 261 (1976).

[117] Pub. L. 98–353, 98 Stat. 333, judiciary provisions at 28 U.S.C. §§ 151 *et seq*.

[118] *See* 28 U.S.C. § 157.

[119] 492 U.S. 33 (1989).

[120] *See* Seventh Amendment, Cases at Common law, infra.

[121] 564 U.S. ___, No. 10–179, slip op. (2011).

[122] The Court noted that the claim ". . . is not a matter that can be pursued only by grace of the other branches . . . or one that 'historically could have been determined exclusively by' those branches . . . . It does not 'depend[] on the will of Congress's . . . ; Congress has nothing to do with it. [It] . . . does not flow from a federal statutory scheme . . . . [And it] is not 'completely dependent upon' adjudication of a claim created by federal law . . . . " 564 U.S. ___, No. 10–179, slip op. at 27 (2011) (citations omitted). The Court also noted that filing of a claim in bankruptcy court (here, a defamation claim) did not constitute consent to a counterclaim, as the claimant had nowhere else to go to obtain recovery. *Id.*

[123] 575 U.S. ___, No. 13–935, slip op. (2015).

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adjudicate with finality a so-called *Stern* claim—that is, a core claim that does not fall within the public rights exception—if the parties have provided knowing and voluntary consent, arguably limiting the ultimate impact of *Stern* for federal bankruptcy law.[124]

Agency Adjudication.—In two decisions subsequent to *Marathon* involving legislative courts, *Thomas v. Union Carbide Agric. Products Co.*[125] and *CFTC v. Schor*,[126] the Court clearly suggested that the majority was now closer to the balancing approach of the *Marathon* dissenters than to the *Marathon* plurality's position that Congress may confer judicial power on legislative courts only in very limited circumstances. Subsequently, however, *Granfinanciera, S.A. v. Nordberg*,[127] a reversion to the fundamentality of *Marathon*, with an opinion by the same author, Justice Brennan, cast some doubt on this proposition.

In *Union Carbide*, the Court upheld a provision of a pesticide law which required binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information pursuant to federal statutory law. And in *Schor*, the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, to also adjudicate "counterclaims" arising out of the same transaction, including those arising under state common law. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.[128] The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," because Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program. . . ."[129] Also deemed important was not "unduly constrict-[ing] Congress's ability to take needed and innovative action pursuant to its Article I powers";[130] arbitration seen as "a pragmatic solution

[124] *See id.* at 20.
[125] 473 U.S. 568 (1985).
[126] 478 U.S. 833 (1986).
[127] 492 U.S. 33 (1989).
[128] *Contrast* the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in INS v. Chadha *and* Bowsher v. Synar, involving congressional incursions on executive power.
[129] 473 U.S. at 589.
[130] CFTC v. Schor, 478 U.S. at 851 (summarizing the *Thomas* rule).

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to [a] difficult problem."[131] The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power." On the other hand, availability of limited judicial review of the arbitrator's findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the "'appropriate exercise of the judicial function.'"[132] Thus, the Court concluded, Congress in exercise of Article I powers "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[133]

In *Schor*, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant's Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by submitting to the administrative law judge's jurisdiction rather than independently seeking relief as he was entitled to and then objecting only after adverse rulings on the merits. But the institutional integrity claim, not being personal, could not be waived, and the Court reached the merits. The threat to institutional independence was "weighed" by reference to "a number of factors." The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in *Marathon*, and as more closely resembling the "model" approved in *Crowell v. Benson*. The CFTC's jurisdiction, unlike that of bankruptcy courts, was said to be confined to "a particularized area of the law;" the agency's orders were enforceable only by order of a district court,[134] and reviewable under a less deferential standard, with legal rulings being subject to *de novo* review; and the agency was not empowered, as had been the bankruptcy courts, to exercise "all ordinary powers of district courts."[135]

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[131] *Thomas*, 473 U.S. at 590.

[132] *Thomas*, 473 U.S. at 591, 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

[133] 473 U.S. at 594.

[134] *Cf. Union Carbide*, 473 U.S. at 591 (fact that "FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement" cited as lessening danger of encroachment on "Article III judicial powers").

[135] *See* CFTC v. Schor, 478 U.S. 833, 853 (1986). Notwithstanding *Schor*'s efforts to distinguish between the context presented in that case and the bankruptcy context, the Court, in Wellness International v. Sharif, extended *Schor*'s holding to adjudications of private right claims by bankruptcy courts. *See* 575 U.S. ___, No. 13–935, slip op. (2015). Specifically, the *Wellness International* Court utilized the bal-

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Granfinanciera followed analysis different from that in *Schor*, although it preserved *Union Carbide* through its concept of "public rights." State law and other legal claims founded on private rights could not be remitted to non-Article III tribunals for adjudication unless Congress, in creating an integrated public regulatory scheme, has so taken up the right as to transform it. It may not simply relabel a private right and place it into the regulatory scheme. The Court is hazy with respect to whether the right itself must be a creature of federal statutory action. The general descriptive language suggests that, but the Court seemingly goes beyond this point in its determination whether the right at issue in the case, the recovery of preferential or fraudulent transfers in the context of a bankruptcy proceeding, is a "private right" that carries with it a right to jury trial. Though a statutory interest, the actions were identical to state-law contract claims brought by a bankrupt corporation to augment the estate.[136] *Schor* was distinguished solely on the waiver part of the decision, relating to the individual interest, without considering the part of the opinion deciding the institutional interest on the merits and utilizing a balancing test.[137] Thus, although the Court has made some progress in reconciling its growing line of disparate cases, doctrinal harmony has not yet been achieved.

Noncourt Entities in the Judicial Branch

Passing on the constitutionality of the establishment of the Sentencing Commission as an "independent" body in the judicial branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power. Rather, its function is to promulgate binding sentencing guidelines for federal courts. It acts, therefore, legislatively, and its membership of seven is composed of three judges and three nonjudges. But the standard of constitutionality, the Court held, is whether the entity exercises powers that are more appropriately performed by another branch or that undermine the integrity of the judiciary. Because the imposition of sentences is a function traditionally exercised within congressionally prescribed limits by federal judges, the Court found the functions of the Commis-

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ancing approach employed by *Schor* to conclude that allowing bankruptcy courts to decide a fraudulent conveyance claim by consent would not "impermissibly threaten the institutional integrity of the Judicial Branch," *id.* at 12 (quoting *Schor*, 478 U.S. at 851), because (1) the underlying class of claims that was being adjudicated by the non-Article III court was "narrow" in nature, resulting in a "de minimis" intrusion on the federal judiciary; (2) the bankruptcy court was ultimately supervised and overseen by a constitutional court and not Congress; and (3) the Court found "no indication" that Congress, in allowing bankruptcy courts to decide with finality certain private right claims, was acting in "an effort to aggrandize itself or humble the Judiciary." *Id.* at 13–14.

[136] *Granfinanciera*, 492 U.S. at 51–55, 55–60.

[137] 492 U.S. at 59 n.14.

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sion could be located in the judicial branch. Nor did performance of its functions contribute, in any meaningful way, to a weakening of the judiciary or an aggrandizement of power, the Court observed.[138]

JUDICIAL POWER

Characteristics and Attributes of Judicial Power

Judicial power is the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[139] It is "the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction."[140] The terms "judicial power" and "jurisdiction" are frequently used interchangeably, with "jurisdiction" defined as the power to hear and determine the subject matter in controversy between parties to a suit[141] or as the "power to entertain the suit, consider the merits and render a binding decision thereon."[142] The cases and commentary however, support, indeed require, a distinction between the two concepts.

Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.[143] Judicial power confers on federal courts the power to decide a case and to render a judgment that conclusively resolves a case. Included within the general judicial power are the ancillary powers of courts to punish for contempt of their authority,[144] to issue writs in aid of jurisdiction when authorized by statute,[145] to make rules governing their process in the absence of statutory authorizations or prohibitions,[146] to order their own process so as to prevent abuse, oppres-

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[138] Mistretta v. United States, 488 U.S. 361, 384–97 (1989). Clearly, some of the powers vested in the Special Division of the United States Court of Appeals for the District of Columbia Circuit under the Ethics in Government Act in respect to the independent counsel were administrative, but because the major nonjudicial power, the appointment of the independent counsel, was specifically authorized in the appointments clause, the additional powers were miscellaneous and could be lodged there by Congress. Implicit in the Court's analysis was the principle that a line exists that Congress may not cross. Morrison v. Olson, 487 U.S. 654, 677–685 (1988).

[139] Justice Samuel Miller, On the Constitution 314 (1891).

[140] Muskrat v. United States, 219 U.S. 346, 361 (1911).

[141] United States v. Arrendondo, 31 U.S. (6 Pet.) 691 (1832).

[142] General Investment Co. v. New York Central R.R., 271 U.S. 228, 230 (1926).

[143] Williams v. United States, 289 U.S. 553, 566 (1933); Yakus v. United States, 321 U.S. 414, 467–68 (1944) (Justice Rutledge dissenting).

[144] Michaelson v. United States, 266 U.S. 42 (1924).

[145] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

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

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sion, and injustice, and to protect their own jurisdiction and officers in the protection of property in custody of law,[147] to appoint masters in chancery, referees, auditors, and other investigators,[148] and to admit and disbar attorneys.[149]

As judicial power is the authority to render dispositive judgments, Congress violates the separation of powers when it purports to alter final judgments of Article III courts.[150] Once such instance arose when the Court unexpectedly recognized a statute of limitations for certain securities actions that was shorter than what had been recognized in many jurisdictions, resulting in the dismissal of several suits, which then become final because they were not appealed. Congress subsequently enacted a statute that, though not changing the limitations period prospectively, retroactively extended the time for suits that had been dismissed and provided for the reopening of these final judgments. In *Plaut v. Spendthrift Farm, Inc.*,[151] the Court invalidated the statute, holding it impermissible for Congress to disturb a final judgment. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."[152] In *Miller v. French*,[153] by contrast, the Court ruled that the Prison Litigation Reform Act's automatic stay of ongoing injunctions remedying violations of prisoners' rights did not amount to an unconstitutional legislative revision of a final judgment. Rather, the automatic stay merely altered "the prospective effect" of injunctions, and it is well established that such prospective relief "remains subject to alteration due to changes in the underlying law."[154]

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[147] Gumbel v. Pitkin, 124 U.S. 131 (1888).

[148] *Ex parte* Peterson, 253 U.S. 300 (1920).

[149] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

[150] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation. *Id.* at 226–27. Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial *department* composed of "inferior courts" and "one Supreme Court." "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Id.* at 227.

[151] 514 U.S. 211 (1995).

[152] 514 U.S. at 227 (emphasis supplied by Court).

[153] 530 U.S. 327 (2000).

[154] 530 U.S. at 344.

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"Shall Be Vested".—The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested" in § 1. Whereas all the judicial power of the United States is vested in the Supreme Court and the inferior federal courts created by Congress, neither has ever been vested with all the jurisdiction which could be granted and, Justice Story to the contrary,[155] the Constitution has not been read to require that Congress confer the entire jurisdiction it might.[156] Thus, except for the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it,[157] and, second, an act of Congress must have conferred it.[158] The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct.[159]

Finality of Judgment as an Attribute of Judicial Power

Since 1792, the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims

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[155] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–331 (1816). *See also* 3 J. Story, Commentaries on the Constitution of the United States (1833) 1584–1590.

[156] *See*, *e.g.*, Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799) (Justice Chase). A recent, sophisticated attempt to resurrect the core of Justice Story's argument appears in Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. Rev. 205 (1985); *see also* Amar, Meltzer, and Redish, *Symposium: Article III and the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990). Professor Amar argues from the text of Article III, § 2, cl. 1, that the use of the word "all" in each of the federal question, admiralty, and public ambassador subclauses means that Congress must confer the entire judicial power to cases involving those issues, whereas it has more discretion in the other six categories.

[157] Which was, of course, the point of Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803), once the power of the Court to hold legislation unconstitutional was established.

[158] The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Constr. Co., 260 U.S. 226 (1922). Some judges, however, have expressed the opinion that Congress's authority is limited by provisions of the Constitution such as the Due Process Clause, so that a limitation on jurisdiction that denied a litigant access to any remedy might be unconstitutional. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 965–966 (D.C. Cir. 1949), *rev'd on other grounds sub nom*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948); Petersen v. Clark, 285 F. Supp. 700, 703 n.5 (N.D. Calif. 1968); Murray v. Vaughn, 300 F. Supp. 688, 694–695 (D.R.I. 1969). The Supreme Court has had no occasion to consider the question.

[159] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Bingham v. Cabot, 3 U.S. (3 Dall.) 382 (1798); Jackson v. Ashton, 33 U.S. (8 Pet.) 148 (1834); Mitchell v. Maurer, 293 U.S. 237 (1934).

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in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant's disability and their opinion with regard to the proper percentage of monthly pay to be awarded, but empowered the Secretary to withhold judicially certified claimants from the pension list if he suspected "imposition or mistake."[160] The Justices then on circuit almost immediately forwarded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to the judicial department, the duties imposed by the act were not judicial, and the subjection of a court's opinions to revision or control by an officer of the executive or the legislature was not authorized by the Constitution.[161]

Attorney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act. Upon enactment of the new law, the Court dismissed the action.[162] Although the Court's opinion contained little analysis, *Hayburn's Case* has since been cited by the Court to reject efforts to give it and the lower federal courts jurisdiction over cases in which judgment would be subject to executive or legislative revision.[163] Thus, in a 1948 case, the Court held that an order of the Civil Aeronautics Board denying to a citizen air carrier a certificate of convenience and necessity for an overseas and foreign air route was, despite statutory language to the contrary,

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[160] Act of March 23, 1792, 1 Stat. 243.

[161] 1 American State Papers: Miscellaneous Documents, Legislative and Executive, of the Congress of the United States 49, 51, 52 (1832). President Washington transmitted the remonstrances to Congress. 1 Messages and Papers of the Presidents 123, 133 (J. Richardson comp., 1897). The objections are also appended to the order of the Court in *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Note that some of the Justices declared their willingness to perform under the act as commissioners rather than as judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1852). The assumption by judges that they could act in some positions as individuals while remaining judges, an assumption many times acted upon, was approved in Mistretta v. United States, 488 U.S. 361, 397–408 (1989).

[162] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324. The reason for the Court's inaction may, on the other hand, have been doubt about the proper role of the Attorney General in the matter, an issue raised in the opinion. *See* Marcus & Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 4; Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 Duke L. J. 561, 590–618. Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225–26 (1995).

[163] *See* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); *In re* Sanborn, 148 U.S. 222 (1893); *cf.* McGrath v. Kritensen, 340 U.S. 162, 167–168 (1950).

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not reviewable by the courts. Because Congress had also deemed such an order subject to discretionary review and revision by the President, the lower court found, and the Supreme Court affirmed, that the courts did not have the authority to review the President's decision. While the lower Court had then attempted to reconcile the statutory scheme by permitting presidential review of the order after judicial review, the Court rejected this interpretation. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."[164] More recently, the Court avoided a similar situation by a close construction of a statute.[165]

Award of Execution.—The adherence of the Court to this proposition, however, has not extended to a rigid rule formulated by Chief Justice Taney, given its fullest expression in a posthumously published opinion.[166] In *Gordon v. United States*,[167] the Court refused to hear an appeal from a decision of the Court of Claims; the act establishing the Court of Claims provided for appeals to the Supreme Court, after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for payment of private claims. But the act also provided that no funds should be paid out of the Treasury for any claims "till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."[168] The opinion of the Court merely stated that the implication of power in the executive officer and in Congress to revise all decisions of the Court of Claims requiring payment of money denied that court the judicial power

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[164] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[165] Connor v. Johnson, 402 U.S. 690 (1971). Under § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973e, no state may "enact or seek to administer" any change in election law or practice different from that in effect on a particular date without obtaining the approval of the Attorney General or the district court in the District of Columbia, a requirement interpreted to reach reapportionment and redistricting. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971). The issue in *Connor* was whether a districting plan drawn up and ordered into effect by a federal district court, after it had rejected a legislatively drawn plan, must be submitted for approval. Unanimously, on the papers without oral argument, the Court ruled that, despite the statute's inclusive language, it did not apply to court-drawn plans.

[166] Gordon v. United States, 117 U.S. 697 (1865) (published 1885). *See* United States v. Jones, 119 U.S. 477 (1886). The Chief Justice's initial effort was in United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[167] 69 U.S. (2 Wall.) 561 (1865).

[168] Act of February 24, 1855, 10 Stat. 612, as amended, Act of March 3, 1963, 12 Stat. 737, as paraphrased in Gordon v. United States, 117 U.S. at 698.

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from the exercise of which "alone" appeals could be taken to the Supreme Court.[169]

In his posthumously published opinion, Chief Justice Taney, because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary and of Congress, regarded any such judgment as nothing more than a certificate of opinion and in no sense a judicial judgment. Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then enunciated a rule that was rigorously applied until 1933: the award of execution is an essential part of every judgment passed by a court exercising judicial powers and no decision is a legal judgment without an award of execution.[170] The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments[171] and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts.[172] But, in 1927, the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was *res judicata* in a subsequent proceeding in federal court, the Court admitted that, "[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."[173] Then, in 1933, the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state

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[169] Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865). Following repeal of the objectionable section, Act of March 17, 1866, 14 Stat. 9, the Court accepted appellate jurisdiction. United States v. Jones, 119 U.S. 477 (1886); De Groot v. United States, 72 U.S. (5 Wall.) 419 (1867). But note that execution of the judgments was still dependent upon congressional appropriations. On the effect of the requirement for appropriations at a time when appropriations had to be made for judgments over $100,000, *see* Glidden Co. v. Zdanok, 370 U.S. 530, 568–571 (1962). *Cf.* Regional Rail Reorganization Act Cases (Blanchette v. Connecticut General Ins. Corp.), 419 U.S. 102, 148–149 & n.35 (1974).

[170] Gordon v. United States, 117 U.S. 697 (1865) (published 1885). Subsequent cases accepted the doctrine that an award of execution as distinguished from finality of judgment was an essential attribute of judicial power. *See In re* Sanborn, 148 U.S. 122, 226 (1893); ICC v. Brimson, 154 U.S. 447, 483 (1894); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 457 (1899); Frasch v. Moore, 211 U.S. 1 (1908); Muskrat v. United States, 219 U.S. 346, 355, 361–362 (1911); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

[171] Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927).

[172] Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

[173] Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927).

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court in a declaratory proceeding.[174] Finality of judgment, however, remains the rule in determining what is judicial power, without regard to the demise of Chief Justice Taney's formulation.

Judicial Immunity from Suit

Under common law—the Supreme Court has not elevated judicial immunity from suit to a constitutional principle—judges "are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for the judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."[175] Three years later, the Court qualified this exception to judges' immunity: the phrase beginning "unless, perhaps," the Court wrote, was "not necessary to a correct statement of the law, and . . . judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter," with judges subject to liability only in the latter instance.[176]

In *Stump v. Sparkman*, the Court upheld the immunity of a judge who approved a petition from the mother of a 15-year-old girl to have the girl sterilized without her knowledge (she was told that

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[174] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). The decisions in *Swope* and *Wallace* removed all constitutional doubts previously shrouding a proposed federal declaratory judgment act, which was enacted in 1934, 48 Stat. 955, 28 U.S.C. §§ 2201–2202, and unanimously sustained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *Wallace* and *Haworth* were cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 120–21).

[175] Randall v. Brigham, 74 U.S. 523, 537 (1869). Judicial immunity "is a general principle of the highest importance to the proper administration of justice . . . . Liability . . . would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." Bradley v. Fisher, 80 U.S. 335, 347 (1872).

[176] Bradley v. Fisher, 80 U.S. 335, 351 (1872). The Court offered a hypothetical example of the distinction. A judge of a probate court who held a criminal trial would act in clear absence of all jurisdiction over the subject matter, whereas a judge of a criminal court who held a criminal trial for an offense that was not illegal would act merely in excess of his jurisdiction. Id. at 352.

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she was to have her appendix removed).[177] In a 5-to-3 opinion, the Court found that there was not the "clear absence of all jurisdiction" that is required to hold a judge civilly liable. The judge had jurisdiction "in all cases at law and in equity whatsoever," except where exclusive jurisdiction is "conferred by law upon some other court, board, or officer," and no statute or case law prohibited the judge from considering a petition for sterilization.[178] The Court also rejected the argument that the judge's approving the petition had not constituted a "judicial" act. The Court found "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. . . . Judge Stump performed the type of act normally performed only by judges and . . . he did so in his capacity as a [judge]."[179]

Although judges are generally immune from suits for damages, the Court has held that a judge may be enjoined from enforcing a court rule, such as a restriction on lawyer advertising that violates the First Amendment.[180] Similarly, a state court magistrate may be enjoined from "imposing bail on persons arrested for nonjailable offenses under Virginia law and . . . incarcerating those persons if they could not meet the bail. . . ."[181] But what if the prevailing party, as it did in these two cases, seeks an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976?[182] The Court found that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards."[183] In fact,

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[177] 435 U.S. 349 (1978).

[178] 435 U.S. at 357, 358. The defendant was an Indiana state court judge, but the suit was in federal court under 42 U.S.C. § 1983. The Court noted that it had held in Pierson v. Ray, 386 U.S. 547 (1967), that there was no indication that, in enacting this statute, Congress had intended to abolish the principle of judicial immunity established in Bradley v. Fisher, *supra*.

[179] 435 U.S. at 362. Justice Stewart's dissent, joined by Justices Marshall and Powell, concluded that what Judge Stump did "was beyond the pale of anything that could sensibly be called a judicial act." Id. at 365. Indiana law, Justice Stewart wrote, provided for administrative proceedings for the sterilization of certain people who were institutionalized (which the girl in this case was not), and what Judge Stump did "was in no way an act 'normally performed by a judge.'" Id. at 367.

[180] Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).

[181] Pulliam v. Allen, 466 U.S. 522, 524–25 (1984).

[182] 42 U.S.C. § 1988(b). Under this statute, "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself," and, therefore, the state must "bear the burden of the counsel fees award." Hutto v. Finney, 437 U.S. 678, 700 (1978).

[183] *Consumers Union*, 446 U.S. at 738–39. This is not the case, however, when judges are sued in their legislative capacity for having issued a rule. Id. at 734.

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"Congress's intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988."[184]

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

Categories of Contempt.—Crucial to an understanding of the history of the law governing the courts' powers of contempt is an awareness of the various kinds of contempt. With a few notable exceptions,[185] the Court has consistently distinguished between criminal and civil contempt, the former being a vindication of the authority of the courts and latter being the preservation and enforcement of the rights of the parties. A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period of time. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt.[186]

The issue of whether a certain contempt is civil or criminal can be of great importance. For instance, criminal contempt, unlike civil contempt, implicates procedural rights attendant to prosecutions.[187] Or, in *Ex parte Grossman*,[188] while holding that the President may pardon a criminal contempt, Chief Justice Taft noted in

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[184] *Pulliam*, 466 U.S. at 544. In 1996, Public Law 104–317, § 309, amended § 1988(b) to preclude the award of attorneys' fees in a suit against a judicial officer unless the officer's action "was clearly in excess of such officer's jurisdiction."

[185] *E.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947).

[186] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441–443 (1911); *Ex parte* Grossman, 267 U.S. 87 (1925). *See also* Bessette v. W.B. Conkey Co., 194 U.S. 324, 327–328 (1904).

[187] In Robertson v. United States ex rel. Watson, the Court had granted certiorari to consider a District of Columbia law that allowed a private individual to bring a criminal contempt action in the congressionally established D.C. courts based on a violation of a civil protective order. 560 U.S. ___, No. 08–6261, slip op. (2010). The Court subsequently issued a per curiam order dismissing the writ of certiorari as having been improvidently granted, but four Justices dissented. Writing in dissent, Chief Justice Roberts thought it imperative to make clear that "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought of behalf of the government." 560 U.S. ___, No. 08–6261, slip op. at 1 (2010) (Roberts, C.J., dissenting). Of particular concern was how various protections in the Bill of Rights against government action would play out in a privately brought action. Id. at 5–6.

[188] 267 U.S. 87, 119–120 (1925). In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties, Michaelson v. United States ex rel. Chicago, S.P., M. & Ry. Co., 266 U.S. 42, 65–66 (1924). *But see* Bloom v. Illinois, 391 U.S. 194, 202 (1968).

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dicta that such pardon power did not extend to civil contempt. Notwithstanding the importance of distinguishing between the two, there have been instances where defendants have been charged with both civil and criminal contempt for the same act.[189]

Long-standing doctrine regarding how courts should distinguish between civil and criminal contempt remains influential. In *Shillitani v. United States*,[190] defendants were sentenced by their respective District Courts to two years imprisonment for contempt of court, but the sentences contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence.[191] Here, the purpose was to obtain answers to the questions for the grand jury, and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence."[192]

In *International Union, UMW v. Bagwell*,[193] however, the Court formulated a new test for drawing the distinction between civil and criminal contempt in certain cases. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is "complex" and thus requires the protection of criminal proceedings.[194]

The Court has also recognized a second, but more subtle distinction between types of contempt, and that is the difference between direct and indirect contempt. Direct contempt results when the contumacious act is committed "in the presence of the Court or so near

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[189] *See* United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

[190] 384 U.S. 364 (1966).

[191] 384 U.S. at 370.

[192] 384 U.S. at 370 n.6. *See* Hicks v. Feiock, 485 U.S. 624 (1988) (remanding for determination whether payment of child support arrearages would purge a determinate sentence, the proper characterization critical to decision on a due process claim).

[193] 512 U.S. 821 (1994).

[194] 512 U.S. at 832–38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable fact-finding. *See esp.* id. at 837–38.

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thereto as to obstruct the administration of justice,"[195] while indirect contempt is behavior that the Court did not itself witness.[196] The nature of the contumacious act, *i.e.*, whether it is direct or indirect, is important because it determines the appropriate procedure for charging the contemnor. As will be seen in the following discussion, the history of the contempt powers of the American judiciary is marked by two trends: a shrinking of the court's power to punish a person summarily and a multiplying of the due process requirements that must otherwise be met when finding an individual to be in contempt.[197]

The Act of 1789.—The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[198] By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court.[199] In the United States, the Judiciary Act of 1789[200] conferred power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the Act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, "or so near thereto as to obstruct the administration of justice," to the

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[195] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. *Cf.* Rule 42(a), FRCrP, which provides, "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." *See also* Beale, *Contempt of Court, Civil and Criminal*, 21 Harv. L. Rev. 161, 171–172 (1908).

[196] *See* Fox, *The Nature of Contempt of Court*, 37 L.Q. Rev. 191 (1921).

[197] Many of the limitations placed on the inferior federal courts have been issued on the basis of the Supreme Court's supervisory power over them rather than upon a constitutional foundation, while, of course, the limitations imposed on state courts necessarily are on constitutional dimensions. Indeed, it is often the case that a limitation, which is applied to an inferior federal court as a superintending measure, is then transformed into a constitutional limitation and applied to state courts. *Compare* Cheff v. Schnackenberg, 384 U.S. 373 (1966), *with* Bloom v. Illinois, 391 U.S. 194 (1968). In the latter stage, the limitations then bind both federal and state courts alike. Therefore, in this section, Supreme Court constitutional limitations on state court contempt powers are cited without restriction for equal application to federal courts.

[198] Fox, *The King v. Almon*, 24 L.Q. Rev. 184, 194–195 (1908).

[199] Fox, *The Summary Power to Punish Contempt*, 25 L.Q. Rev. 238, 252 (1909).

[200] 1 Stat. 83, § 17 (1789).

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misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.[201]

An Inherent Power.—The nature of the contempt power was described Justice Field, writing for the Court in *Ex parte Robinson*,[202] sustaining the act of 1831: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."[203] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[204] In *Michaelson v. United States*,[205] the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[206] relating to punishment for contempt of court by disobedience of injunctions in labor disputes. The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the state where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor

[201] 18 U.S.C. § 401. For a summary of the Peck impeachment and the background of the act of 1831, *see* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1024–1028 (1924).

[202] 86 U.S. (19 Wall.) 505 (1874).

[203] 86 U.S. at 505–11.

[204] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). *See also In re* Debs, 158 U.S. 564, 595 (1895).

[205] 266 U.S. 42 (1924).

[206] 38 Stat. 730, 738 (1914).

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rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[207] This latter power, to enforce, the Court has held, includes the authority to appoint private counsel to prosecute a criminal contempt.[208] Although the contempt power may be inherent, it is not unlimited. In *Spallone v. United States*,[209] the Court held that a district court had abused its discretion by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

First Amendment Limitations on the Contempt Power.—The phrase, "in the presence of the Court or so near thereto as to obstruct the administration of justice," was interpreted so broadly in *Toledo Newspaper Co. v. United States*[210] as to uphold the action of a district court judge in punishing a newspaper for contempt for publishing spirited editorials and cartoons issues raised in an action challenging a street railway's rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." Similarly, the test whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but "the reasonable tendency of the acts done

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[207] 266 U.S. at 65–66. *See* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

[208] Young v. United States ex rel. Vuitton, 481 U.S. 787, 793–801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801–802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802–08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. *See also* United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of *certiorari* after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. *See* 28 U.S.C. § 518.

[209] 493 U.S. 265 (1990). The decision was an exercise of the Court's supervisory power. Id. at 276. Four Justices dissented. Id. at 281.

[210] 247 U.S. 402 (1918).

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to influence or bring about the baleful result . . . without reference to the consideration of how far they may have been without influence in a particular case."[211] In *Craig v. Hecht*,[212] these criteria were applied to sustain the imprisonment of the comptroller of New York City for writing and publishing a letter to a public service commissioner criticizing the action of a United States district judge in receivership proceedings.

The decision in *Toledo Newspaper*, however, did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons, it was reversed in *Nye v. United States*,[213] and the theory of constructive contempt based on the "reasonable tendency" rule was rejected. The defendants in the civil suit, by persuasion and the use of liquor, had induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the court was sitting and were held not to put the persons responsible for them in contempt of court. Although *Nye v. United States* was exclusively a case of statutory construction, it was significant from a constitutional point of view because its reasoning was contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contempts independently of, and contrary to, congressional regulation of this power. *Bridges v. California*[214] was noteworthy for the dictum of the majority that the contempt power of all courts, federal as well as state, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.[215]

A series of cases involving highly publicized trials and much news media attention and exploitation,[216] however, caused the Court to suggest that the contempt and other powers of trial courts should be used to stem the flow of publicity before it can taint a trial. Thus,

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[211] 247 U.S. at 418–21.

[212] 263 U.S. 255 (1923).

[213] 313 U.S. 33, 47–53 (1941).

[214] 314 U.S. 252, 260 (1941).

[215] *See also* Wood v. Georgia, 370 U.S. 375 (1962), further clarifying the limitations imposed by the First Amendment upon this judicial power and delineating the requisite serious degree of harm to the administration of law necessary to justify exercise of the contempt power to punish the publisher of an out-of-court statement attacking a charge to the grand jury, absent any showing of actual interference with the activities of the grand jury.

It is now clearly established that courtroom conduct to be punishable as contempt "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. 367, 376 (1947); *In re* Little, 404 U.S. 553, 555 (1972).

[216] *E.g.*, Estes v. Texas, 381 U.S. 532 (1965); Marshall v. United States, 360 U.S. 310 (1959); Sheppard v. Maxwell, 384 U.S. 333 (1966).

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Justice Clark, speaking for the majority in *Sheppard v. Maxwell*,[217] wrote, "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. . . . Neither prosecutors, counsel for defense, the accused, witness, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious, as well as is the necessity for protection of the equally important right to a fair trial.[218]

Due Process Limitations on Contempt Power: Right to Notice and to a Hearing Versus Summary Punishment.—Misbehavior in the course of a trial may be punished summarily by the trial judge. In *Ex parte Terry*,[219] the Court denied *habeas corpus* relief to a litigant who had been jailed for assaulting a United States marshal in the presence of the court. In *Cooke v. United States*,[220] however, the Court remanded for further proceedings a judgment jailing an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of *Terry*, Chief Justice Taft, speaking for the unanimous Court, said: "The important distinction . . . is that this contempt was not in open court. . . . To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law."[221]

As to the timeliness of summary punishment, the Court, in *Sacher v. United States*,[222] at first construed Rule 42(a) of the Federal Rules of Criminal Procedure, which was designed to afford judges clearer

[217] 384 U.S. 333, 363 (1966).

[218] For another approach, bar rules regulating the speech of counsel and the First Amendment standard, *see* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

[219] 128 U.S. 289 (1888).

[220] 267 U.S. 517 (1925).

[221] 267 U.S. at 535, 534.

[222] 343 U.S. 1 (1952).

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guidelines as to the exercise of their contempt power, to allow "the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power."[223] Subsequently, however, interpreting the Due Process Clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of the proceeding, he must afford the alleged contemnor at least reasonable notice of the specific charge and opportunity to be heard in his own defense. Apparently, a "full scale trial" is not contemplated.[224]

Curbing the judge's power to consider conduct as occurring in his presence, the Court, in *Harris v. United States*,[225] held that summary contempt proceedings in aid of a grand jury probe, achieved through swearing the witness and repeating the grand jury's questions in the presence of the judge, did not constitute contempt "in the actual presence of the court" for purposes of Rule 42(a); rather, the absence of a disturbance in the court's proceedings or of the need to immediately vindicate the court's authority makes the witness' refusal to testify an offense punishable only after notice and a hearing.[226] Moreover, when it is not clear that the judge was fully aware of the contemptuous behavior when it occurred, notwithstanding the fact that it occurred during the trial, "a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete."[227]

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[223] 343 U.S. at 11.

[224] Taylor v. Hayes, 418 U.S. 488 (1974). In a companion case, the Court observed that, although its rule conceivably encourages a trial judge to proceed immediately rather than awaiting a calmer moment, "[s]ummary convictions during trials that are unwarranted by the facts will not be invulnerable to appellate review." Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974).

[225] 382 U.S. 162 (1965), *overruling* Brown v. United States, 359 U.S. 41 (1959).

[226] *But see* Green v. United States, 356 U.S. 165 (1958) (noncompliance with order directing defendants to surrender to marshal for execution of their sentence is an offense punishable summarily as a criminal contempt); Reina v. United States, 364 U.S. 507 (1960).

[227] Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (citing *In re* Oliver, 333 U.S. 257, 275–276 (1948)).

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Due Process Limitations on Contempt Power: Right to Jury Trial.—Originally, the right to a jury trial was not available in criminal contempt cases.[228] But the Court held in *Cheff v. Schnackenberg*,[229] that a defendant is entitled to trial by jury when the punishment in a criminal contempt case in federal court is more than the sentence for a petty offense, traditionally six months. Although the ruling was made pursuant to the Supreme Court's supervisory powers and was thus inapplicable to state courts and presumably subject to legislative revision, two years later the Court held that the Constitution also requires jury trials in criminal contempt cases in which the offense was more than a petty one.[230] Whether an offense is petty or not is determined by the maximum sentence authorized by the legislature or, in the absence of a statute, by the sentence actually imposed. Again the Court drew the line between petty offenses and more serious ones at six months' imprisonment. Although this case involved an indirect criminal contempt (willful petitioning to admit to probate a will known to be falsely prepared) the majority in dictum indicated that even in cases of direct contempt a jury will be required in appropriate instances. "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."[231] Presumably, there is no equivalent right to a jury trial in civil contempt cases,[232] although one could spend much more time in jail pursuant to a judgment of civil contempt than one could for

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[228] *See* Green v. United States, 356 U.S. 165 (1958); United States v. Barnett, 376 U.S. 681 (1964), and cases cited. The dissents of Justices Black and Douglas in those cases prepared the ground for the Court's later reversal. On the issue, *see* Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042–1048 (1924).

[229] 384 U.S. 373 (1966).

[230] Bloom v. Illinois, 391 U.S. 194 (1968). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (refining the test for when contempt citations are criminal and thus require jury trials).

[231] 391 U.S. at 209. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held a jury trial to be required when the trial judge awaits the conclusion of the proceeding and then imposes separate contempt sentences in which the total aggregated more than six months even though no sentence for more than six months was imposed for any single act of contempt. For a tentative essay at defining a petty offense when a fine is levied, *see* Muniz v. Hoffman, 422 U.S. 454, 475–77 (1975). In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.

[232] The Sixth Amendment is applicable only to criminal cases and the Seventh to suits at common law, but the due process clause is available if needed.

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most criminal contempts.[233] The Court has, however, expanded the right to jury trials in federal civil cases on nonconstitutional grounds.[234]

Due Process Limitations on Contempt Powers: Impartial Tribunal.—In *Cooke v. United States*,[235] Chief Justice Taft uttered some cautionary words to guide trial judges in the use of their contempt powers. "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish v. The United States*, 299 Fed. 283, 285; *Toledo Company v. The United States*, 237 Fed. 986, 988. The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."[236]

Sacher v. United States[237] grew out of a tempestuous trial of eleven Communist Party leaders in which Sacher and others were counsel for the defense. Upon the conviction of the defendants, the trial judge at once found counsel guilty of criminal contempt and

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[233] Note that under 28 U.S.C. § 1826 a recalcitrant witness before a grand jury may be imprisoned for the term of the grand jury, which can be 36 months. 18 U.S.C. § 3331(a).

[234] *E.g.*, Beacon Theatres v. Westover, 359 U.S. 500 (1959); Dairy Queen v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970). However, the Court's expansion of jury trial rights may have halted with McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[235] 267 U.S. 517, 539 (1925).

[236] The *Toledo Company* case that the Court cited was affirmed in Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[237] 343 U.S. 1 (1952). *See* Dennis v. United States, 341 U.S. 494 (1951).

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imposed jail terms of up to six months. At issue directly was whether the contempt charged was one that the judge was authorized to determine for himself or whether it was one that under Rule 42(b) could be passed upon only by another judge and only after notice and hearing, but behind this issue loomed the applicability and nature of due process requirements, in particular whether the defense attorneys were constitutionally entitled to trial before a different judge. A divided Court affirmed most of the convictions, set aside others, and denied that due process required a hearing before a different judge. "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power. . . . We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling." [238]

In *Offutt v. United States*,[239] acting under its supervisory powers over the lower federal courts, the Court set aside a criminal contempt conviction imposed on a lawyer after a trial marked by highly personal recriminations between the trial judge and the lawyer. In a situation in which the record revealed that the contumacious conduct was the product of both lack of self-restraint on the part of the contemnor and a reaction to the excessive zeal and personal animosity of the trial judge, the majority felt that any contempt trial must be held before another judge. This holding, that when a judge becomes personally embroiled in the controversy with an accused he must defer trial of his contempt citation to another judge, which was founded on the Court's supervisory powers, was

[238] 343 U.S. at 11, 13–14.
[239] 348 U.S. 11 (1954).

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constitutionalized in *Mayberry v. Pennsylvania*,[240] in which a defendant acting as his own counsel engaged in quite personal abuse of the trial judge. The Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going,[241] but if he should wait until the conclusion of the trial he must defer to another judge.

Contempt by Disobedience of Orders.—Disobedience of injunctive orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In *United States v. United Mine Workers*,[242] the Court held, first, that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court's jurisdiction, is punishable as criminal contempt where the issue is not frivolous, but substantial.[243] Second, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional.[244] Third, on the basis of *United States v. Shipp*,[245] the Court held that violations of a court's order are punishable as criminal contempt, even if the order is set aside on appeal as in excess of the court's jurisdiction and even if the basic action has become moot.[246] Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and punitive measures, which may be imposed in a single proceeding.[247]

Contempt Power in Aid of Administrative Power.—Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have be-

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[240] 400 U.S. 455 (1971). *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); Holt v. Virginia, 381 U.S. 131 (1965). Even in the absence of a personal attack on a judge that would tend to impair his detachment, the judge may still be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides, so that it is likely the judge has felt a "sting" sufficient to impair his objectivity. Taylor v. Hayes, 418 U.S. 488 (1974).

[241] 400 U.S. at 463. *See* Illinois v. Allen, 397 U.S. 337 (1970), in which the Court affirmed that summary contempt or expulsion may be used to keep a trial going.

[242] 330 U.S. 258 (1947). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994).

[243] 330 U.S. at 292–93.

[244] 330 U.S. at 293. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

[245] 203 U.S. 563 (1906).

[246] 330 U.S. at 290–92.

[247] 330 U.S. at 299. *But see* Cheff v. Schnackenberg, 384 U.S. 273 (1966), and "Due Process Limitations on Contempt Power: Right to Jury Trial," supra.

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come increasingly common since the leading case of *ICC v. Brimson*,[248] which held that the contempt power of the courts might by statutory authorization be used to aid the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that, where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt.[249] Notwithstanding the power of administrative agencies to cite an individual for contempt, however, such bodies must be acting within the authority that has been lawfully delegated to them.[250]

Sanctions Other Than Contempt

Long recognized by the courts as inherent powers are those authorities that are necessary to the administration of the judicial system itself, of which the contempt power just discussed is only the most controversial.[251] Courts, as elements of an independent and coequal branch of government, once they are created and their jurisdiction established, have the authority to do what courts have traditionally done in order to accomplish their assigned tasks.[252] Of course, these inherent powers may be limited by statutes and by rules,[253] but, just as noted above in the discussion of the same issue with respect to contempt, the Court asserts both the power to act in areas not covered by statutes and rules and the power to act unless Congress has not only provided regulation of the exercise of

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[248] 154 U.S. 447 (1894).

[249] Penfield Co. v. SEC, 330 U.S. 585 (1947). Note the dissent of Justice Frankfurter. For delegations of the subpoena power to administrative agencies and the use of judicial process to enforce them, *see also* McCrone v. United States, 307 U.S. 61 (1939); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[250] Gojack v. United States, 384 U.S. 702 (1966). *See also* Sanctions of the Investigatory Power: Contempt, supra, for a discussion of Congress's power to cite an individual for contempt by virtue of its investigatory duties, which is applicable, at least by analogy, to administrative agencies.

[251] "Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute . . . ." United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 34 (1812).

[252] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); Link v. Wabash R.R., 370 U.S. 626, 630–631 (1962); Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991); and id. at 58 (Justice Scalia dissenting), 60, 62–67 (Justice Kennedy dissenting).

[253] Chambers v. NASCO, Inc., 501 U.S. at 47.

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the power, but also has unmistakably enunciated its intention to limit the courts' inherent powers.[254]

Thus, in *Chambers v. NASCO, Inc.*, the Court upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case. Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not, and the Court held that, absent a showing that Congress had intended to limit the courts, they could use their inherent powers to impose sanctions for the entire course of conduct, including shifting attorneys' fees, which is ordinarily against the common-law American rule.[255] In another case, a party failed to comply with discovery orders and a court order concerning a schedule for filing briefs. The Supreme Court held that the attorneys' fees statute did not allow assessment of such fees in that situation, but it remanded for consideration of sanctions under both a Federal Rule of Civil Procedure and the trial court's inherent powers, subject to a finding of bad faith.[256] But bad faith is not always required for the exercise of some inherent powers. Thus, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.[257]

Power to Issue Writs: The Act of 1789

From the beginning of government under the Constitution of 1789, Congress has assumed, under the Necessary and Proper Clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and its power to regulate the issuance of writs.[258] Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[259] Section 14 provided that all "courts of the United States shall have power to issue writs

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[254] 501 U.S. at 46–51. *But see* id. at 62–67 (Justice Kennedy dissenting).

[255] 501 U.S. at 49–51. On the implications of the fact that this was a diversity case, *see* id. at 51–55.

[256] Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

[257] Link v. Wabash R.R., 370 U.S. 626 (1962).

[258] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1016–1023 (1924).

[259] 1 Stat. 73, 81. "Section 13 was a provision unique to the Court, granting the power of prohibition as to district courts in admiralty and maritime cases . . . ." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4005, p. 98 (1996). *See also* R. Fallon, et al., Hart and Wechsler's The Federal Courts and the Federal System (6th ed. 2009), Ch. III, p. 268 (hereinafter Hart & Wechsler (6th ed.))

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of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[260]

Although the Act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.[261] Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for constitutional violations or whether such remedies must fit within congressionally authorized writs or procedures is often left unexplored. In *Missouri v. Jenkins*,[262] for example, the Court, rejecting a claim that a federal court exceeded judicial power under Article III by ordering local authorities to increase taxes to pay for desegregation remedies, declared that "a court order directing a local government body to levy its own taxes" is plainly a judicial act within the power of a federal court.[263] In the same case, the Court refused to rule on "the difficult constitutional issues" presented by the state's claim that the district court had exceeded its constitutional powers in a prior order directly raising taxes, instead ruling that this order had violated principles of comity.[264]

Common Law Powers of District of Columbia Courts.—The portion of § 13 of the Judiciary Act of 1789 that authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in *Marbury v. Madison*,[265] as an unconstitutional enlargement of the Supreme Court's original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States

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[260] 1 Stat. 73, 81–82. *See also* United States v. Morgan, 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis*.

[261] This proposition was recently reasserted in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes).

[262] 495 U.S. 33 (1990).

[263] 495 U.S. at 55, citing Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233–34 (1964) (an order that local officials "exercise the power that is theirs" to levy taxes in order to open and operate a desegregated school system "is within the court's power if required to assure . . . petitioners that their constitutional rights will no longer be denied them").

[264] 495 U.S. at 50–52.

[265] 5 U.S. (1 Cr.) 137 (1803). *Cf.* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321 (1796).

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except in aid of already existing jurisdiction,[266] a litigant was successful in *Kendall v. United States ex rel. Stokes*,[267] in finding a court that would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia, which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the state that became the District of Columbia was made to the United States, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.[268]

Habeas Corpus: Congressional and Judicial Control.—The writ of *habeas corpus*[269] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition by the first Congress in the Judiciary Act of 1789,[270] as a means "to relieve detention by executive authorities without judicial trial."[271] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts, which raises the question of whether Congress could suspend the writ *de facto* by declining to authorize its issuance. In other words, is a statute needed to make the writ available or does the right to

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[266] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

[267] 37 U.S. (12 Pet.) 524 (1838).

[268] In 1962, Congress conferred upon all federal district courts the same power to issue writs of mandamus as was exercisable by federal courts in the District of Columbia. 76 Stat. 744, 28 U.S.C. § 1361.

[269] Reference to the "writ of *habeas corpus*" is to the "Great Writ," *habeas corpus ad subjiciendum*, by which a court would inquire into the lawfulness of a detention of the petitioner. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 95 (1807). For other uses, *see* Carbo v. United States, 364 U.S. 611 (1961); Price v. Johnston, 334 U.S. 266 (1948). Technically, federal prisoners no longer utilize the writ of *habeas corpus* in seeking post-conviction relief, now the largest office of the writ, but proceed under 28 U.S.C. § 2255, on a motion to vacate judgment. Intimating that if § 2255 afforded prisoners a less adequate remedy than they would have under *habeas corpus*, it would be unconstitutional, the Court in United States v. Hayman, 342 U.S. 205 (1952), held the two remedies to be equivalent. *Cf.* Sanders v. United States, 373 U.S. 1, 14 (1963). The claims cognizable under one are cognizable under the other. Kaufman v. United States, 394 U.S. 217 (1969). Therefore, the term *habeas corpus* is used here to include the § 2255 remedy. There is a plethora of writings about the writ. *See*, *e.g.*, Hart & Wechsler (6th ed), *supra* at 1153–1310; *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970).

[270] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[271] INS v. St. Cyr, 533 U.S. 289, 301 (2001), quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

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habeas corpus stem by implication from the Suspension Clause or from the grant of judicial power?[272]

Since Chief Justice Marshall's opinion in *Ex parte Bollman*,[273] it was generally[274] accepted that "the power to award the writ by any of the courts of the United States, must be given by written law."[275] As Marshall explained, however, the suspension clause was an "injunction," an "obligation" to provide "efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[276] And so it has been understood since,[277] with only a few judicial voices raised to suggest that what Congress could not do directly (by suspension) it could not do by omission (by failing to provide for *habeas*).[278] But, because statutory authority had always existed authorizing the federal courts to grant the relief they deemed necessary under *habeas corpus*, the Court did not need to face the question.[279]

Having determined in *Bollman* that a statute was necessary before the federal courts had power to issue writs of *habeas corpus*, Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority.[280] As the Chief Justice read it, the authorization was limited to persons imprisoned under federal authority. It was not until 1867, with two small exceptions,[281]

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[272] Professor Chafee contended that by the time of the Constitutional Convention the right to *habeas corpus* was so well established no affirmative authorization was needed. *The Most Important Human Right in the Constitution*, 32 B.U.L. Rev. 143, 146 (1952). *But compare* Collins, *Habeas Corpus for Convicts: Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335, 344–345 (1952).

[273] 8 U.S. (4 Cr.) 75 (1807).

[274] 8 U.S. at 94. *See also Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[275] 8 U.S. at 64.

[276] 8 U.S. at 95. In quoting the clause, Marshall renders "shall not be suspended" as "should not be suspended."

[277] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *Cf.* Carbo v. United States, 364 U.S. 611, 614 (1961).

[278] *E.g.*, Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *revd. on other grounds sub nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that habeas exists as an inherent common law right); *see also* Justice Black's dissent, id. at 791, 798: "*Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." And, in Jones v. Cunningham, 371 U.S. 236, 238 (1963), the Court said: "The habeas corpus jurisdictional statute implements the *constitutional command* that the writ of habeas corpus be made available." (Emphasis added).

[279] *Cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[280] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 94 (1807). *See* Fay v. Noia, 372 U.S. 391, 409 (1963).

[281] Act of March 2, 1833, § 7, 4 Stat. 634 (federal officials imprisoned for enforcing federal law); Act of August 29, 1842, 5 Stat. 539 (foreign nationals detained by a

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that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority.[282] Pursuant to this authorization, the Court then expanded the use of the writ into a major instrument to reform procedural criminal law in both federal and state jurisdictions.

However, the question then arose as to what aspects of this broader *habeas* are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."[283] This statement, however, appears to be in tension with the theory of congressionally defined *habeas* found in *Bollman*, unless one assumes that a *habeas* right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act[284] that limited *habeas*, passed up an opportunity to delineate Congress's permissive authority over *habeas*, finding that none of the limitations to the writ in that statute raised questions of constitutional import.[285]

For practical purposes, the issue appears to have been resolved by *Boumediene v. Bush*,[286] in which the Court held that Congress's attempt to eliminate all federal *habeas* jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[287] violated the Suspension Clause. Although the Court did not explicitly identify whether

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state in violation of a treaty). *See also* Bankruptcy Act of April 4, 1800,§ 38, 2 Stat. 19, 32 (*habeas corpus* for imprisoned debtor discharged in bankruptcy), repealed by Act of December 19, 1803, 2 Stat. 248.

[282] The act of February 5, 1867, 14 Stat. 385, conveyed power to federal courts "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." On the law with respect to state prisoners prior to this statute, *see Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845); *cf.* Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823) (Justice Johnson); *Ex parte* Cabrera, 4 Fed. Cas. 964 (No. 2278) (C.C.D. Pa. 1805) (Justice Washington).

[283] Felker v. Turpin, 518 U.S. 651, 663–64 (1996). *See* INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); Swain v. Pressley, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

[284] Pub. L. 104–132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

[285] Felker v. Turpin, 518 U.S. 651 (1996).

[286] 128 S. Ct. 2229 (2008).

[287] In Rasul v. Bush, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal *habeas* statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees

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the underlying right to *habeas* that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of *habeas* being extended to enemy aliens held overseas.[288] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[289]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for *habeas*, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings—here, Combatant Status Review Tribunals or (CSRTs)—rather than proceedings before a court of law.[290] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant judicial oversight.[291] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evidence to challenge the government's case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admission of hearsay evidence. While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.[292]

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whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[288] 128 S. Ct. at 2251.

[289] 128 S. Ct. at 2258, 2259.

[290] Under the Detainee Treatment Act, Pub. L. 109–148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to "(I) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

[291] 128 S. Ct. at 2263, 2275.

[292] The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President's authority to detain them indefinitely.

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Habeas Corpus: The Process of the Writ.—A petition for a writ of *habeas corpus* is filed by or on behalf of a person in "custody," a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison.[293] The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[294] Traditionally, the proceeding could not be used to secure an adjudication of a question which if determined in the petitioner's favor would not result in his immediate release, since a discharge from custody was the only function of the writ,[295] but this restraint too the Court has abandoned in an emphasis upon the statutory language directing the habeas court to "dispose of the matter as law and justice require."[296] Thus, even if a prisoner has been released from jail, the presence of collateral consequences flowing from his conviction gives the court jurisdiction to determine the constitutional validity of the conviction.[297]

Petitioners seeking federal *habeas* relief must first exhaust their state remedies, a limitation long settled in the case law and codified in 1948.[298] Prisoners are required to present their claims in

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[293] 28 U.S.C. §§ 2241(c), 2254(a). "Custody" does not mean one must be confined; a person on parole or probation is in custody. Jones v. Cunningham, 371 U.S. 236 (1963). A person on bail or on his own recognizance is in custody, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300–301 (1984); Lefkowitz v. Newsome, 420 U.S. 283, 291 n.8 (1975); Hensley v. Municipal Court, 411 U.S. 345 (1973), and Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was also sufficiently in the custody of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

[294] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494–95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (federal district court for District of Columbia had jurisdiction of habeas petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

[295] McNally v. Hill, 293 U.S. 131 (1934); Parker v. Ellis, 362 U.S. 574 (1960).

[296] 28 U.S.C. § 2243. *See* Peyton v. Rowe, 391 U.S. 54 (1968). *See also* Maleng v. Cook, 490 U.S. 488 (1989).

[297] Carafas v. LaVallee, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 U.S. 574 (1960). In Peyton v. Rowe, 391 U.S. 54 (1968), the Court overruled McNally v. Hill, 293 U.S. 131 (1934), and held that a prisoner may attack on *habeas* the second of two consecutive sentences while still serving the first. *See also* Walker v. Wainwright, 390 U.S. 335 (1968) (prisoner may attack the first of two consecutive sentences although the only effect of a successful attack would be immediate confinement on the second sentence). Braden v. 30th Judicial Circuit Court , 410 U.S. 484 (1973), held that one sufficiently in custody of a state could use *habeas* to challenge the state's failure to bring him to trial on pending charges.

[298] 28 U.S.C. § 2254(b). See Preiser v. Rodriguez, 411 U.S. 475, 490–497 (1973), and id. at 500, 512–24 (Justice Brennan dissenting); Rose v. Lundy, 455 U.S. 509, 515–21 (1982). If a prisoner submits a petition with both exhausted and unexhausted claims, the *habeas* court must dismiss the entire petition. Rose v. Lundy, 455 U.S.

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state court only once, either on appeal or collateral attack, and they need not return time and again to raise their issues before coming to federal court.[299] In addition, "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. . . . A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once."[300]

Although they were once required to petition the Supreme Court on *certiorari* to review directly their state convictions, prisoners have been relieved of this largely pointless exercise,[301] but, if the Supreme Court has taken and decided a case, then its judgment is conclusive in *habeas* on all issues of fact or law actually adjudicated.[302] A federal prisoner in a § 2255 proceeding will file his motion in the court that sentenced him;[303] a state prisoner in a federal *habeas* action may file either in the district of the court in which he was sentenced or in the district in which he is in custody.[304]

Habeas corpus is not a substitute for an appeal.[305] It is not a method to test ordinary procedural errors at trial or violations of state law but only to challenge alleged errors which if established would go to make the entire detention unlawful under federal law.[306] If, after appropriate proceedings, the *habeas* court finds that on the facts discovered and the law applied the prisoner is entitled to relief, it must grant it, ordinarily ordering the government to release the prisoner unless he is retried within a certain period.[307]

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at 518–519. Exhaustion first developed in cases brought by persons in state custody prior to any judgment. *Ex parte* Royall, 117 U.S. 241 (1886); Urquhart v. Brown, 205 U.S. 179 (1907).

[299] Brown v. Allen, 344 U.S. 443, 447–450 (1953); id. at 502 (Justice Frankfurter concurring); Castille v. Peoples, 489 U.S. 346, 350 (1989).

[300] Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 17, 18 (2009).

[301] Fay v. Noia, 372 U.S. 391, 435 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950).

[302] 28 U.S.C. § 2244(c). But an affirmance of a conviction by an equally divided Court is not an adjudication on the merits. Neil v. Biggers, 409 U.S. 188 (1972).

[303] 28 U.S.C. § 2255.

[304] 28 U.S.C. § 2241(d). *Cf.* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), overruling Ahrens v. Clark, 335 U.S. 188 (1948), and holding that a petitioner may file in the district in which his custodian is located even though the prisoner may be located elsewhere.

[305] Glasgow v. Moyer, 225 U.S. 420, 428 (1912); Riddle v. Dyche, 262 U.S. 333, 335 (1923); Eagles v. United States ex rel. Samuels, 329 U.S. 304, 311 (1946). *But compare* Brown v. Allen, 344 U.S. 443, 558–560 (1953) (Justice Frankfurter dissenting in part).

[306] Estelle v. McGuire, 502 U.S. 62 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Pulley v. Harris, 465 U.S. 37, 41–42 (1984).

[307] 8 U.S.C. § 2244(b). See Whiteley v. Warden, 401 U.S. 560, 569 (1971); Irvin v. Dowd, 366 U.S. 717, 729 (1961).

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Congressional Limitation of the Injunctive Power

Although some judicial dicta[308] support the idea of an inherent power of the federal courts sitting in equity to issue injunctions independently of statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in § 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,[309] it did assert the power of Congress to regulate the equity powers of the federal courts. The Act of March 2, 1793,[310] prohibited the issuance of any injunction by any court of the United States to stay proceedings in state courts except where such injunctions may be authorized by any law relating to bankruptcy proceedings. In subsequent statutes, Congress prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes,[311] provided for a three-judge court as a prerequisite to the issuance of injunctions to restrain the enforcement of state statutes for unconstitutionality,[312] for enjoining federal statutes for unconstitutionality,[313] and for enjoining orders of the Interstate Commerce Commission,[314] limited the power to issue injunc-

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[308] In United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), Justice Brewer, speaking for the Court, approached a theory of inherent equity jurisdiction when he declared: "The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases." It should be emphasized, however, that the Court made no suggestion that it could apply pre-existing principles of equity without jurisdiction over the subject matter. Indeed, the inference is to the contrary. In a dissenting opinion in which Justices McKenna and Van Devanter joined, in Paine Lumber Co. v. Neal, 244 U.S. 459, 475 (1917), Justice Pitney contended that Article III, § 2, "had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate."

[309] Boyce's Executors v. Grundy, 28 U.S. (3 Pet.) 210 (1830).

[310] 1 Stat. 333, 28 U.S.C. § 2283.

[311] 26 U.S.C. § 7421(a).

[312] This provision was repealed in 1976, save for apportionment and districting suits and when otherwise required by an Act of Congress. Pub. L. 94–381, § 1, 90 Stat. 1119, and § 3, 28 U.S.C. § 2284. Congress occasionally provides for such courts, as in the Voting Rights Act, 42 U.S.C. §§ 1971, 1973c.

[313] Repealed by Pub. L. 94–381, § 2, 90 Stat. 1119 (1976). Congress occasionally provides for such courts now, in order to expedite Supreme Court consideration of constitutional challenges to critical federal laws. *See* Bowsher v. Synar, 478 U.S. 714, 719–721 (1986) (3-judge court and direct appeal to Supreme Court in the Balanced Budget and Emergency Deficit Control Act of 1985).

[314] Repealed by Pub. L. 93–584, § 7, 88 Stat. 1918.

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tions restraining rate orders of state public utility commissions,[315] and the use of injunctions in labor disputes,[316] and placed a very rigid restriction on the power to enjoin orders of the Administrator under the Emergency Price Control Act.[317]

Perhaps pressing its powers further than prior legislation, Congress has enacted the Prison Litigation Reform Act of 1996.[318] Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. If a decree was previously issued without regard to the standards now imposed, the defendant or intervenor is entitled to move to vacate it. No prospective relief is to last longer than two years if any party or intervenor so moves. Finally, a previously issued decree that does not conform to the new standards imposed by the Act is subject to termination upon the motion of the defendant or an intervenor. After a short period (30 or 60 days, depending on whether there is "good cause" for a 30-day extension), such a motion operates as an automatic stay of the prior decree pending the court's decision on the merits. The Court upheld the termination and automatic stay provisions in *Miller v. French*,[319] rejecting the contention that the automatic stay provision offends separation of powers principles by legislative revision of a final judgment. Rather, Congress merely established new standards for the enforcement of prospective relief, and the automatic stay provision "helps to implement the change in the law."[320] A number of constitutional challenges can be expected respecting Congress's power to limit federal judicial authority to remedy constitutional violations.

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the

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[315] 28 U.S.C. § 1342.

[316] 29 U.S.C. §§ 52, 101–110.

[317] 56 Stat. 31, 204 (1942).

[318] The statute was part of an Omnibus Appropriations Act signed by the President on April 26, 1996. Pub. L. 104–134, §§ 801–10, 110 Stat. 1321–66—1321–77, amending 18 U.S.C. § 3626.

[319] 530 U.S. 327 (2000).

[320] 530 U.S. at 348.

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prohibition against the stay of proceedings in state courts,[321] but it has on the whole adhered to the statute. The exceptions raise no constitutional issues, and the tendency has been alternately to contract and to expand the scope of the exceptions.[322]

In *Duplex Printing Press Co. v. Deering*,[323] the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress on the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932, which has not only been declared constitutional[324] but has been applied liberally[325] and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

Injunctions Under the Emergency Price Control Act of 1942.—*Lockerty v. Phillips*[326] justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals, which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or orders of OPA, and even it could enjoin such orders only after finding that the order was not in accordance with law or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees, and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by *certiorari*, effectiveness was to be postponed until final disposition. A unanimous Court, speaking through Chief Justice Stone, declared that there "is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by Article III, § 1, of the Constitution. This power, which Congress

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[321] Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Gaines v. Fuentes, 92 U.S. 10 (1876); *Ex parte* Young, 209 U.S. 123 (1908).

[322] *See*, Anti-Injunction Statute, *infra*.

[323] 254 U.S. 443 (1921).

[324] Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[325] In addition to *Lauf* and *New Negro Alliance*, *see* Drivers' Union v. Valley Co., 311 U.S. 91, 100–103 (1940), *and compare* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), *with* Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[326] 319 U.S. 182 (1943).

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is left free to exercise or not, was held to include the power "'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"[327] Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of *Yakus v. United States*,[328] which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act.[329]

The Rule-Making Power and Powers Over Process

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business.[330] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman v. Southard*,[331] which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later, in *Fink v. O'Neil*,[332] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States, and hence the government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the

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[327] 319 U.S. at 187 (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). *See* South Carolina v. Katzenbach, 383 U.S. 301, 331–332 (1966), upholding a provision of the Voting Rights Act of 1965 that made the district court for the District of Columbia the only avenue of relief for States seeking to remove the coverage of the Act.

[328] 321 U.S. 414 (1944). *But compare* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (construing statute in way to avoid the constitutional issue raised in *Yakus*). In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), the Court held that, when judicial review of a deportation order had been precluded, due process required that the alien be allowed to make a collateral challenge to the use of that proceeding as an element of a subsequent criminal proceeding.

[329] Ch. 26, 56 Stat. 31, § 204 (1942).

[330] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629 (1924).

[331] 23 U.S. (10 Wheat.) 1 (1825).

[332] 106 U.S. 272, 280 (1882).

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law confers and limits it."[333] Conceding, in 1934, the limited competence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes.[334] Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the Federal Rules of Civil Procedure thus judicially promulgated neither affect the substantive rights of litigants[335] nor alter the jurisdiction[336] of federal courts and the venue of actions therein[337] and, thus circumscribed, have been upheld as valid.

Limitations to The Rule Making Power.—The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule "can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules "which lower courts make for their own guidance under authority conferred."[338] As incident to the judicial power, courts of the United States possess inherent

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[333] *See* Miner v. Atlass, 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. *See also* Harris v. Nelson, 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a *habeas corpus* court to propound interrogatories.

[334] In the Act of June 19, 1934, 48 Stat. 1064, and contained in 28 U.S.C. § 2072, Congress, in authorizing promulgation of rules of civil procedure, reserved the power to examine and override or amend rules proposed pursuant to the act which it found to be contrary to its legislative policy. *See* Sibbach v. Wilson, 312 U.S. 1, 14–16 (1941). Congress also has authorized promulgation of rules of criminal procedure, *habeas*, evidence, admiralty, bankruptcy, and appellate procedure. *See* Hart & Wechsler (6th ed.), supra at 533–543 (discussing development of rules and citing secondary authority). Congress in the 1970s disagreed with the direction of proposed rules of evidence and of *habeas* practice, and, first postponing their effectiveness, enacted revised rules. Pub. L. 93–505, 88 Stat. 1926 (1974); Pub. L. 94–426, 90 Stat. 1334 (1976). On this and other actions, *see* Hart & Wechsler (6th ed.), supra.

[335] However, the abolition of old rights and the creation of new ones in the course of litigation conducted in conformance with these judicially prescribed federal rules has been sustained as against the contention of a violation of substantive rights. Sibbach v. Wilson, 312 U.S. 1, 14 (1941).

[336] *Cf.* United States v. Sherwood, 312 U.S. 584, 589–590 (1941).

[337] Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

[338] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629, 635, 636 (1924). It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals should be exercised. As long as the latter court keeps within the

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authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.[339]

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression, and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law.[340] Such powers are said to be essential to and inherent in the organization of courts of justice.[341] While the Court has not "precisely delineated the outer boundaries" of a federal court's inherent powers to manage its own internal affairs, the Court has recognized two limits on the exercise of such authority.[342] First, a court, in exercising its inherent powers over its own processes, must act reasonably in response to a specific problem or issue "confronting the court's fair administration of justice."[343] Second, any exercise of an inherent power cannot conflict with any express grant of or limitation on the district court's power as contained in a statute or rule, such as the Federal Rules of Civil Procedure.[344] In applying these two standards, the Court has recognized that a district court, as an exercise of its inherent powers, can in limited circumstances rescind an order to discharge a jury and recall that jury in a civil case.[345] The Supreme Court has also acknowledged that federal courts possess the inherent power to con-

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bounds of judicial discretion, its action is not reviewable. *In re* Burwell, 350 U.S. 521 (1956).

[339] McDonald v. Pless, 238 U.S. 264, 266 (1915); Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844). *See* Thomas v. Arn, 474 U.S. 140 (1985) (court of appeal rule conditioning appeal on having filed with the district court timely objections to a master's report). In Rea v. United States, 350 U.S. 214, 218 (1956), the Court, citing McNabb v. United States, 318 U.S. 332 (1943), asserted that this supervisory power extends to policing the requirements of the Court's rules with respect to the law enforcement practices of federal agents. *But compare* United States v. Payner, 447 U.S. 727 (1980).

[340] Gumbel v. Pitkin, 124 U.S. 131 (1888); Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866).

[341] Eberly v. Moore, 65 U.S. (24 How.) 147 (1861); Arkadelphia Co. v. St. Louis S.W. Ry., 249 U.S. 134 (1919).

[342] *See* Dietz v. Bouldin, 579 U.S. ___, No. 15–458, slip op. at 4 (2016).

[343] *Id.* at 4–5.

[344] *Id.* at 4.

[345] *Id.* at 5–7 (acknowledging that while it is "reasonable" to allow a jury to reconvene after a formal discharge to correct an error and while such an exercise of authority does not conflict with a rule or statute, the exercise of the inherent power to rescind a discharge order needs to be "carefully circumscribed" to guarantee the existence of an impartial jury); *see also id.* at 9–10 (holding that a court, in exercising an inherent power to rescind a discharge order, must consider, among other factors, (1) the length of delay between discharge and recall; (2) whether jurors have spoken to anyone after discharge; (3) any reaction to the verdict in the courtroom; and (4) any access jurors may have had to outside materials after discharge). The rule provided in *Dietz* extends only to civil cases, as additional constitutional concerns—

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trol other aspects of regulating internal court proceedings, including having the inherent power to (1) hear a motion *in limine*;[346] (2) dismiss a case for the convenience of the parties or witnesses because of the availability of an alternative forum[347]; and (3) stay proceedings pending the resolution of parallel actions in other courts.[348] The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.[349]Nonetheless, while the exercise of an inherent power can, at times, allow for departures from even long-established, judicially crafted common law rules,[350] courts are not "generally free to discover new inherent powers that are contrary to civil practice as recognized in the common laws."[351]

Appointment of Referees, Masters, and Special Aids

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in *Heckers v. Fowler*[352] to be coequal with the organization of the federal courts. In the leading case of *Ex parte Peterson*,[353] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The court authorized him to conduct a preliminary investigation of facts and file a report thereon

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namely, the attachment of the double jeopardy bar—may arise if a court were to recall a jury after discharge in a criminal case. *See id.* at 10.

[346] *See* Luce v. United States, 469 U.S. 38, 41 n.4 (1984). A motion *in limine* is a preliminary motion resolved by a court prior to trial and generally regards the admissibility of evidence. *See* Black's Law Dictionary 1171 (10th ed. 2014).

[347] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947). This doctrine is called *forum non conveniens*. *See* Black's Law Dictionary 770 (10th ed. 2014) (defining *forum non conveniens* as the "doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.").

[348] *See* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

[349] Gagnon v. United States, 193 U.S. 451, 458 (1904).

[350] *See Dietz*, slip op. at 11 (assuming that, even if courts at common law lacked the inherent power to rescind a jury discharge order, a court's exercise of its inherent powers can depart from the common law). The term "common law" refers to the body of English law that was "adopted as the law of the American colonies and supplemented with local enactments and judgments." *See* Black's Law Dictionary 334 (10th ed. 2014).

[351] *See Dietz*, slip op. at 12.

[352] 69 U.S. (2 Wall.) 123, 128–129 (1864).

[353] 253 U.S. 300 (1920).

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for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[354] The power to appoint auditors by federal courts sitting in equity has been exercised from their very beginning, and here it was held that this power is the same whether the court sits in law or equity.

Power to Admit and Disbar Attorneys

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." Such power, he made clear, however, "is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself."[355] The Test-Oath Act of July 2, 1862, which purported to exclude former Confederates from the practice of law in the federal courts, was invalidated in *Ex parte Garland*.[356] In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the court, and though Congress may prescribe qualifications for the practice of law in the federal courts, it may not do so in such a way as to inflict punishment con-

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[354] 253 U.S. at 312.

[355] *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1857). In Frazier v. Heebe, 482 U.S. 641 (1987), the Court exercised its supervisory power to invalidate a district court rule respecting the admission of attorneys. *See In re* Sawyer, 360 U.S. 622 (1959), with reference to the extent to which counsel of record during a pending case may attribute error to the judiciary without being subject to professional discipline.

[356] 71 U.S. (4 Wall.) 333 (1867).

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trary to the Constitution or to deprive a pardon of the President of its legal effect.[357]

SECTION 2. Clause 1. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

JUDICIAL POWER AND JURISDICTION-CASES AND CONTROVERSIES

The potential for abuse of judicial power was of concern to the Founding Fathers, leading them to establish limits on the circumstance in which the courts could consider cases. When, late in the Convention, a delegate proposed to extend the judicial power beyond the consideration of laws and treaties to include cases arising under the Constitution, Madison's notes captured these concerns. "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the

[357] 71 U.S. at 378–80. Although a lawyer is admitted to practice in a federal court by way of admission to practice in a state court, he is not automatically sent out of the federal court by the same route, when "principles of right and justice" require otherwise. A determination of a state court that an accused practitioner should be disbarred is not conclusively binding on the federal courts. Theard v. United States, 354 U.S. 278 (1957), citing Selling v. Radford, 243 U.S. 46 (1917). *Cf. In re* Isserman, 345 U.S. 286, 288 (1953), where it was acknowledged that upon disbarment by a state court, Rule 2, par. 5 of the Rules of the Supreme Court imposes upon the attorney the burden of showing cause why he should not be disbarred in the latter, and upon his failure to meet that burden, the Supreme Court will "follow the finding of the state that the character requisite for membership in the bar is lacking." In 348 U.S. 1 (1954), Isserman's disbarment was set aside for reason of noncompliance with Rule 8 requiring concurrence of a majority of the Justices participating in order to sustain a disbarment. *See also In re* Disbarment of Crow, 359 U.S. 1007 (1959). For an extensive treatment of disbarment and American and English precedents thereon, *see Ex parte* Wall, 107 U.S. 265 (1883).

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Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." Consequently, "[t]he motion of Docr. Johnson was agreed to nem : con : it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—."[358]

This passage, and the language of Article III, § 2, makes clear that the Framers did not intend for federal judges to roam at large in construing the Constitution and laws of the United States, but rather preferred and provided for resolution of disputes arising in a "judicial" manner. This interpretation is reenforced by the refusal of the Convention to assign the judges the extra-judicial functions which some members of the Convention—Madison and Wilson notably—conceived for them. Thus, for instance, the Convention four times voted down proposals for judges, along with executive branch officials, to sit on a council of revision with the power to veto laws passed by Congress.[359] A similar fate befell suggestions that the Chief Justice be a member of a privy council to assist the President[360] and that the President or either House of Congress be able to request advisory opinions of the Supreme Court.[361] The intent of the Framers in rejecting the latter proposal was early effectuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793.[362] Moreover, the refusal of the Justices to participate in a congressional plan for awarding veterans' pensions[363] bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsulated in a series of principles or doctrines, the application of which determines whether an issue is met for judicial resolution and whether the parties raising it are entitled to have it judicially resolved. Constitutional restrictions are intertwined with prudential considerations in

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[358] 2 M. Farrand, supra at 430.

[359] The proposal was contained in the Virginia Plan. 1 id. at 21. For the four rejections, *see* id. at 97–104, 108–10, 138–40, 2 id. at 73–80, 298.

[360] Id. at 328–29, 342–44. Although a truncated version of the proposal was reported by the Committee on Detail, id. at 367, the Convention never took it up.

[361] Id. at 340–41. The proposal was referred to the Committee on Detail and never heard of again.

[362] 1 C. Warren, supra at 108–111; 3 Correspondence and Public Papers of John Jay 633–635 (H. Johnston ed., 1893); Hart & Wechsler (6th ed.), supra at 50–52.

[363] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), discussed "Finality of Judgment as an Attribute of Judicial Power," supra.

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the expression of these principles and doctrines, and it is seldom easy to separate out the two strands.[364]

The Two Classes of Cases and Controversies

By the terms of the foregoing section, the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in *Cohens v. Virginia*:[365] "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[366]

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[367] The meaning attached to the terms "cases" and "controversies"[368] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law."[369] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention,

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[364] *See*, *e.g.*, Justice Brandeis dissenting in Ashwander v. TVA, 297 U.S. 288, 341, 345–348 (1936). *Cf.* Flast v. Cohen, 392 U.S. 83, 97 (1968); Rescue Army v. Municipal Court, 331 U.S. 549, 568–575 (1947).

[365] 19 U.S. (6 Wheat.) 264 (1821).

[366] 19 U.S. at 378.

[367] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[368] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[369] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

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redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."[370]

Chief Justice Hughes once essayed a definition, which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[371] Of the "case" and "controversy" requirement, Chief Justice Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine."[372] Justice Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it.[373]

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

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[370] *In re* Pacific Ry. Comm'n, 32 F. 241, 255 (C.C. Calif. 1887) (Justice Field). *See also* Smith v. Adams, 130 U.S. 167, 173–174 (1889).

[371] Aetna Life Ins. Co. v. Haworth, 300 U.S. 229, 240–241 (1937). *Cf.* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952).

[372] Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

[373] "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 150 (1951).

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Adverse Litigants

The presence of adverse litigants with real interests to contend for is a standard which has been stressed in numerous cases,[374] and the requirement implicates a number of complementary factors making up a justiciable suit. The requirement was one of the decisive factors, if not the decisive one, in *Muskrat v. United States*,[375] in which the Court struck down a statute authorizing certain named Indians to bring a test suit against the United States to determine the validity of a law affecting the allocation of Indian lands. Attorney's fees of both sides were to be paid out of tribal funds deposited in the United States Treasury. "The judicial power," said the Court, ". . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. . . . It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question."[376]

Concerns regarding adversity also arise when the executive branch chooses to enforce, but not defend in court, federal statutes that it has concluded are unconstitutional. In *United States v. Windsor*,[377] the Court considered the Defense of Marriage Act (DOMA), which excludes same-sex partners from the definition of "spouse" as used

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[374] Lord v. Veazie, 49 U.S. (8 How.) 251 (1850); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892); California v. San Pablo & T.R.R., 149 U.S. 308 (1893); Tregea v. Modesto Irrigation District, 164 U.S. 179 (1896); Lampasas v. Bell, 180 U.S. 276 (1901); Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Johnson, 319 U.S. 302 (1943); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971).

[375] 219 U.S. 346 (1911).

[376] 219 U.S. at 361–62. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. Gritts v. Fisher, 224 U.S. 640 (1912). Other cases have involved similar problems, but they resulted in decisions on the merits. *E.g.*, *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 455–463 (1899); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966); *but see* id. at 357 (Justice Black dissenting). The principal effect of *Muskrat* was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law.

[377] 570 U.S. ___, No. 12–307, slip op. (2013).

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in federal statutes.[378] DOMA was challenged by the surviving member of a same-sex couple (married in Canada), who was seeking to claim a spousal federal estate tax exemption. Although the executive branch continued to deny the exemption, it also declined to defend the statute based on doubts as to whether it would survive scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause. Consequently, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG)[379] intervened to defend the statute. The Court held that, despite the decision not to defend, the failure of the United States to provide a refund to the taxpayer constituted an injury sufficient to establish standing, leaving only "prudential" limitations on judicial review at issue.[380] The Court concluded that the "prudential" concerns were outweighed by the presence of BLAG to offer an adversarial presentation of the issue, the legal uncertainty that would be caused by dismissing the case, and the concern that the executive branch's assessment of the constitutionality of the statute would be immunized from judicial review.[381]

Collusive and Feigned Suits.—Adverse litigants are lacking in those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord v. Veazie*,[382] the latter had executed a deed to the former warranting that he had certain rights claimed by a third person, and suit was instituted to decide the "dispute." Declaring that "the whole proceeding was in contempt of the court, and highly reprehensible," the Court observed: "The contract set out in the pleadings was made for the purpose of instituting this suit. . . . The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit. . . . And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves . . . and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision. . . ."[383] "Whenever," said the Court in another case, "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involv-

[378] Pub. L. 104–199, § 3, 110 Stat. 2419, 1 U.S.C. § 7.

[379] The BLAG is a standing body of the House, created by rule, consisting of members of the House Leadership and authorized to direct the House Office of the General Counsel to file suit on its behalf in state or federal court.

[380] *Windsor*, slip op. at 6–7.

[381] *Id.* at 10–13.

[382] 49 U.S. (8 How.) 251 (1850).

[383] 49 U.S. at 254–55.

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ing the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."[384] Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.[385] There are also instances in which there may not be in fact an adverse party at certain stages; that is, instances when the parties do not actually disagree, but where the Supreme Court and the lower courts are empowered to adjudicate.[386]

Stockholder Suits.—Moreover, adversity in parties has often been found in suits by stockholders against their corporation in which the constitutionality of a statute or a government action is drawn in question, even though one may suspect that the interests of plaintiffs and defendant are not all that dissimilar. Thus, in *Pollock v. Farmers' Loan & Trust Co.*,[387] the Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing a statute which forbade the maintenance in any court of a suit to restrain the collection of any tax.[388] Subsequently, the Court sustained jurisdiction in cases brought by

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[384] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892).

[385] *E.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *cf.* 1 C. Warren, supra at 147, 392–95; 2 id. at 279–82. In Powell v. Texas, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be "the premises of a syllogism transparently designed to bring this case" within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.

[386] Examples are naturalization cases, Tutun v. United States, 270 U.S. 568 (1926), entry of judgment by default or on a plea of guilty, *In re* Metropolitan Ry. Receivership, 208 U.S. 90 (1908), and consideration by the Court of cases in which the Solicitor General confesses error below. *Cf.* Young v. United States, 315 U.S. 257, 258–259 (1942); Casey v. United States, 343 U.S. 808 (1952); Rosengart v. Laird, 404 U.S. 908 (1972) (Justice White dissenting). *See also* Sibron v. New York, 392 U.S. 40, 58–59 (1968).

[387] 157 U.S. 429 (1895). The first injunction suit by a stockholder to restrain a corporation from paying a tax was apparently Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856). *See also* Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).

[388] *Cf.* Cheatham v. United States, 92 U.S. 85 (1875); Snyder v. Marks, 109 U.S. 189 (1883).

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a stockholder to restrain a company from investing its funds in farm loan bonds issued by federal land banks[389] and by preferred stockholders against a utility company and the TVA to enjoin the performance of contracts between the company and TVA on the ground that the statute creating it was unconstitutional.[390] Perhaps most notorious was *Carter v. Carter Coal Co.*,[391] in which the president of the company brought suit against the company and its officials, among whom was Carter's father, a vice president of the company, and in which the Court entertained the suit and decided the case on the merits.[392]

Substantial Interest: Standing

Perhaps the most important element of the requirement of adverse parties may be found in the "complexities and vagaries" of the standing doctrine. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[393] The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[394] This practical conception of standing has now given way to a primary emphasis upon separation of powers as the guide. "[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that require-

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[389] Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[390] Ashwander v. TVA, 297 U.S. 288 (1936). *See* id. at 341 (Justice Brandeis dissenting in part).

[391] 298 U.S. 238 (1936).

[392] Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 667–668 (1948) (detailing the framing of the suit).

[393] Flast v. Cohen, 392 U.S. 83, 99 (1968). This characterization is not the view of the present Court; *see* Allen v. Wright, 468 U.S. 737, 750, 752, 755–56, 759–61 (1984). In taxpayer suits, it is appropriate to look to the substantive issues to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Id. at 102; United States v. Richardson, 418 U.S. 166, 174–75 (1974); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78–79 (1978).

[394] Baker v. Carr, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather, the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. Valley Forge Christian College v. Americans United, 454 U.S. 464, 482–486 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225–226 (1974). Nor is the fact that, if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. Id. at 227.

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ment are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[395]

Standing as a doctrine is composed of both constitutional and prudential restraints on the power of the federal courts to render decisions,[396] and is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action.[397] As such, it is often interpreted according to the prevailing philosophies of judicial activism and restraint, and narrowly or broadly in terms of the viewed desirability of access to the courts by persons seeking to challenge legislation or other governmental action. The trend in the 1960s was to broaden access; in the 1970s, 1980s, and 1990s, it was to narrow access by stiffening the requirements of standing, although Court majorities were not entirely consistent. The major difficulty in setting forth the standards is that the Court's generalizations and the results it achieves are often at variance.[398]

The standing rules apply to actions brought in *federal* courts, and they have no direct application to actions brought in state courts.[399]

Generalized or Widespread Injuries.—Persons do not have standing to sue in federal court when all they can claim is that they have an interest or have suffered an injury that is shared by

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[395] Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). All the standards relating to whether a plaintiff is entitled to adjudication of his claims must be evaluated "by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' . . . and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" Id. at 752 (quoting, respectively, Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892), and Flast v. Cohen, 392 U.S. 83, 97 (1968)). For the strengthening of the separation-of-powers barrier to standing, *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60, 571–78 (1992).

[396] *E.g.*, Valley Forge Christian College v. Americans United, 454 U.S. 464, 471–476 (1982); Allen v. Wright, 468 U.S. 737, 750–751 (1984).

[397] C. Wright, Handbook of the Law of Federal Courts 60 (4th ed. 1983).

[398] "[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . [and] this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982). "Generalizations about standing to sue are largely worthless as such." Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970). For extensive consideration of the doctrine, *see* Hart & Wechsler (6th ed.), supra at 100–183.

[399] Thus, state courts could adjudicate a case brought by a person who had no standing in the federal sense. If the plaintiff lost, he would have no recourse in the U.S. Supreme Court, because of his lack of standing, Tileston v. Ullman, 318 U.S. 44 (1943); Doremus v. Board of Education, 342 U.S. 429 (1952), but if plaintiff prevailed, the losing defendant might be able to appeal, because he might be able to assert sufficient injury to his federal interests. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

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all members of the public. Thus, a group of persons suing as citizens to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, was denied standing.[400] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. . . . [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance."[401]

Notwithstanding that a generalized injury that all citizens share is insufficient to confer standing, where a plaintiff alleges that the defendant's action injures him in "a concrete and personal way," "it does not matter how many [other] persons have [also] been injured. . . . [W]here a harm is concrete, though widely shared, the Court has found injury in fact."[402]

Taxpayer Suits.—Save for a narrow exception, standing is also lacking when a litigant attempts to sue to contest governmental action that he claims injures him as a taxpayer. In *Frothingham v. Mellon*,[403] the Court denied standing to a taxpayer suing to restrain disbursements of federal money to those states that chose to participate in a program to reduce maternal and infant mortality; her claim was that Congress lacked power to appropriate funds for those purposes and that the appropriations would increase her taxes in future years in an unconstitutional manner. Noting that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminate" and that "the effect upon future taxation, of any payment out of the funds . . . [is] remote, fluctuating and uncertain," the Court ruled that plaintiff had failed to allege the type of "direct injury" necessary to confer standing.[404]

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

[401] 418 U.S. at 217. *See also* United States v. Richardson, 418 U.S. 166, 176–77 (1974); Valley Forge Christian College v. Americans United, 454 U.S. 464, 483 (1982); Allen v. Wright, 468 U.S. 737, 754 (1984); Whitmore v. Arkansas, 495 U.S. 149 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–77 (1992); Lance v. Coffman, 549 U.S. 437, 441 (2007) (per curiam). *Cf. Ex parte* Levitt, 302 U.S. 633 (1937); Laird v. Tatum, 408 U.S. 1 (1972).

[402] Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 517, 522 (2007) (internal quotation marks omitted). In this case, "EPA maintain[ed] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." The Court, however, found that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" Id. at 517, 521.

[403] Usually cited as Massachusetts v. Mellon, 262 U.S. 447 (1923), the two suits having been consolidated.

[404] 262 U.S. at 487, 488. In Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007), the Court added that, "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."

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Taxpayers were found to have standing, however, in *Flast v. Cohen*,[405] to contest the expenditure of federal moneys to assist religious-affiliated organizations. The Court asserted that the answer to the question whether taxpayers have standing depends on whether the circumstances of each case demonstrate that there is a logical nexus between the status asserted and the claim sought to be adjudicated. First, there must be a logical link between the status of taxpayer and the type of legislative enactment attacked; this means that a taxpayer must allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, rather than also of incidental expenditure of funds in the administration of an essentially regulatory statute. Second, there must be a logical nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged; this means that the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power, rather than simply arguing that the enactment is generally beyond the powers delegated to Congress. Both *Frothingham* and *Flast* met the first test, because they attacked a spending program. *Flast* met the second test, because the Establishment Clause of the First Amendment operates as a specific limitation upon the exercise of the taxing and spending power, but *Frothingham* did not, having alleged only that the Tenth Amendment had been exceeded. The Court reserved the question whether other specific limitations constrain the Taxing and Spending Clause in the same manner as the Establishment Clause.[406]

Since *Flast*, the Court has refused to expand taxpayer standing. Litigants seeking standing as taxpayers to challenge legislation permitting the CIA to withhold from the public detailed information about its expenditures as a violation of Article I, § 9, cl. 7, and to challenge certain Members of Congress from holding commissions in the reserves as a violation of Article I, § 6, cl. 2, were denied standing, in the former cases because their challenge was not to an exercise of the taxing and spending power and in the latter because their challenge was not to legislation enacted under Article I, § 8, but rather was to executive action in permitting Members to maintain their reserve status.[407] An organization promoting church-state separation was denied standing to challenge an execu-

[405] 392 U.S. 83 (1968).

[406] 392 U.S. at 105.

[407] United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227–28 (1974). *Richardson* in its generalized grievance constriction does not apply when Congress confers standing on litigants. FEC v. Akins, 524 U.S. 11 (1998). When Congress confers standing on "any person aggrieved" by the denial of information required to be furnished them, it matters

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tive decision to donate surplus federal property to a church-related college, both because the contest was to executive action under valid legislation and because the property transfer was not pursuant to a Taxing and Spending Clause exercise but was taken under the Property Clause of Article IV, § 3, cl. 2.[408] The Court also refused to create an exception for Commerce Clause violations to the general prohibition on taxpayer standing.[409]

Most recently, a Court plurality held that, even in Establishment Clause cases, there is no taxpayer standing where the expenditure of funds that is challenged was not specifically authorized by Congress, but came from general executive branch appropriations.[410]

Where expenditures "were not expressly authorized or mandated by any specific congressional enactment," a lawsuit challenging them "is not directed at an exercise of congressional power and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'"[411]

Local taxpayers attacking local expenditures have generally been permitted more leeway than federal taxpayers insofar as standing

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not that most people will be entitled and will thus suffer a "generalized grievance," the statutory entitlement is sufficient. Id. at 21–25.

[408] Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982). In Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996), the Court played down the "serious and adversarial treatment" prong of standing and strongly reasserted the separation-of-powers value of keeping courts within traditional bounds. The Court again took this approach in Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2569 (2007), finding that "*Flast* itself gave too little weight to [separation-of-powers] concerns."

[409] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[410] Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007). This decision does not affect Establishment Clause cases in which the plaintiff can allege a personal injury. A plaintiff who challenges a government display of a religious object, for example, need not sue as a taxpayer but may have standing "by alleging that he has undertaken a 'special burden' or has altered his behavior to avoid the object that gives him offense. . . . [I]t is enough for standing purposes that a plaintiff allege that he 'must come into direct and unwelcome contact with the religious display to participate fully as [a] citizen[ ] . . . and to fulfill . . . legal obligations.'" Books v. Elkhart County, 401 F.3d 857, 861 (7th Cir. 2005). In Van Orden v. Perry, 545 U.S. 677, 682 (2005), the Court, without mentioning standing, noted that the plaintiff "has encountered the Ten Commandments monument during his frequent visits to the [Texas State] Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building."

[411] 127 S. Ct. at 2568 (citations omitted). Justices Scalia and Thomas concurred in the judgment but would have overruled *Flast*. Justice Souter, joined by three other justices, dissented because he saw no logic in the distinction the plurality drew, as the plurality did not and could not have suggested that the taxpayers in *Hein* "have any less stake in the outcome than the taxpayers in *Flast*." Id. at 2584.

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is concerned. Thus, in *Everson v. Board of Education*,[412] a municipal taxpayer was found to have standing to challenge the use of public funds for transportation of pupils to parochial schools.[413] But, in *Doremus v. Board of Education*,[414] the Court refused an appeal from a state court for lack of standing of a taxpayer challenging Bible reading in the classroom. The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[415] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in *Doremus* wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[416]

Constitutional Standards: Injury in Fact, Causation, and Redressability.—Although the Court has been inconsistent, it has now settled upon the rule that, "at an irreducible minimum," the constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have: 1) suffered some actual or threatened injury; 2) that injury can fairly be traced to the challenged action of the defendant; and 3) that the injury is likely to be redressed by a favorable decision.[417]

For a time, the actual or threatened injury requirement noted above included an additional requirement that such injury be the product of "a wrong which directly results in the violation of a le-

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[412] 330 U.S. 1 (1947). In DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

[413] *See* Bradfield v. Roberts, 175 U.S. 291, 295 (1899); Crampton v. Zabriskie, 101 U.S. 601 (1880); Heim v. McCall, 239 U.S. 175 (1915). *See also* Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962) (plaintiffs suing as parents and taxpayers).

[414] 342 U.S. 429 (1952). *Compare* Alder v. Board of Education, 342 U.S. 485 (1952). *See also* Richardson v. Ramirez, 418 U.S. 24 (1974).

[415] 342 U.S. at 434.

[416] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006).

[417] Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Monsanto Co. v. Geerston Seed Farms, 561 U.S. ___, No. 09–475, slip op. (2010). *But see* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), a class action case in which the majority opinion appears to reduce the significance of the personal stake requirement. Id. at 404 n.11, reserving full consideration of the dissent's argument at 401 n.1, 420–21.

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gal right."[418] In other words, the injury needs to be "one of property, one arising out of contract, one protected against tortuous invasion, or one founded in a statute which confers a privilege."[419] It became apparent, however, that the "legal right" language was "demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."[420] Despite this test, the observable tendency of the Court was to find standing in cases which were grounded in injuries far removed from property rights.[421]

In any event, the "legal rights" language has now been dispensed with. Rejection of this doctrine occurred in two administrative law cases in which the Court announced that parties had standing when they suffered "injury in fact" to some interest, "economic or otherwise," that is arguably within the zone of interest to be protected or regulated by the statute or constitutional provision in question.[422] Political,[423] environmental, aesthetic, and social interests, when impaired, now afford a basis for making constitutional attacks upon governmental action.[424] "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create

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[418] Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938). *Cf.* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 151–152 (1951) (Justice Frankfurter concurring). *But see* Frost v. Corporation Comm'n, 278 U.S. 515 (1929); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

[419] Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939).

[420] C. Wright, *supra* at 65–66.

[421] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (indirect injury to organization and members by governmental maintenance of list of subversive organizations); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (same); Abington School Dist. v. Schempp, 374 U.S. 203, 224 n.9 (1963) (parents and school children challenging school prayers); McGowan v. Maryland, 366 U.S. 420, 430–431 (1961) (merchants challenging Sunday closing laws); Baker v. Carr, 369 U.S. 186, 204–208 (1962) (voting rights).

[422] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The "zone of interest" test is a prudential rather than constitutional standard. The Court sometimes uses other language to characterize this test. Thus, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Court refers to injury in fact as "an invasion of a legally protected interest," but in context, here and in the cases cited, it is clear the reference is to any interest that the Court finds protectable under the Constitution, statutes, or regulations.

[423] Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

[424] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1991); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72–74 (1978); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261–263 (1977); Singleton v. Wulff, 428 U.S. 106, 112–113 (1976); Warth v. Seldin, 422 U.S. 490, 498–499 (1975); O'Shea v. Littleton, 414 U.S. 488, 493–494 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617–618 (1973).

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Article III standing."[425] Moreover, while Congress has the power to define injuries and articulate "chains of causation" that will give rise to a case or controversy, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize a person to sue to vindicate that right."[426]

The breadth of the "injury-in-fact" concept may be discerned in a series of cases involving the right of private parties to bring actions under the Fair Housing Act to challenge alleged discriminatory practices, even where discriminatory action was not directed against parties to a suit, Theses case held that the subjective and intangible interests of enjoying the benefits of living in integrated communities were sufficient to permit them to attack actions that threatened or harmed those interests.[427] Or, there is important case of *FEC v. Akins*,[428] which addresses the ability of Congress to confer standing and to remove prudential constraints on judicial review. Congress had afforded persons access to Commission information and had authorized "any person aggrieved" by the actions of the FEC to sue. The Court found "injury-in-fact" present where plaintiff voters alleged that the Federal Election Commission had denied them information respecting an organization that might or might not be a political action committee.[429] Another area where the Court has interpreted this term liberally are injuries to the interests of individuals and associations of individuals who use the environment, affording them standing to challenge actions that threatened those environmental conditions.[430]

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[425] Summers v. Earth Island Institute, 129 S. Ct. 1142, 1151 (2009) (environmental group that was denied the opportunity to file comments with the United States Forest Service regarding a Forest Service action denied standing for lack of concrete injury). On the other hand, where a party has successfully established a legal right, a threat to the enforcement of that legal right gives rise to a separate legal injury. Salazar v. Buono, 559 U.S. ___, No. 08–472, slip op. at 8 (2010) (plurality opinion) ("A party that obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment").

[426] *See* Spokeo, Inc. v. Robins, 578 U.S. ___, No. 13–1339, slip op. at 9 (2016). The phrase "chains of causation" originates from Justice Kennedy's concurrence in *Defenders of Wildlife*, in which he states that in order to properly define an injury that can be vindicated in an Article III court, "Congress must . . . identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." 504 U.S. at 580 (Kennedy, J., concurring).

[427] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

[428] 524 U.S. 11 (1998).

[429] That the injury was widely shared did not make the claimed injury a "generalized grievance," the Court held, but rather in this case, as in others, the denial of the statutory right was found to be a concrete harm to each member of the class.

[430] Sierra Club v. Morton, 405 U.S. 727, 735 (1972); United States v. SCRAP, 412 U.S. 669, 687–88 (1973); Duke Power Co. v. Carolina Environmental Study Group,

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Even citizens who bring *qui tam* actions under the False Claims Act—actions that entitle the plaintiff ("relator") to a percentage of any civil penalty assessed for violation—have been held to have standing, on the theory that the government has assigned a portion of its damages claim to the plaintiff, and the assignee of a claim has standing to assert the injury in fact suffered by the assignor.[431] Citing this holding and historical precedent, the Court upheld the standing of an assignee who had promised to remit the proceeds of the litigation to the assignor.[432] The Court noted that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians at litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; and so forth."[433]

Beyond these historical anomalies, the Court has indicated that, for parties lacking an individualized injury to seek judicial relief on behalf of an absent third party, there generally must be some sort of agency relationship between the litigant and the injured party. In *Hollingsworth v. Perry*,[434] the Court considered the question of whether the official proponents of Proposition 8,[435] a state measure that amended the California Constitution to define marriage as a

438 U.S. 59, 72–74 (1978). But the Court has refused to credit general allegations of injury untied to specific governmental actions. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). *SCRAP* in particular is disfavored as too broad. Lujan v. Defenders of Wildlife, 504 U.S. at 566. Moreover, unlike the situation in taxpayer suits, there is no requirement of a nexus between the injuries claimed and the constitutional rights asserted. In *Duke Power*, 438 U.S. at 78–81, claimed environmental and health injuries grew out of construction and operation of nuclear power plants but were not directly related to the governmental action challenged, the limitation of liability and indemnification in cases of nuclear accident. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264–65 (1991); Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000).

[431] Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000). The Court confirmed its conclusion by reference to the long tradition of *qui tam* actions, since the Constitution's restriction of judicial power to "cases" and "controversies" has been interpreted to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." Id. at 774.

[432] Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S. Ct. 2531 (2008) (payphone operators had assigned claims against long-distance carriers to "aggregators" to sue on their behalf). Chief Justice Roberts, in a dissent joined by Justices Scalia, Thomas, and Alito, stated that the aggregators lacked standing because they "have nothing to gain from their lawsuit." Id. at 2549.

[433] 128 S. Ct. at 2543.

[434] 570 U.S. ___, No. 12–144, slip op. (2013).

[435] Under the relevant provisions of the California Elections Code , "'[p]roponents of an initiative or referendum measure' means . . . the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General . . . ; or . . . the person or persons who publish a notice of intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body."CAL. ELEC. CODE § 342 (West 2003).

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union between a man and a woman, had standing to defend the constitutionality of the provision on appeal. After rejecting the argument that the proponents of Proposition 8 had a particularized injury in their own right,[436] the Court considered the argument that the plaintiffs were formally authorized through some sort of official act to litigate on behalf of the State of California.

Although the proponents were authorized by California law to argue in defense of the proposition,[437] the Court found that this authorization, by itself, was insufficient to create standing. The Court expressed concern that, although California law authorized the proponents to argue in favor of Proposition 8, the proponents were still acting as private individuals, not as state officials[438] or as agents that were controlled by the state.[439] Because the proponents did not act as agents or official representatives of the State of California in defending the law, the Court held that the proponents only possessed a generalized interest in arguing in defense of Proposition 8 and, therefore, lacked standing to appeal an adverse district court decision.

Nonetheless, the Court has been wary in constitutional cases of granting standing to persons who alleged threats or harm to interests that they shared with the larger community of people at large; it is unclear whether this rule against airing "generalized grievances" through the courts[440] has a constitutional or a prudential basis.[441]

In a number of cases, particularly where a plaintiff seeks prospective relief, such as an injunction or declaratory relief, the Supreme Court has strictly construed the nature of the injury-in-fact

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[436] *Hollingsworth*, slip op. at 7–9.

[437] California's governor and state and local officials declined to defend Proposition 8 in federal district court, so the proponents were allowed to intervene. After the federal district court held the proposition unconstitutional, the government officials elected not to appeal, so the proponents did. The federal court of appeals certified a question to the California Supreme Court on whether the official proponents of the proposition had the authority to assert the state's interest in defending the constitutionality of Proposition 8, *see* Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (2011), which was answered in the affirmative, *see* Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

[438] *See Hollingsworth*, slip op. at 12 (citing Karcher v. May, 484 U.S. 72 (1987)).

[439] The Court noted that an essential feature of agency is the principal's right to control the agent's actions. Here, the proponents "decided what arguments to make and how to make them." *Id.* at 15. The Court also noted that the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal. *Id.*

[440] *See* "Generalized or Widespread Injuries," *supra*.

[441] *Compare* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (prudential), *with* Valley Forge Christian College v. Americans United, 454 U.S. 464, 485, 490 (1982) (apparently constitutional). In Allen v. Wright, 468 U.S. 737, 751 (1984), it is again prudential.

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necessary to obtain such judicial remedy. First, the Court has been hesitant to assume jurisdiction over matters in which the plaintiff seeking relief cannot articulate a concrete harm.[442] For example, in *Laird v. Tatum*, the Court held that plaintiffs challenging a domestic surveillance program lacked standing when their alleged injury stemmed from a "subjective chill," as opposed to a "claim of specific present objective harm or a threat of specific future harm."[443] And in *Spokeo, Inc. v. Robins*, the Court explained that a concrete injury requires that an injury must "actually exist" or there must be a "risk of real harm," such that a plaintiff who alleges nothing more than a bare procedural violation of a federal statute cannot satisfy the injury-in-fact requirement.[444] Second, the Court has required plaintiffs seeking equitable relief to demonstrate that the risk of a future injury is of a sufficient likelihood; past injury is insufficient to create standing to seek prospective relief.[445] The Court has articulated the threshold of likelihood of future injury necessary for standing in such cases in various ways,[446] generally refusing to find standing where the risk of future injury is speculative.[447]

More recently, in *Clapper v. Amnesty International USA*, the Court held that, in order to demonstrate Article III standing, a plaintiff seeking injunctive relief must prove that the future injury, which is the basis for the relief sought, must be "certainly impending"; a

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[442] *See generally* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a . . . right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."); *see, e.g.,* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 73 (1974) (plaintiffs alleged that Treasury regulations would require them to report currency transactions, but made no additional allegation that any of the information required by the Secretary will tend to incriminate them).

[443] 408 U.S. 1, 14–15 (1972).

[444] *See* 578 U.S. ___, No. 13–1339, slip op. at 8–10 (2016). Nonetheless, the *Spokeo* Court cautioned that "intangible" injuries, such as violations of constitutional rights like freedom of speech or the free exercise of religion, can amount to "concrete" injuries. *Id.* at 8–9 ("'Concrete' is not, however, necessarily synonymous with 'tangible.'"). In determining whether an intangible harm amounts to a concrete injury, the Court noted that history and the judgment of Congress can inform a court's conclusion about whether a particular plaintiff has standing. *Id.* at 9.

[445] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983) (holding that a victim of a police chokehold seeking injunctive relief was unable to show sufficient likelihood of recurrence as to him).

[446] *See* Davis v. FEC, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.").

[447] *See, e.g.,* Rizzo v. Goode, 423 U.S. 362, 372 (1976) ("[I]ndividual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (no "sufficient immediacy and reality" to allegations of future injury that rest on the likelihood that plaintiffs will again be subjected to racially discriminatory enforcement and administration of criminal justice).

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showing of a "reasonable likelihood" of future injury is insufficient.[448] Moreover, the Court in *Amnesty International* held that a plaintiff cannot satisfy the imminence requirement by merely "manufacturing" costs incurred in response to speculative, non-imminent injuries.[449]

A year after *Amnesty International*, the Court in *Susan B. Anthony List v. Driehaus*[450] reaffirmed that preenforcement challenges to a statute can occur "under circumstances that render the threatened enforcement sufficiently imminent."[451] In *Susan B. Anthony List*, an organization planning to disseminate a political advertisement, which was previously the source of an administrative complaint under an Ohio law prohibiting making false statements about a candidate or a candidate's record during a political campaign, challenged the prospective enforcement of that law. The Court, in finding that the plaintiff's future injury was certainly impending, relied on the history of prior enforcement of the law with respect to the advertisement, coupled with the facts that "any per-

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[448] 568 U.S. ___, No. 11–205, slip op. at 10–11 (2013). In adopting a "certainly impending" standard, the five-Justice majority observed that earlier cases had not uniformly required literal certainty. *Id.* at 15 n.5. *Amnesty International*'s limitation on standing may be particularly notable in certain contexts, such as national security, where evidence necessary to prove a "certainly impending" injury may be unavailable to a plaintiff.

[449] *Id.* at 10–11. In *Amnesty International*, defense attorneys, human rights organizations, and others challenged prospective, covert surveillance of the communications of certain foreign nationals abroad as authorized by the FISA Amendments Act of 2008. The Court found the plaintiffs lacked standing because they failed to show, inter alia, what the government's targeting practices would be, what legal authority the government would use to monitor any of the plaintiffs' overseas clients or contacts, whether any approved surveillance would be successful, and whether the plaintiffs' own communications from within the United States would incidentally be acquired. *Id.* at 11–15. Moreover, the Court rejected that the plaintiffs could demonstrate an injury-in-fact as a result of costs that they had incurred to guard against a reasonable fear of future harm (such as, travel expenses to conduct in person conversations abroad in lieu of conducting less costly electronic communications that might be more susceptible to surveillance) because those costs were the result of an injury that was not certainly impending. *Id.* at 16–19.

[450] 573 U.S. ___, No. 13–193, slip op. (2014).

[451] Relying on *Amnesty International*, the Court in *Susan B. Anthony List* held that an allegation of future injury may suffice if the injury is "'certainly impending' or there is a 'substantial risk' that the harm may occur." *Id.* at 8 (quoting *Amnesty Int'l*, slip op. at 10, 15, n.5). Interestingly, while previous Court decisions have viewed preenforcement challenges as a question of "ripeness," *see* Article III: Section 2. Judicial Power and Jurisdiction: Clause 1. Cases and Controversies; Grants of Jurisdiction: Judicial Power and Jurisdiction-Cases and Controversies: The Requirements of a Real Interest: Ripeness, *infra*, *Susan B. Anthony List* held that the doctrine of ripeness ultimately "boil[s] down to the same question" as standing and, therefore, viewed the case through the lens of Article III standing. *Susan B. Anthony List*, slip op. at 7 n.5.

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son" could file a complaint under the law, and any threat of enforcement of the law could burden political speech.[452]

Of increasing importance are causation and redressability, the second and third elements of standing, recently developed and held to be of constitutional requisite. There must be a causal connection between the injury and the conduct complained of; that is, the Court insists that the plaintiff show that "but for" the action, she would not have been injured. And the Court has insisted that there must be a "substantial likelihood" that the relief sought from the court if granted would remedy the harm.[453] Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy of extending tax benefits to hospitals that did not serve indigents, because they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them.[454] Or, low-income persons seeking the invalidation of a town's restrictive zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury—inability to obtain adequate housing within their means—was fairly attributable to the ordinance instead of to other factors, so that voiding of the ordinance might not have any effect upon their ability to find affordable housing.[455] Similarly, the

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[452] *Susan B. Anthony List*, slip op. at 14–17 (internal quotation marks omitted).

[453] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 595 (1992); *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 612–617 (1989) (plurality opinion); Allen v. Wright, 468 U.S. 737, 751 (1984); *see, e.g.,* Wittman v. Personhuballah, 578 U.S. ___, No. 14–1504, slip op. at 4–5 (2016) (dismissing a challenge to a redistricting plan by a congressman, who conceded that regardless of the result of the case he would not run in his old district, as any injury suffered could not be redressed by a favorable ruling). Although "causation" and "redressability" were initially articulated as two facets of a single requirement, the Court now views them as separate inquiries. *See* Sprint Commc'ns Co., L.P. v. APCC Servs., 554 U.S. 269, 286–87 (2008). To the extent there is a difference, it is that the former examines a causal connection between the allegedly unlawful conduct and the injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. *Id.*

[454] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). *See also* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (mother of illegitimate child lacked standing to contest prosecutorial policy of using child support laws to coerce support of legitimate children only, as it was "only speculative" that prosecution of father would result in support rather than jailing). However, in Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009), the Court noted in dicta that, if a plaintiff is denied a procedural right, the fact that the right had been accorded by Congress "can loosen the strictures of the redressability prong of our standing inquiry." Thus, standing may exist even though a court's enforcing a procedural right accorded by Congress, such as the right to comment on a proposed federal agency action, will not guarantee the plaintiff success in persuading the agency to adopt the plaintiff's point of view.

[455] Warth v. Seldin, 422 U.S. 490 (1975). In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 (1974), however, a person who alleged he was seeking housing in the community and that he would qualify if the

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link between fully integrated public schools and allegedly lax administration of tax policy permitting benefits to discriminatory private schools was deemed too tenuous, the harm flowing from private actors not before the courts and the speculative possibility that directing denial of benefits would result in any minority child being admitted to a school.[456]

But the Court did permit plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that "but for" the passage of the law there was a "substantial likelihood," based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur; thus, a voiding of the law would likely relieve the plaintiffs of the complained of injuries.[457] Operation of these requirements makes difficult but not impossible the establishment of standing by persons indirectly injured by governmental action, that is, action taken as to third parties that is alleged to have injured the claimants as a consequence.[458]

In a case permitting a plaintiff contractors' association to challenge an affirmative-action, set-aside program, the Court seemed to depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too "speculative" or too "contingent."[459] The association had sued, alleging that many of its members "regularly bid on and perform construction work" for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had stand-

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organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing housing for low-income persons like himself was held to have shown a "substantial probability" that voiding of the ordinance would benefit him.

[456] Allen v. Wright, 468 U.S. 737 (1984). *But see* Heckler v. Mathews, 465 U.S. 728 (1984), where persons denied equal treatment in conferral of benefits were held to have standing to challenge the treatment, although a judicial order could only have terminated benefits to the favored class. In that event, members would have secured relief in the form of equal treatment, even if they did not receive benefits. *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Orr v. Orr, 440 U.S. 268, 271–273 (1979).

[457] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72–78 1978). The likelihood of relief in some cases appears to be rather speculative at best. *E.g.*, Bryant v. Yellen, 447 U.S. 352, 366–368 (1980); Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160–162 (1981).

[458] Warth v. Seldin, 422 U.S. 490, 505 (1975); Allen v. Wright, 468 U.S. 737, 756–761 (1984).

[459] Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984).

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ing, because certain prior cases under the Equal Protection Clause established a relevant proposition. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[460] The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis.[461]

Redressability can be present in an environmental "citizen suit" even when the remedy is civil penalties payable to the government. The civil penalties, the Court explained, "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones."[462]

Prudential Standing Rules.—Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims.[463] The rule is "not meant to be especially demanding,"[464] and it is clear that the Court feels free to disregard any of these prudential rules when it sees fit.[465] Congress is also free to legislate away prudential restraints and confer standing to the extent permitted by Article III.[466] The Court has identified three

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[460] Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Court derived the proposition from another set of cases. Turner v. Fouche, 396 U.S. 346 (1970); Clements v. Fashing, 457 U.S. 957 (1982); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

[461] 508 U.S. at 666. *But see*, in the context of ripeness, Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993), in which the Court, over the dissent's reliance on *Jacksonville*, 509 U.S. at 81–82, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.

[462] Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 187 (2000).

[463] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979) ("a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

[464] Match-E-Be-Nash-She-Wish Band Of Pottawatomi Indians v. Patchak, 567 U.S. ___, No. 11–246, slip op. at 15 (2010).

[465] Warth v. Seldin, 422 U.S. 490, 500–501 (1975); Craig v. Boren, 429 U.S. 190, 193–194 (1976).

[466] "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even

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rules as prudential ones,[467] only one of which has been a significant factor in the jurisprudence of standing. The first two rules are that the plaintiff's interest, to which she asserts an injury, must come within the "zone of interest" arguably protected by the constitutional provision or statute in question[468] and that plaintiffs may not air "generalized grievances" shared by all or a large class of citizens.[469] The important rule concerns the ability of a plaintiff to represent the constitutional rights of third parties not before the court.

Standing to Assert the Rights of Others.—Usually, one may assert only one's interest in the litigation and not challenge the constitutionality of a statute or a governmental action because it infringes the protectable rights of someone else.[470] In *Tileston v. Ull-*

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if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973); O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974). Examples include United States v. SCRAP, 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). *See also* Buckley v. Valeo, 424 U.S. 1, 8 n.4, 11–12 (1976). For a good example of the congressionally created interest and the injury to it, *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–75 (1982) (Fair Housing Act created right to truthful information on availability of housing; black tester's right injured through false information, but white tester not injured because he received truthful information). It is clear, however, that the Court will impose separation-of-powers restraints on the power of Congress to create interests to which injury would give standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992). Justice Scalia, who wrote the opinion in *Defenders of Wildlife*, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President's "take care" obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.

[467] Valley Forge Christian College v. Americans United, 454 U.S. 464, 474–75 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984).

[468] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 153 (1970); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976); Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982); Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987). *See also* Bennett v. Spear, 520 U.S. 154 (1997). The Court has indicated that

[469] United States v. Richardson, 418 U.S. 166, 173, 174–76 (1974); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978); Allen v. Wright, 468 U.S. 737, 751 (1984). In United States v. SCRAP, 412 U.S. 669, 687–88 (1973), a congressional conferral case, the Court agreed that the interest asserted was one shared by all, but the Court has disparaged SCRAP, asserting that it "surely went to the very outer limit of the law," Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

[470] United States v. Raines, 362 U.S. 17, 21–23 (1960); Yazoo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912). *Cf.* Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

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man,[471] an early round in the attack on a state anti-contraceptive law, a doctor sued, charging that he was prevented from giving his patients needed birth control advice. The Court held that he had no standing; no right of his was infringed, and he could not represent the interests of his patients.

There are several exceptions to the general rule, however, that make generalization misleading. Many cases allow standing to third parties who demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. Thus, in *Barrows v. Jackson*,[472] a white defendant who was being sued for damages for breach of a restrictive covenant directed against African Americans—and therefore able to show injury in liability for damages—was held to have standing to assert the rights of the class of persons whose constitutional rights were infringed.[473] Similarly, the Court has permitted defendants who have been convicted under state law—giving them the requisite injury—to assert the rights of those persons not before the Court whose rights would be adversely affected through enforcement of the law in question.[474] In fact, the Court has permitted persons who would be subject to future prosecution or future legal action—thus satisfying the injury requirement—to represent the rights of third parties with whom the challenged law has interfered with a relationship.[475]

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[471] 318 U.S. 44 (1943). *See* Warth v. Seldin, 422 U.S. 490, 508–510 (1975) (challenged law did not adversely affect plaintiffs and did not adversely affect a relationship between them and persons they sought to represent).

[472] 346 U.S. 249 (1953).

[473] *See also* Buchanan v. Warley, 245 U.S. 60 (1917) (white plaintiff suing for specific performance of a contract to convey property to a black had standing to contest constitutionality of ordinance barring sale of property to "colored" people, inasmuch as black defendant was relying on ordinance as his defense); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (white assignor of membership in discriminatory private club could raise rights of black assignee in seeking injunction against expulsion from club).

[474] *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (persons convicted of prescribing contraceptives for married persons and as accessories to crime of using contraceptives have standing to raise constitutional rights of patients with whom they had a professional relationship; although use of contraceptives was a crime, it was doubtful any married couple would be prosecuted so that they could challenge the statute); Eisenstadt v. Baird, 405 U.S. 438 (1972) (advocate of contraception convicted of giving device to unmarried woman had standing to assert rights of unmarried persons denied access; unmarried persons were not subject to prosecution and were thus impaired in their ability to gain a forum to assert their rights).

[475] *E.g.*, Doe v. Bolton, 410 U.S. 179, 188–189 (1973) (doctors have standing to challenge abortion statute since it operates directly against them and they should not have to await criminal prosecution to challenge it); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (same); Craig v. Boren, 429 U.S. 190, 192–197 (1976) (licensed beer distributor could contest sex discriminatory alcohol laws because it operated on him, he suffered injury in fact, and was "obvious claimant" to raise issue);

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It is also possible, of course, that one's own rights can be affected by action directed at someone from another group.[476] A substantial dispute was occasioned in *Singleton v. Wulff*,[477] over the standing of doctors who were denied Medicaid funds for the performance of abortions not "medically indicated" to assert the rights of absent women to compensated abortions. All the Justices thought the Court should be hesitant to resolve a controversy on the basis of the rights of third parties, but they divided with respect to the standards exceptions. Four Justices favored a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; four Justices would have permitted a litigant to assert the rights of third parties only when government directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.[478] Following *Wulff*, the Court emphasized the close attorney-client relationship in holding that a lawyer had standing to assert his client's Sixth Amendment right to counsel in challenging application of a drug-forfeiture law to deprive the client of the means of paying counsel.[479] However, a "next friend" whose stake in the outcome is only speculative must establish that the real party in interest is unable to litigate his own

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Carey v. Population Services Int'l, 431 U.S. 678, 682–84 (1977) (vendor of contraceptives had standing to bring action to challenge law limiting distribution). Older cases support the proposition. *See*, *e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[476] Holland v. Illinois, 493 U.S. 474 (1990) (white defendant had standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury, since defendant had a right to a jury comprised of a fair cross section of the community). The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

[477] 428 U.S. 106 (1976).

[478] *Compare* 428 U.S. at 112–18 (Justices Blackmun, Brennan, White, and Marshall), *with* id. at 123–31 (Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger). Justice Stevens concurred with the former four Justices on narrower grounds limited to this case.

[479] Caplin & Drysdale v. United States, 491 U.S. 617, 623–624 n.3 (1989). *Caplin & Drysdale* was distinguished in Kowalski v. Tesmer, 543 U.S. 123, 131 (2004), the Court's finding that attorneys seeking to represent hypothetical indigent clients in challenging procedures for appointing appellate counsel had "no relationship at all" with such potential clients, let alone a "close" relationship.

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cause because of mental incapacity, lack of access to courts, or other disability.[480]

A variant of the general rule is that one may not assert the unconstitutionality of a statute in other respects when the statute is constitutional as to him.[481] Again, the exceptions may be more important than the rule. Thus, an overly broad statute, especially one that regulates speech and press, may be considered on its face rather than as applied, and a defendant to whom the statute constitutionally applies may thereby be enabled to assert its unconstitutionality.[482]

Legal challenges based upon the allocation of governmental authority under the Constitution, *e.g.*, separation of powers and federalism, are generally based on a showing of injury to the disadvantaged governmental institution. The prohibition on litigating the injuries of others, however, does not appear to bar individuals from bringing these suits. For instance, injured private parties routinely bring separation-of-powers challenges,[483] even though one could argue that the injury in question is actually upon the authority of the affected branch of government. Then, in *Bond v. United States*,[484] the Court considered whether a criminal defendant could raise federalism arguments based on state prerogatives under the Tenth Amendment.[485] There, the Court held that individuals could raise Tenth Amendment challenges, because states are not the "sole intended beneficiaries of federalism," and an individual has a "direct

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[480] Whitmore v. Arkansas, 495 U.S. 149 (1990) (death row inmate's challenge to death penalty imposed on a fellow inmate who knowingly, intelligently, and voluntarily chose not to appeal cannot be pursued).

[481] United States v. Raines, 362 U.S. 17, 21–24 (1960).

[482] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Winters v. New York, 333 U.S. 507 (1948); Dombrowski v. Pfister, 380 U.S. 479, 486–487 (1965); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974). The Court has narrowed its overbreadth doctrine, though not consistently, in recent years. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Young v. American Mini Theatres, 427 U.S. 50, 59–60 (1976), and id. at 73 (Justice Powell concurring); New York v. Ferber, 458 U.S. 747, 771–773 (1982). But the exception as stated in the text remains strong. *E.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988).

[483] *See, e.g.,* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986);Clinton v. City of New York, 524 U.S. 417 (1998).

[484] 564 U.S. ___, No. 09–1227, slip op. (2011).

[485] The defendant, in an attempt to harass a woman who had become impregnated by the defendant's husband, had placed caustic substances on objects the woman was likely to touch. The defendant was convicted under 18 U.S.C. § 229, a broad prohibition against the use of harmful chemicals, enacted as part of the implementation of the 1997 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The specifics of the defendant's Tenth Amendment argument was not before the Court.

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interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . ."[486]

Organizational Standing.—Organizations do not have standing as such to represent their particular concept of the public interest,[487] but organizations have been permitted to assert the rights of their members.[488] In *Hunt v. Washington State Apple Advertising Comm'n*,[489] the Court promulgated elaborate standards, holding that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Similar considerations arise in the context of class actions, in which the Court holds that a named representative with a justiciable claim for relief is necessary when the action is filed and when the class is certified, but that following class certification there need be only a live controversy with the class, provided the adequacy of the representation is sufficient.[490]

Standing of States to Represent Their Citizens.—The right of a state to sue as *parens patriae*, in behalf of its citizens, has long been recognized.[491] No state, however, may be *parens patriae* of its citizens "as against the Federal Government."[492] But a state may

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[486] 564 U.S. ___, No. 09–1227, slip op. at 10.

[487] Sierra Club v. Morton, 401 U.S. 727 (1972). An organization may, of course, sue to redress injuries to itself. *See* Havens Realty Co. v. Coleman, 455 U.S. 363, 378–379 (1982).

[488] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[489] 432 U.S. 333, 343 (1977). The organization here was not a voluntary membership entity but a state agency charged with furthering the interests of apple growers who were assessed annual sums to support the Commission. Id. at 341–45. *See also* Warth v. Seldin, 422 U.S. 490, 510–17 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39–40 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 263–264 (1977); Harris v. McRae, 448 U.S. 297, 321 (1980); International Union, UAW v. Brock, 477 U.S. 274 (1986).

[490] United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). *Geraghty* was a mootness case.

[491] Louisiana v. Texas, 176 U.S. 1 (1900) (recognizing the propriety of *parens patriae* suits but denying it in this particular suit).

[492] Massachusetts v. Mellon, 262 U.S. 447, 485–486 (1923). *But see* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (denying such standing to raise two constitutional claims against the United States but deciding a third); Oregon v. Mitchell, 400 U.S. 112, 117 n.1 (1970) (no question raised about standing or jurisdiction; claims adjudicated).

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sue to protect the its citizens from environmental harm,[493] and to enjoin other states and private parties from engaging in actions harmful to the economic or other well-being of it citizens.[494] The state must be more than a nominal party without a real interest of its own, merely representing the interests of particular citizens who cannot represent themselves;[495] it must articulate an interest apart from those of private parties that partakes of a "quasi-sovereign interest" in the health and well-being, both physical and economic, of its residents in general, although there are suggestions that the restrictive definition grows out of the Court's wish to constrain its original jurisdiction and may not fit such suits brought in the lower federal courts.[496]

Standing of Members of Congress.—The lower federal courts, principally the D.C. Circuit, developed a body of law governing the standing of Members of Congress, as Members, to bring court actions, usually to challenge actions of the executive branch.[497] When the Supreme Court finally addressed the issue on the merits in 1997, however, it severely curtailed Member standing.[498] All agree that a

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[493] Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 206 U.S. 46 (1907); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); New York v. New Jersey, 256 U.S. 296 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); North Dakota v. Minnesota, 263 U.S. 365 (1923).

[494] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) (antitrust); Maryland v. Louisiana, 451 U.S. 725, 737–739 (1981) (discriminatory state taxation of natural gas shipped to out-of-state customers); Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) (discrimination by growers against Puerto Rican migrant workers and denial of Commonwealth's opportunity to participate in federal employment service laws).

[495] New Hampshire v. Louisiana, 108 U.S. 76 (1883); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277 (1911); North Dakota v. Minnesota, 263 U.S. 365, 376 (1923); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).

[496] Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607–08 (1982). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the Court's standards should apply only in original actions and not in actions filed in federal district courts, where, they contended, the prerogative of a state to bring suit on behalf of its citizens should be commensurate with the ability of private organizations to do so. Id. at 610. The Court admitted that different considerations might apply between original actions and district court suits. Id. at 603 n.12.

[497] Member standing has not fared well in other Circuits. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

[498] Raines v. Byrd, 521 U.S. 811 (1997). In Coleman v. Miller, 307 U.S. 433, 438 (1939), the Court had recognized that legislators can in some instances suffer an injury in respect to the effectiveness of their votes that will confer standing. In Pressler v. Blumenthal, 434 U.S. 1028 (1978), *affg*, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), the Court affirmed a decision in which the lower court had found Member standing but had then decided against the Member on the merits. The "unexplicated affirmance" could have reflected disagreement with the lower court on standing or agreement with it on the merits. Note Justice Rehnquist's appended statement. Id.

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legislator "receives no special consideration in the standing inquiry,"[499] and that he, along with every other person attempting to invoke the aid of a federal court, must show "injury in fact" as a predicate to standing.[500] What such injury in fact may consist of, however, has been the subject of debate.

A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond his constitutional authority, the holding would have a distinct and significant bearing upon the Members' duties to vote appropriations and other supportive legislation and to consider impeachment.[501] The breadth of this rationale was disapproved in subsequent cases. The leading decision is *Kennedy v. Sampson*,[502] in which a Member was held to have standing to contest the alleged improper use of a pocket veto to prevent from becoming law a bill the Senator had voted for. Thus, Congressmen were held to have a derivative rather than direct interest in protecting their votes, which was sufficient for standing purposes, when some "legislative disenfranchisement" occurred.[503] In a comprehensive assessment of its position, the Circuit distinguished between (1) a diminution in congressional influence resulting from executive action that nullifies a specific congressional vote or opportunity to vote in an objectively verifiable manner, which will constitute injury in fact, and (2) a diminution in a legislator's effectiveness, subjectively judged by him, resulting from executive ac-

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In Goldwater v. Carter, 444 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing, and directed dismissal, but none of the Justices who addressed the question of standing. The opportunity to consider Member standing was strongly pressed in Burke v. Barnes, 479 U.S. 361 (1987), but the expiration of the law in issue mooted the case.

[499] Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978).

[500] *See, e.g.,* Wittman v. Personhuballah, 578 U.S. ___, No. 14–1504, slip op. at 6 (2016) (concluding that two congressmen could not invoke federal jurisdiction to challenge a redistricting plan when they could not provide any evidence that the plan might injure their reelection chances).

[501] Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

[502] 511 F.2d 430 (D.C. Cir. 1974). In Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), the court again found standing by Members challenging a pocket veto, but the Supreme Court dismissed the appeal as moot. *Sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). Whether the injury was the nullification of the past vote on passage only or whether it was also the nullification of an opportunity to vote to override the veto has divided the Circuit, with the majority favoring the broader interpretation. Goldwater v. Carter, 617 F.2d 697, 702 n.12 (D.C. Cir. 1979), and id. at 711–12 (Judge Wright), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979)

[503] Kennedy v. Sampson, 511 F.2d 430, 435–436 (D.C. Cir. 1974). *See* Harrington v. Bush, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977). *Harrington* found no standing in a Member's suit challenging CIA failure to report certain actions to Congress, in order that Members could intelligently vote on certain issues. *See also* Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978).

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tion, such a failing to obey a statute, where the plaintiff legislator has power to act through the legislative process, in which injury in fact does not exist.[504] Having thus established a fairly broad concept of Member standing, the Circuit then proceeded to curtail it by holding that the equitable discretion of the court to deny relief should be exercised in many cases in which a Member had standing but in which issues of separation of powers, political questions, and other justiciability considerations counseled restraint.[505]

Member or legislator standing has been severely curtailed, although not quite abolished, in *Raines v. Byrd*.[506] Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed lawmaking power.[507] Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a "personal stake" in the dispute and that the alleged injury suffered is particularized as to him.[508] Neither requirement, the Court held, was met by these legislators. First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. "[A]ppellees' claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete. . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds

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[504] Goldwater v. Carter, 617 F.2d 697, 702, 703 (D.C. Cir. 1979) (en banc), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). The failure of the Justices to remark on standing is somewhat puzzling, since it has been stated that courts "turn initially, although not invariably, to the question of standing to sue." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974). *But see* Harrington v. Bush, 553 F.2d 190, 207 (D.C. Cir. 1977). In any event, the Supreme Court's decision vacating *Goldwater* deprives the Circuit's language of precedential effect. United States v. Munsingwear, 340 U.S. 36, 39–40 (1950); O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975).

[505] Riegle v. FOMC, 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981).

[506] 521 U.S. 811 (1997).

[507] The Act itself provided that "[a]ny Member of Congress or any individual adversely affected" could sue to challenge the law. 2 U.S.C. § 692(a)(1). After failure of this litigation, the Court in the following Term, on suits brought by claimants adversely affected by the exercise of the veto, held the statute unconstitutional. Clinton v. City of New York, 524 U.S. 417 (1998).

[508] 521 U.S. at 819.

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. . . as trustee for his constituents, not as a prerogative of personal power."[509]

So, there is no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) *Coleman v. Miller*,[510] in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in *Raines* chose to fasten on a particularly narrow point. "[O]ur holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[511] Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing.[512]

In a subsequent case, the Court reaffirmed the continued viability of *Coleman*[513] in concluding that legislators, when authorized by the legislature, could have standing to assert an "institutional injury" to that legislative body.[514] Specifically, the Court held in *Arizona State Legislature v. Arizona Independent Redistricting Commission* that the Arizona legislature had standing to challenge the validity of the Arizona Independent Redistricting Commission and the commission's 2012 map of congressional districts because the legislature had been "stripped" of what the plaintiff considered its "exclusive constitutionally guarded role" in redistricting.[515] Comparing the Arizona legislature's role to the "institutional injury" suffered by the plaintiffs in *Coleman*, the Court viewed the Arizona legislators' injury as akin to that of the *Coleman* legislators. Specifically, the Court likened the instant case to *Coleman* because the Arizona Constitution and the ballot initiative that provided for redistricting by an independent commission "completely nullif[y]" any vote "now or 'in the future'" by the legislature "purporting to adopt

[509] 521 U.S. at 821.
[510] 307 U.S. 433 (1939).
[511] 521 U.S. at 823.
[512] 521 U.S. at 824–26.
[513] *See* Coleman v. Miller, 307 U.S. 433 (1939).
[514] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. ___, No. 13–1314, slip op. at 14 (2015).
[515] *Id.* at 10.

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a redistricting plan."[516] However, in *Arizona State Legislature*, the Court left open the question of whether Congress, in a lawsuit against the President over an institutional injury to the legislative branch, would likewise have standing, as such a lawsuit would "raise separation-of-powers concerns absent" in the case before the Court.[517]

Standing to Challenge Lawfulness of Governmental Action.—Standing to challenge governmental action on statutory or other non-constitutional grounds has a constitutional content to the degree that Article III requires a "case" or "controversy," necessitating a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution."[518] Liberalization of standing in the administrative law field has been notable.

The "old law" required that in order to sue to contest the lawfulness of agency administrative action, one must have suffered a "legal wrong," that is, "the right invaded must be a legal right,"[519] requiring some resolution of the merits preliminarily. An injury-in-fact was insufficient. A "legal right" could be established in one of two ways. It could be a common-law right, such that if the injury were administered by a private party, one could sue on it;[520] or it could be a right created by the Constitution or a statute.[521] The statutory right most relied on was the judicial review section of the

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[516] *Id*.

[517] *Id*. at 14 n.12.

[518] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 151–152 (1970), citing Flast v. Cohen, 392 U.S. 83, 101 (1968). "But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [quoting *Flast*, supra, at 100], is one within the power of Congress to determine." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[519] Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[520] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). This was apparently the point of the definition of "legal right" as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939).

[521] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). The Court approached this concept in two interrelated ways. (1) It might be that a plaintiff had an interest that it was one of the purposes of the statute in question to protect in some degree. *Chicago Junction Case*, 264 U.S. 258 (1924); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930); Alton R.R. v. United States, 315 U.S. 15 (1942). Thus, in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), a private utility was held to have standing to contest allegedly illegal competition by TVA on the ground that the statute was meant to give private utilities some protection from certain forms of TVA competition. (2) It might be that a plaintiff was a "person aggrieved" within the terms of a judicial review section of an administrative or regulatory statute. Injury to an economic interest was sufficient to "aggrieve" a litigant. FCC v. Sanders Brothers Radio Sta-

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Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[522] Early decisions under this statute interpreted the language as adopting the "legal interest" and "legal wrong" standard then prevailing as constitutional requirements of standing, which generally had the effect of limiting the type of injury cognizable in federal court to economic ones.[523]

In 1970, however, the Court promulgated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee in question, he has standing.[524] Of even greater importance was the expansion of the nature of the cognizable injury beyond economic injury to encompass "aesthetic, conservational, and recreational" interests as well.[525] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make

tion, 309 U.S. 470 (1940); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943), *cert. dismissed as moot*, 320 U.S. 707 (1943).

[522] 5 U.S.C. § 702. *See also* 47 U.S.C. § 202(b)(6) (FCC); 15 U.S.C. § 77i(a) (SEC); 16 U.S.C. § 825a(b) (FPC).

[523] FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940); City of Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77, 83 (1958); Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968).

[524] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Justices Brennan and White argued that only injury-in-fact should be requisite for standing. Id. at 167. In Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), the Court applied a liberalized zone-of-interest test. *But see* Lujan v. National Wildlife Federation, 497 U.S. 871, 885–889 (1990); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517 (1991). In applying these standards, the Court, once it determined that the litigant's interests were "arguably protected" by the statute in question, proceeded to the merits without thereafter pausing to inquire whether in fact the interests asserted were among those protected. Arnold Tours v. Camp, 400 U.S. 45 (1970); Investment Company Institute v. Camp, 401 U.S. 617 (1971); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977). Almost contemporaneously, the Court also liberalized the ripeness requirement in review of administrative actions. Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *See also* National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is "arguably within the zone of interests to be protected . . . by the statute." Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5-to-4 in applying the test. *See also* Bennett v. Spear, 520 U.S. 154 (1997).

[525] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 154 (1970).

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them less deserving of legal protection through the judicial process."[526] Thus, plaintiffs who pleaded that they used the natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" to challenge the rates set. Neither the large numbers of persons allegedly injured nor the indirect and less perceptible harm to the environment was justification to deny standing. The Court granted that the plaintiffs might never be able to establish the "attenuated line of causation" from rate setting to injury, but that was a matter for proof at trial, not for resolution on the pleadings.[527]

Much debate has occurred in recent years with respect to the validity of "citizen suit" provisions in the environmental laws, especially in light of the Court's retrenchment in constitutional standing cases. The Court in insisting on injury in fact as well as causation and redressability has curbed access to citizen suits,[528] but that Congress may expansively confer substantial degrees of standing through statutory creations of interests remains true.

The Requirement of a Real Interest

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions."[529] A party cannot maintain a suit "for a mere dec-

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[526] Sierra Club v. Morton, 405 U.S. 727, 734 (1972), Moreover, said the Court, once a person establishes that he has standing to seek judicial review of an action because of particularized injury to him, he may argue the public interest as a "representative of the public interest," as a "private attorney general," so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Id. at 737–738, noting Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. (1940). *See also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n. (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 n.16 (1982) (noting ability of such party to represent interests of third parties).

[527] United States v. SCRAP, 412 U.S. 669, 683–690 (1973). As was noted above, this case has been disparaged by the later Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992); Whitmore v. Arkansas, 495 U.S. 149, 158–160 (1990).

[528] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). *But see* Bennett v. Spear, 520 U.S. 154 (1997) (fact that citizen suit provision of Endangered Species Act is directed at empowering suits to further environmental concerns does not mean that suitor who alleges economic harm from enforcement of Act lacks standing); FEC v. Akins, 524 U.S. 11 (1998) (expansion of standing based on denial of access to information).

[529] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945).

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laration in the air."[530] In *Texas v. ICC*,[531] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."[532] And in *Ashwander v. TVA*,[533] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining."[534]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,[535] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for "concrete legal issues, presented in actual cases, not abstractions," and seeing the suit as really an attack on the political expediency of the Act.[536]

Advisory Opinions.—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States per-

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[530] Giles v. Harris, 189 U.S. 475, 486 (1903).

[531] 258 U.S. 158 (1922).

[532] 258 U.S. at 162.

[533] 297 U.S. 288 (1936).

[534] 297 U.S. at 324. Chief Justice Hughes cited New York v. Illinois, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and Arizona v. California, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. *See also* Massachusetts v. Mellon, 262 U.S. 447, 484–485 (1923); New Jersey v. Sargent, 269 U.S. 328, 338–340 (1926); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1867).

[535] 330 U.S. 75 (1947).

[536] 330 U.S. at 89–91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the concerns expressed in Mitchell were largely ignored as the Court reached the merits in an anticipatory attack on the Act. *Compare* Epperson v. Arkansas, 393 U.S. 97 (1968).

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taining to questions of international law arising out of the wars of the French Revolution.[537] Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: "These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seem to have been purposely as well as expressly united to the Executive departments."[538] Although the Court has generally adhered to its refusal, Justice Jackson was not quite correct when he termed the policy a "firm and unvarying practice. . . ."[539] The Justices in response to a letter calling for suggestions on improvements in the operation of the courts drafted a letter suggesting that circuit duty for the Justices was unconstitutional, but they apparently never sent it;[540] Justice Johnson communicated to President Monroe, apparently with the knowledge and approval of the other Justices, the views of the Justices on the constitutionality of internal improvements legislation;[541] and Chief Justice Hughes in a letter to Senator Wheeler on President Roosevelt's Court Plan questioned the constitutionality of a proposal to increase the membership and have the Court sit in divisions.[542] Other Justices have individually served as advisers and confidants of Presidents in one degree or another.[543]

Nonetheless, the Court has generally adhered to the early precedent and would no doubt have developed the rule in any event, as a logical application of the case and controversy doctrine. As Justice Jackson wrote when the Court refused to review an order of the Civil Aeronautics Board, which in effect was a mere recommendation to the President for his final action: "To revise or review an

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[537] 1 C. Warren, supra at 108–111. The full text of the exchange appears in 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed., 1893).

[538] Jay Papers at 488.

[539] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[540] *See* supra.

[541] 1 C. Warren, supra at 595–597.

[542] *Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491. *See also* Chief Justice Taney's private advisory opinion to the Secretary of the Treasury that a tax levied on the salaries of federal judges violated the Constitution. S. Tyler, Memoirs of Roger B. Taney 432–435 (1876).

[543] *E.g.*, Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969); Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 Harv. L. Rev. 366 (1969). The issue earned the attention of the Supreme Court, Mistretta v. United States, 488 U.S. 361, 397–408 (1989) (citing examples and detailed secondary sources), when it upheld the congressionally authorized service of federal judges on the Sentencing Commission.

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administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."[544] The Court's early refusal to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties,[545] or where the judgment of the Court was subject to later review or action by the executive or legislative branches of government,[546] or where the issues involved were abstract or contingent.[547]

Declaratory Judgments.—Rigid emphasis upon such elements of judicial power as finality of judgment and award of execution coupled with equally rigid emphasis upon adverse parties and real interests as essential elements of a case and controversy created serious doubts about the validity of any federal declaratory judgment procedure.[548] These doubts were largely dispelled by Court decisions in the late 1920s and early 1930s,[549] and Congress quickly responded with the Federal Declaratory Judgment Act of 1934.[550] Quickly tested, the Act was unanimously sustained.[551] "The principle involved in this form of procedure," the House report said, "is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts."[552] The

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[544] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–114 (1948).

[545] Muskrat v. United States, 219 U.S. 346 (1911).

[546] United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[547] United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[548] *Cf.* Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928).

[549] Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123 (1927); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1963). *Wallace* was cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 120–21).

[550] 48 Stat. 955, as amended, 28 U.S.C. §§ 2201–2202.

[551] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007)).

[552] H. Rep. No. 1264, 73d Congress, 2d Sess. (1934), 2.

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Senate report stated: "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice." [553]

The 1934 Act provided that "[i]n cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed. . . ." [554] Upholding the Act, the Court wrote: "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish." [555] Finding that the case presented a definite and concrete controversy, the Court held that a declaration should have been issued.[556]

The Court has insisted that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." [557] As Justice Douglas wrote: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [558] It remains, therefore, for the courts to determine in each case the degree of controversy necessary to establish a case for purposes of jurisdiction. Even then, however, the Court

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[553] S. Rep. No. 1005, 73d Congress, 2d Sess. (1934), 2.
[554] 48 Stat. 955. The language remains quite similar. 28 U.S.C. § 2201.
[555] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–240 (1937).
[556] 300 U.S. at 242–44.
[557] Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).
[558] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

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is under no compulsion to exercise its jurisdiction.[559] Use of declaratory judgments to settle disputes and identify rights in many private areas, like insurance and patents in particular but extending into all areas of civil litigation, except taxes,[560] is common. The Court has, however, at various times demonstrated a substantial reluctance to have important questions of public law, especially regarding the validity of legislation, resolved by such a procedure.[561] In part, this has been accomplished by a strict insistence upon concreteness, ripeness, and the like.[562] Nonetheless, even at such times, several noteworthy constitutional decisions were rendered in declaratory judgment actions.[563]

As part of the 1960s hospitality to greater access to courts, the Court exhibited a greater receptivity to declaratory judgments in constitutional litigation, especially cases involving civil liberties issues.[564] The doctrinal underpinnings of this hospitality were sketched out by Justice Brennan in his opinion for the Court in *Zwickler v. Koota*,[565] in which the relevance to declaratory judgments of the *Dombrowski v. Pfister*[566] line of cases involving federal injunctive relief against the enforcement of state criminal statutes was in issue. First, it was held that the vesting of "federal question" jurisdiction in the federal courts by Congress following the Civil War, as well as the enactment of more specific civil rights jurisdictional statutes, "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hear-

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[559] Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942); Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952); Public Affairs Associates v. Rickover, 369 U.S. 111, 112 (1962). *See also* Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

[560] An exception "with respect to Federal taxes" was added in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in California v. Grace Brethren Church, 457 U.S. 393 (1982). Earlier, in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. *Cf.* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

[561] *E.g.*, Ashwander v. TVA, 297 U.S. 288 (1936); Electric Bond Co. v. SEC, 303 U.S. 419 (1938); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Eccles v. Peoples Bank, 333 U.S. 426 (1948); Rescue Army v. Municipal Court, 331 U.S. 549, 572–573 (1947).

[562] United Public Workers v. Mitchell, 330 U.S. 75 (1947); Poe v. Ullman, 367 U.S. 497 (1961); Altvater v. Freeman, 319 U.S. 359 (1943); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[563] *E.g.*, Currin v. Wallace, 306 U.S. 1 (1939); Perkins v. Elg, 307 U.S. 325 (1939); Ashwander v. TVA, 297 U.S. 288 (1936); Evers v. Dwyer, 358 U.S. 202 (1958).

[564] *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Turner v. City of Memphis, 369 U.S. 350 (1962); Powell v. McCormack, 395 U.S. 486 (1969). *But see* Golden v. Zwickler, 394 U.S. 103 (1969).

[565] 389 U.S. 241 (1967).

[566] 380 U.S. 479 (1965).

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ing and decision of his federal constitutional claims."[567] Escape from that duty might be found only in "narrow circumstances," such as an appropriate application of the abstention doctrine, which was not proper where a statute affecting civil liberties was so broad as to reach protected activities as well as unprotected activities. Second, the judicially developed doctrine that a litigant must show "special circumstances" to justify the issuance of a federal injunction against the enforcement of state criminal laws is not applicable to requests for federal declaratory relief: "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."[568] This language was qualified subsequently, so that declaratory and injunctive relief were equated in cases in which a criminal prosecution is pending in state court at the time the federal action is filed[569] or is begun in state court after the filing of the federal action but before any proceedings of substance have taken place in federal court,[570] and federal courts were instructed not to issue declaratory judgments in the absence of the factors permitting issuance of injunctions under the same circumstances. But in the absence of a pending state action or the subsequent and timely filing of one, a request for a declaratory judgment that a statute or ordinance is unconstitutional does not have to meet the stricter requirements justifying the issuance of an injunction.[571]

Ripeness.—Just as standing historically has concerned *who* may bring an action in federal court, the ripeness doctrine concerns *when* it may be brought. Formerly, it was a wholly constitutional principle requiring a determination that the events bearing on the substantive issue have happened or are sufficiently certain to occur so as to make adjudication necessary and so as to assure that the issues are sufficiently defined to permit intelligent resolution. The focus was on the harm to the rights claimed rather than on the harm to the plaintiff that gave him standing to bring the action,[572] although, to be sure, in most cases the harm is the same. But in lib-

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[567] Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[568] Zwickler v. Koota, 389 U.S. 241, 254 (1967).

[569] Samuels v. Mackell, 401 U.S. 66 (1971). The case and its companion, Younger v. Harris, 401 U.S. 37 (1971), substantially undercut much of the *Dombrowski* language and much of *Zwickler* was downgraded.

[570] Hicks v. Miranda, 422 U.S. 332, 349 (1975).

[571] Steffel v. Thompson, 415 U.S. 452 (1974). In cases covered by Steffel, the federal court may issue preliminary or permanent injunctions to protect its judgments, without satisfying the *Younger* tests. Doran v. Salem Inn, 422 U.S. 922, 930–931 (1975); Wooley v. Maynard, 430 U.S. 705, 712 (1977).

[572] United Public Workers v. Mitchell, 330 U.S. 75 (1947); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). For recent examples of lack of ripe-

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eralizing the doctrine of ripeness in recent years the Court subdivided it into constitutional and prudential parts[573] and conflated standing and ripeness considerations.[574]

The early cases generally required potential plaintiffs to expose themselves to possibly irreparable injury in order to invoke federal judicial review. Thus, in *United Public Workers v. Mitchell*,[575] government employees alleged that they wished to engage in various political activities and that they were deterred from their desires by the Hatch Act prohibitions on political activities. As to all but one plaintiff, who had himself actually engaged in forbidden activity, the Court held itself unable to adjudicate because the plaintiffs were not threatened with "actual interference" with their interests. The Justices viewed the threat to plaintiffs' rights as hypothetical and refused to speculate about the kinds of political activity they might engage in or the Government's response to it. "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations."[576] Similarly, resident aliens planning to work in the Territory of Alaska for the summer and then return to the United States were denied a request for an interpretation of the immigration laws that they would not be treated on their return as excludable aliens entering the United States for the first time, or alternatively, for a ruling that the laws so interpreted would be unconstitutional. The resident aliens had not left the country and attempted to return, although other alien workers had gone and been denied reentry, and the immigration authorities were on record as intending to enforce

ness, *see* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Texas v. United States, 523 U.S. 296 (1998).

[573] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (certainty of injury a constitutional limitation, factual adequacy element a prudential one).

[574] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81–82 (1978) (that plaintiffs suffer injury-in-fact and such injury would be redressed by granting requested relief satisfies Article III ripeness requirement; prudential element satisfied by determination that Court would not be better prepared to render a decision later than now). *But compare* Renne v. Geary, 501 U.S. 312 (1991).

[575] 330 U.S. 75 (1947).

[576] 330 U.S. at 90. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), without discussing ripeness, the Court decided on the merits anticipatory attacks on the Hatch Act. Plaintiffs had, however, alleged a variety of more concrete infringements upon their desires and intentions than the UPW plaintiffs had.

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the laws as they construed them.[577] Of course, the Court was not entirely consistent in applying the doctrine.[578]

It remains good general law that pre-enforcement challenges to criminal and regulatory legislation will often be unripe for judicial consideration because of uncertainty of enforcement,[579] because the plaintiffs can allege only a subjective feeling of inhibition or fear arising from the legislation or from enforcement of it,[580] or because the courts need before them the details of a concrete factual situation arising from enforcement in order to engage in a reasoned balancing of individual rights and governmental interests.[581] But one who challenges a statute or possible administrative action need demonstrate only a realistic danger of sustaining an injury to his rights as a result of the statute's operation and enforcement and need not await the consummation of the threatened injury in order to obtain preventive relief, such as exposing himself to actual arrest or

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[577] International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). *See also* Electric Bond Co. v. SEC, 303 U.S. 419 (1938); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

[578] In Adler v. Board of Educ., 342 U.S. 485 (1952), without discussing ripeness, the Court decided on the merits a suit about a state law requiring dismissal of teachers advocating violent overthrow of the government, over a strong dissent arguing the case was indistinguishable from *Mitchell*. Id. at 504 (Justice Frankfurter dissenting). In Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), a state employee was permitted to attack a non-Communist oath, although he alleged he believed he could take the oath in good faith and could prevail if prosecuted, because the oath was so vague as to subject plaintiff to the "risk of unfair prosecution and the potential deterrence of constitutionally protected conduct." Id. at 283–84. *See also* Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[579] *E.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (no adjudication of challenge to law barring use of contraceptives because in 80 years of the statute's existence the state had never instituted a prosecution). *But compare* Epperson v. Arkansas, 393 U.S. 97 (1987) (merits reached in absence of enforcement and fair indication state would not enforce it); Vance v. Amusement Co., 445 U.S. 308 (1980) (reaching merits, although state asserted law would not be used, although local prosecutor had so threatened; no discussion of ripeness, but dissent relied on *Poe*, id. at 317–18).

[580] *E.g.*, Younger v. Harris, 401 U.S. 37, 41–42 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); O'Shea v. Littleton, 414 U.S. 488 (1974); Spomer v. Littleton, 414 U.S. 514 (1974); Rizzo v. Goode, 423 U.S. 362 (1976). In the context of the ripeness to challenge of agency regulations, as to which there is a presumption of available judicial remedies, the Court has long insisted that federal courts should be reluctant to review such regulations unless the effects of administrative action challenged have been felt in a concrete way by the challenging parties, i.e., unless the controversy is "ripe." *See*, of the older cases, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967). More recent cases include Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993); Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

[581] *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 294–297 (1981); Renne v. Geary, 501 U.S. 312, 320–323 (1991).

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prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injunctive relief.[582] Similarly, the reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues.[583]

Of considerable uncertainty in the law of ripeness is *Duke Power*, in which the Court held ripe for decision on the merits a challenge to a federal law limiting liability for nuclear accidents at nuclear power plants, on the basis that, because the plaintiffs had sustained an injury-in-fact and had standing, the Article III requisite of ripeness was satisfied and no additional facts arising out of the occurrence of the claimed harm would enable the court better to decide the issues.[584] Should this analysis prevail, ripeness as a limitation on justiciability will decline in importance.

Mootness.—A case initially presenting all the attributes necessary for federal court litigation may at some point lose some attribute of justiciability and become "moot." The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated.[585] "Under Article III of the Constitution, federal courts may adjudi-

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[582] Steffel v. Thompson, 415 U.S. 452 (1974); Wooley v. Maynard, 430 U.S. 705, 707–708, 710 (1977); Babbitt v. United Farm Workers, 442 U.S. 289, 297–305 (1979) (finding some claims ripe, others not). *Compare* Doe v. Bolton, 410 U.S. 179, 188–189 (1973), *with* Roe v. Wade, 410 U.S. 113, 127–128 (1973). *See also* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Colautti v. Franklin, 439 U.S. 379 (1979).

[583] Buckley v. Valeo, 424 U.S. 1, 113–118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (holding some but not all the claims ripe). *See also* Goldwater v. Carter, 444 U.S. 996, 997 (Justice Powell concurring) (parties had not put themselves in opposition).

[584] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81–82 (1978). The injury giving standing to plaintiffs was the environmental harm arising from the plant's routine operation; the injury to their legal rights was alleged to be the harm caused by the limitation of liability in the event of a nuclear accident. The standing injury had occurred, the ripeness injury was conjectural and speculative and might never occur. *See* id. at 102 (Justice Stevens concurring in the result). It is evident on the face of the opinion and expressly stated by the objecting Justices that the Court used its standing/ripeness analyses in order to reach the merits, so as to remove the constitutional cloud cast upon the federal law by the district court decision. Id. at 95, 103 (Justices Rehnquist and Stevens concurring in the result).

[585] *E.g.*, United States v. Munsingwear, 340 U.S. 36 (1950); Golden v. Zwickler, 394 U.S. 103, 108 (1969); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Roe v. Wade, 410 U.S. 113, 125 (1973); Sosna v. Iowa, 419 U.S. 393, 398–399 (1975); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), and id. at 411 (Justice Powell dissenting); Burke v. Barnes, 479 U.S. 361, 363 (1987); Honig v. Doe, 484 U.S. 305, 317 (1988); Lewis v. Continental Bank Corp., 494 U.S. 472, 477–478 (1990); *Camreta V. Greene*, 563 U.S. ___, No. 09–1954, slip op. (2011); United States v. Juvenile Male, 564 U.S. ___, No. 09–940, slip op. at 4 (2011).

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cate only actual, ongoing cases or controversies. . . . Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' . . . and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit."[586] Because, with the advent of declaratory judgments, it is open to the federal courts to "declare the rights and other legal relations" of the parties with *res judicata* effect,[587] the question in cases alleged to be moot now seems largely if not exclusively to be decided in terms of whether an actual controversy continues to exist between the parties rather than in terms of any additional older concepts.[588] So long as concrete, adverse legal interests between the parties continue, a case is not made moot by intervening actions that cast doubt on the practical enforceability of a final judicial order.[589]

Munsingwear has long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after *certiorari* had been granted was to vacate or reverse and remand with directions to dismiss. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), however, the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.

[586] Lewis v. Continental Bank Corp., 494 U.S. 472, 477–78 (1990) (internal citations omitted). The Court's emphasis upon mootness as a constitutional limitation mandated by Article III is long stated in the cases. *E.g.*, Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Sibron v. New York, 392 U.S. 40, 57 (1968). *See* Honig v. Doe, 484 U.S. 305, 317 (1988), and id. at 332 (Justice Scalia dissenting). *But compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976) (referring to mootness as presenting policy rather than constitutional considerations).

[587] *But see* Steffel v. Thompson, 415 U.S. 452, 470–72 (1974); id. at 477 (Justice White concurring), 482 n.3 (Justice Rehnquist concurring) (on *res judicata* effect in state court in subsequent prosecution). In any event, the statute authorizes the federal court to grant "[f]urther necessary or proper relief," which could include enjoining state prosecutions.

[588] Award of process and execution are no longer essential to the concept of judicial power. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[589] Chafin v. Chafin, 568 U.S. ___, No. 11–1347, slip op. (2013) (appeal of district court order returning custody of a child to her mother in Scotland not made moot by physical return of child to Scotland and subsequent ruling of Scottish court in favor of the mother continuing to have custody).

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Cases may become moot because of a change in the law,[590] or in the status of the parties,[591] or because of some act of one of the parties which dissolves the controversy.[592] But the Court has developed several exceptions. Thus, in criminal cases, although the sentence of the convicted appellant has been served, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[593] The "mere possibility" of such a consequence, even a "remote" one, is enough to find that one who has served his sentence has retained the requisite personal stake giving his case "an adversary cast and making it justiciable."[594] This exception has its

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[590] *E.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852); United States v. Alaska Steamship Co., 253 U.S. 113 (1920); Hall v. Beals, 396 U.S. 45 (1969); Sanks v. Georgia, 401 U.S. 144 (1971); Richardson v. Wright, 405 U.S. 208 (1972); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972); Lewis v. Continental Bank Corp., 494 U.S. 481 (1990). *But compare* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–289 (1982) (case not mooted by repeal of ordinance, since City made clear its intention to reenact it if free from lower court judgment); *see also* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. ___, No. 11–338, slip op. (2013) (action to enforce penalty under former regulation not mooted by change in regulation where violation occurred before regulation was changed). Following *Aladdin's Castle*, the Court in Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 660–63 (1993), held that when a municipal ordinance is repealed but replaced by one sufficiently similar so that the challenged action in effect continues, the case is not moot. *But see* id. at 669 (Justice O'Connor dissenting) (modification of ordinance more significant and case is mooted).

[591] Atherton Mills v. Johnston, 259 U.S. 13 (1922) (in challenge to laws regulating labor of youths 14 to 16, Court held case two-and-one-half years after argument and dismissed as moot since certainly none of the challengers was now in the age bracket); Golden v. Zwickler, 394 U.S. 103 (1969); DeFunis v. Odegaard, 416 U.S. 312 (1974); Dove v. United States, 423 U.S. 325 (1976); Lane v. Williams, 455 U.S. 624 (1982). *Compare* County of Los Angeles v. Davis, 440 U.S. 625 (1979), *with* Vitek v. Jones, 445 U.S. 480 (1980). In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.

[592] *E.g.*, Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); Oil Workers Local 8–6 v. Missouri, 361 U.S. 363 (1960); A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961); Preiser v. Newkirk, 422 U.S. 395 (1975); County of Los Angeles v. Davis, 440 U.S. 625 (1979); Alvarez v. Smith, 558 U.S. ___, No. 08–351 (2009).

[593] Sibron v. New York, 395 U.S. 40, 50–58 (1968). *But compare* Spencer v. Kemna, 523 U.S. 1 (1998).

[594] Benton v. Maryland, 395 U.S. 784, 790–791 (1969). The cases have progressed from leaning toward mootness to leaning strongly against. *E.g.*, St. Pierre v. United States, 319 U.S. 41 (1943); Fiswick v. United States, 329 U.S. 211 (1946); United States v. Morgan, 346 U.S. 502 (1954); Pollard v. United States, 352 U.S. 354 (1957); Ginsberg v. New York, 390 U.S. 629, 633–634 n.2 (1968); Sibron v. New York, 392 U.S. 40, 49–58 (1968).*But see* Lane v. Williams, 455 U.S. 624 (1982);United States v. Juvenile Male, 564 U.S. ___, No. 09–940, slip op. at 6 (2011) (per curiam) (rejecting as too indirect a benefit that favorable resolution of a case might serve as beneficial precedent for a future case involving the plaintiff). The exception permits review at the instance of the prosecution as well as defendant. Pennsylvania v. Mimms,

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counterpart in civil litigation in which a lower court judgment may still have certain present or future adverse effects on the challenging party.[595]

A second exception, the "voluntary cessation" doctrine, focuses on whether challenged conduct which has lapsed or the utilization of a statute which has been superseded is likely to recur.[596] Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case only if it can be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'"[597] This amounts to a "formidable burden" of showing with absolute clarity that there is no reasonable prospect of renewed activity.[598] Otherwise, "[t]he defendant is free to return to his old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled."[599] In this vein, the Court in *Campbell-Ewald Co. v. Gomez*, informed by principles of contract law, held that an unaccepted offer to settle a lawsuit amounts to a "legal nullity" that fails to bind either party and therefore does not moot the litigation.[600]

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434 U.S. 106 (1977). When a convicted defendant dies while his case is on direct review, the Court's present practice is to dismiss the petition for certiorari. Dove v. United States, 423 U.S. 325 (1976), overruling Durham v. United States, 401 U.S. 481 (1971).

[595] Southern Pacific Terminal Co. v. ICC, 219 U.S. 433, 452 (1911); Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) (holding that expiration of strike did not moot employer challenge to state regulations entitling strikers to state welfare assistance since the consequences of the regulations would continue).

[596] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Porter v. Lee, 328 U.S. 246 (1946); United States v. W.T. Grant Co., 345 U.S. 629 (1953); Gray v. Sanders, 372 U.S. 368 (1963); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202–04 (1969); DeFunis v. Odegaard, 416 U.S. 312, 318 (1974); County of Los Angeles v. Davis, 440 U.S. 625, 631–34 (1979), and id. at 641–46 (Justice Powell dissenting); Vitek v. Jones, 445 U.S. 480, 486–487 (1980), and id. at 500–01 (Justice Stewart dissenting); Princeton University v. Schmidt, 455 U.S. 100 (1982); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–289 (1982).

[597] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d. Cir. 1945)).

[598] Already, LLC v. Nike, Inc., 568 U.S. ___, No. 11–982, slip op. at 4 (2013) (dismissal of a trademark infringement claim against rival and submittal of an unconditional and irrevocable covenant not to sue satisfied the burden under the voluntary cessation test) (citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 190 (2000)).

[599] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). *But see* A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961).

[600] 577 U.S. ___, No. 14–857, slip op. 7–9 (2016) ("[W]ith no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation that they had at the outset."). The *Campbell-Ewald* decision was limited to the question of whether an *offer* of complete relief moots a case. The Court left

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Still a third exception concerns the ability to challenge short-term conduct which may recur in the future, which has been denominated as disputes "capable of repetition, yet evading review."[601] Thus, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, mootness will not be found when the complained-of conduct ends.[602] This exception is frequently invoked in cases involving situations of comparatively limited duration, such as elections,[603] pregnancies,[604] short sentences in criminal cases,[605] the award of at least some short-term federal government contracts,[606] and the issuance of injunctions that expire in a brief period.[607]

An interesting and potentially significant liberalization of the law of mootness, perhaps as part of a continuing circumstances exception, is occurring in the context of class action litigation. It is now clearly established that, when the controversy becomes moot as to the plaintiff in a certified class action, it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists.[608] The Court was closely divided, however, with respect to the right of the named party, when the sub-

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open the question of whether the *payment* of complete relief by a defendant to a plaintiff *can* render a case moot. *Id.* at 11.

[601] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[602] Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Murphy v. Hunt, 455 U.S. 478, 482 (1982). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125–26 (1974), and id. at 130–32 (Justice Stewart dissenting), Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 189–91 (2000),. The degree of expectation or likelihood that the issue will recur has frequently divided the Court. *Compare* Murphy v. Hunt, *with* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *compare* Honig v. Doe, 484 U.S. 305, 318–23 (1988), *with* id. at 332 (Justice Scalia dissenting).

[603] *See, e.g.,* Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

[604] *See* Roe v. Wade, 410 U.S. 113, 124–125 (1973).

[605] *See, e.g.*, Sibron v. New York, 392 U.S. 40, 49–58 (1968). *See also* Gerstein v. Pugh, 420 U.S. 103 (1975).

[606] *See, e.g.*, Kingdomware Techs., Inc. v. United States, 579 U.S. ___, No. 14–916, slip op. at 7 (2016) ("We have previously held that a period of two years is too short to complete judicial review of the lawfulness of [a] procurement.") (citing S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514–16 (1911)).

[607] *See, e.g.,* Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968). *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (short-term court order restricting press coverage).

[608] Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 752–757 (1976). A suit which proceeds as a class action but without formal certification may not receive the benefits of this rule. Board of School Commr's v. Jacobs, 420 U.S. 128 (1975). *See also* Weinstein v. Bradford, 423 U.S. 147 (1975); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976). *But see* the characterization of these cases in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 n.7

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stantive controversy became moot as to him, to appeal as error the denial of a motion to certify the class which he sought to represent and which he still sought to represent. The Court held that in the class action setting there are two aspects of the Article III mootness question, the existence of a live controversy and the existence of a personal stake in the outcome for the named class representative.[609] Finding a live controversy, the Court determined that the named plaintiff retained a sufficient interest, "a personal stake," in his claimed right to represent the class in order to satisfy the "imperatives of a dispute capable of judicial resolution;" that is, his continuing interest adequately assures that "sharply presented issues" are placed before the court "in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions."[610]

The immediate effect of the decision is that litigation in which class actions are properly certified or in which they should have been certified will rarely ever be mooted if the named plaintiff (or in effect his attorney) chooses to pursue the matter, even though the named plaintiff can no longer obtain any personal relief from the decision sought.[611] Of much greater potential significance is the possible extension of the weakening of the "personal stake" requirement in other areas, such as the representation of third-party claims in non-class actions and the initiation of some litigation in the form

(1980). Mootness is not necessarily avoided in properly certified cases, but the standards of determination are unclear. *See* Kremens v. Bartley, 431 U.S. 119 (1977).

[609] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

[610] 445 U.S. at 403. Justices Powell, Stewart, Rehnquist, and Chief Justice Burger dissented, id. at 409, arguing there could be no Article III personal stake in a procedural decision separate from the outcome of the case. In Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980), in an opinion by Chief Justice Burger, the Court held that a class action was not mooted when defendant tendered to the named plaintiffs the full amount of recovery they had individually asked for and could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litigation to those who would share in its benefits if the class were certified was deemed to be a sufficient "personal stake". *Cf.* Genesis Healthcare Corp. v. Symczyk, 569 U.S. ___, No. 11–1059, slip op. (2013) (in the context of a "collective action" under the Fair Labor Standards Act where a plaintiff's individual claim was moot and no other individuals had joined the suit, holding that a plaintiff had no personal stake in the case that provided the court with subject matter jurisdiction). In a slightly different context, the Court, in *Campbell-Ewald Co. v. Gomez*, held that neither an unaccepted settlement offer or an offer of judgment provided *prior* to class certification would moot a potential lead plaintiff's case. 577 U.S. ___, No. 14–857, slip op. at 11 (2016). According to the majority opinion, this holding avoided placing defendants in the "driver's seat" with respect to class litigation wherein a defendant's offer of settlement could eliminate a court's jurisdiction to adjudicate potentially costly class actions. *Id.*

[611] The named plaintiff must still satisfy the class action requirement of adequacy of representation. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 405–407 (1980). On the implications of *Geraghty*, which the Court has not returned to, *see* Hart & Wechsler (6th ed.), supra at 194–198.

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of a "private attorneys general" pursuit of adjudication.[612] In *Genesis Healthcare Corporation v. Symczyk*,[613] the Court appeared to follow the "personal stake" rule applicable to class actions in the context of "collective actions" under the Fair Labor Standards Act, at least to the extent that actions that would moot the plaintiff's claims prior to a "conditional certification" by the court would likewise moot the collective action.

Retroactivity Versus Prospectivity.—One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that an Article III court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases.[614] The Court asserted that this principle is true, while applying it only to give retroactive effect to the parties to the immediate case.[615] Yet, occasionally, the Court did not apply its holding to the parties before it,[616] and in a series of cases beginning in the mid-1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively[617]—constitutional-criminal law decisions. The results have been confusing and unpredictable.[618]

Prior to 1965, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions."[619] Statutory and judge-made law have consequences, at least to the extent that people must rely on them in making decisions

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[612] *Geraghty*, 445 U.S. at 404 & n.11.

[613] 569 U.S. ___, No. 11–1059, slip op. (2013).

[614] For a masterful discussion of the issue in both criminal and civil contexts, *see* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

[615] Stovall v. Denno, 388 U.S. 293, 301 (1967).

[616] England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 422 (1964); James v. United States, 366 U.S. 213 (1961). *See also* Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

[617] Noncriminal constitutional cases included Lemon v. Kurtzman, 411 U.S. 192 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). Indeed, in Buckley v. Valeo, 424 U.S. 1 (1976), and Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court postponed the effectiveness of its decision for a period during which Congress could repair the flaws in the statute. Noncriminal, nonconstitutional cases include Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Allen v. State Board of Elections, 393 U.S. 544 (1969); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[618] Because of shifting coalitions of Justices, Justice Harlan complained, the course of retroactivity decisions "became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." Mackey v. United States, 401 U.S. 667, 676 (1971) (separate opinion).

[619] Robinson v. Neil, 409 U.S. 505, 507 (1973). The older rule of retroactivity derived from the Blackstonian notion "that the duty of the court was not to 'pro-

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and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests founded upon the old.[620] In both criminal and civil cases, however, the Court's discretion to do so has been constrained by later decisions.

In the 1960s, when the Court began its expansion of the Bill of Rights and applied its rulings to the states, it became necessary to determine the application of the rulings to criminal defendants who had exhausted all direct appeals but who could still resort to *habeas corpus*, to those who had been convicted but still were on direct appeal, and to those who had allegedly engaged in conduct but who had not gone to trial. At first, the Court drew the line at cases in which judgments of conviction were not yet final, so that all persons in those situations obtained retrospective use of decisions,[621] but the Court later promulgated standards for a balancing process that resulted in different degrees of retroactivity in different cases.[622] Generally, in cases in which the Court declared a rule that was "a clear break with the past," it denied retroactivity to all defendants, with the sometime exception of the appellant himself.[623] With respect to certain cases in which a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial[624] or to cases in which the Court found that a constitutional doctrine barred the conviction or punishment of someone,[625] full retroactivity, even to *habeas* claimants, was the rule. Justice Harlan strongly argued that the Court should sweep away its confusing balancing rules and hold that all defendants whose cases are still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule, but that no *habeas* claimant should be entitled to benefit.[626]

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nounce a new law, but to maintain and expound the old one.'" Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (quoting 1 W. Blackstone, Commentaries *69).

[620] Lemon v. Kurtzman, 411 U.S. 192, 198–99 (1973).

[621] Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966).

[622] Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); Adams v. Illinois, 405 U.S. 278 (1972).

[623] Desist v. United States, 394 U.S. 244, 248 (1969); United States v. Peltier, 422 U.S. 531 (1975); Brown v. Louisiana, 447 U.S. 323, 335–36 (1980) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 55 (1973); United States v. Johnson, 457 U.S. 537, 549–50, 551–52 (1982).

[624] Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion); Brown v. Louisiana, 447 U.S. 323, 328–30 (1980) (plurality opinion); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

[625] United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971); Moore v. Illinois, 408 U.S. 786, 800 (1972); Robinson v. Neil, 409 U.S. 505, 509 (1973).

[626] Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion); Desist v. United States, 394 U.S. 244, 256 (1969) (dissenting). Justice Powell has also strongly supported the proposed rule. Hankerson v. North Carolina, 432 U.S. 233, 246–248

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The Court later drew a sharp distinction between criminal cases pending on direct review and cases pending on collateral review. For cases on direct review, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[627] Justice Harlan's *habeas* approach was first adopted by a plurality in *Teague v. Lane*[628] and then by the Court in *Penry v. Lynaugh*.[629] Thus, for collateral review in federal courts of state court criminal convictions, the general rule is that "new rules" of constitutional interpretation—those "not '*dictated* by precedent existing at the time the defendant's conviction became final'"[630]—will not be applied.[631] However, "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[632] Put another way, a new rule will be applied in a collateral proceeding only if it places certain kinds of conduct "beyond the power of the criminal law-making authority to prescribe" or constitutes a "new procedure[ ] without which the likelihood of an accurate conviction is seriously diminished."[633] In *Montgomery v. Louisiana*, the Court extended the holding of *Teague* beyond the context of federal habeas review, such that when a new substantive rule of constitutional law controls the outcome of a case, state collateral review courts must give

(1977) (concurring in judgment); Brown v. Louisiana, 447 U.S. 323, 337 (1980) (concurring in judgment).

[627] Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (cited with approval in Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

[628] 489 U.S. 288 (1989).

[629] 492 U.S. 302 (1989).

[630] Whorton v. Bockting, 549 U.S. 406, 416 (2007). Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" and if it was not "an illogical or even a grudging application" of the prior decision. Butler v. McKellar, 494 U.S. 407, 412–415 (1990). For additional elaboration on "new law," *see* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[631] For an example of the application of the *Teague* rule in federal collateral review of a federal court conviction, see Chaidez v. United States, 568 U.S. ___, No. 11–820, slip op. (2013). *See also* Welch v. United States, 578 U.S. ___, No. 15–6418, slip op. at 7 (2016) (assuming, without deciding, that the *Teague* framework "applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction").

[632] Whorton v. Bockting, 549 U.S. 406, 416 (2007).

[633] Teague v. Lane, 489 U.S. 288, 307, 311–313 (1989) (plurality opinion); *see also* Butler v. McKellar, 494 U.S. 407, 415–416 (1990).

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retroactive effect to that rule in the same manner as federal courts engaging in habeas review.[634]

As a result, at least with regard to the first exception, the Court has held that the *Teague* rule is constitutionally based,[635] as substantive rules set forth categorical guarantees that place certain laws and punishments beyond a state's power, making "the resulting conviction or sentence . . . by definition . . . unlawful."[636] In contrast, procedural rules are those that are aimed at enhancing the accuracy of a conviction or sentence by regulating the manner of determining the defendant's guilt.[637] As a consequence, with respect to a defendant who did not receive the benefit of a new *procedural* rule, the possibility exists that the underlying conviction or sentence may "still be accurate" and the "defendant's continued confinement may still be lawful" under the Constitution.[638] In this vein, the Court has described a substantive rule as one that alters the range of conduct that the law punishes, or that prohibits "a certain category of punishment for a class of defendants because of their status or offense."[639]

Under the second exception it is "not enough under *Teague* to say that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the

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[634] *See* Montgomery v. Louisiana, 577 U.S. ___, No. 14–280, slip op. at 12 (2016) ("If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings."). The Court reasoned as such because new substantive rules constitute wholesale prohibitions on the state's power to convict or sentence a criminal defendant under certain circumstances, making the underlying conviction or sentence void and providing the state with no authority to leave the underlying judgment in place during collateral review. *Id.* at 10–11; *see also id.* at 12 ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.").

[635] *See Montgomery*, slip op. at 8 ("[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.")

[636] *Id.* at 9.

[637] *Id.*

[638] *Id.*

[639] See *Welch*, slip op. at 11; *see also* Schriro v. Summerlin, 542 U.S. 348, 353 (2004); Penry v. Lynaugh, 492 U.S. 302, 330 (1989). Accordingly, the Court has rejected the argument that the underlying "source" of a constitutional rule—i.e., the fact that a constitutional rule on its face creates substantive or procedural rights—can determine the retroactivity of a ruling. *See Welch*, slip op. at 10 ("[T]his Court has determined whether a new rule is substantive . . . by considering the function of the rule, not its underlying constitutional source.").

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bedrock procedural elements essential to the fairness of a proceeding."[640]

What the rule is to be, and indeed if there *is* to be a rule, in civil cases has been disputed to a rough draw in recent cases. As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case.[641] As in criminal cases, the creation of new law, through overrulings or otherwise, may result in retroactivity in all instances, in pure prospectivity, or in partial prospectivity in which the prevailing party obtains the results of the new rule but no one else does. In two cases raising the question when states are required to refund taxes collected under a statute that is subsequently ruled unconstitutional, the Court revealed itself to be deeply divided.[642] The question in *Beam* was whether the company could claim a tax refund under an earlier ruling holding unconstitutional the imposition of certain taxes upon its products. The holding of a fractionated Court was that it could seek a refund, because in the earlier ruling the Court had applied the holding to the contesting company, and, once a new rule has been applied retroactively to the litigants in a civil case, considerations of equality and *stare decisis* compel application to all.[643] Although par-

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[640] Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis in original) (internal quotations and citations omitted).

For application of these principles, see *Montgomery*, slip op. at 14–17 (holding that the Court, in interpreting the Eighth Amendment to prohibit mandatory life without parole for juvenile offenders, "did announce a new substantive rule" because the prohibition necessarily placed beyond the power of a state a particular punishment with respect to the "vast majority of juvenile offenders"). *See also Welch*, slip op. at 9–11 (holding that a conviction under a statute that was later found to be void for vagueness is a substantive rule, as the invalidity of the law under the Due Process Clause altered the "range of conduct or class of persons that the law punishes."); *Schriro*, 542 U.S. at 352 (holding that the requirement that aggravating factors justifying the death penalty be found by the jury was a new procedural rule that did not apply retroactively).

[641] The standard that has been applied was enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Briefly, the question of retroactivity or prospectivity was to be determined by a balancing of the equities. To be limited to prospectivity, a decision must have established a new principle of law, either by overruling clear past precedent on which reliance has been had or by deciding an issue of first impression whose resolution was not clearly foreshadowed. The courts must look to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Then, the courts must look to see whether a decision to apply retroactively a decision will produce substantial inequitable results. Id. at 106–07. American Trucking Assn's v. Smith, 496 U.S. 167, 179–86 (1990) (plurality opinion).

[642] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); American Trucking Assn's, Inc. v. Smith, 496 U.S. 167 (1990).

[643] The holding described in the text is expressly that of only a two-Justice plurality. 501 U.S. at 534–44 (Justices Souter and Stevens). Justice White, Justice

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tial or selective prospectivity is thus ruled out, neither pure retroactivity nor pure prospectivity is either required or forbidden.

Four Justices adhered to the principle that new rules, as defined above, may be applied purely prospectively, without violating any tenet of Article III or any other constitutional value.[644] Three Justices argued that all prospectivity, whether partial or total, violates Article III by expanding the jurisdiction of the federal courts beyond true cases and controversies.[645] Apparently, the Court now has resolved this dispute, although the principal decision was by a five-to-four vote. In *Harper v. Virginia Dep't of Taxation*,[646] the Court adopted the principle of the *Griffith* decision in criminal cases and disregarded the *Chevron Oil* approach in civil cases. Henceforth, in civil cases, the rule is: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[647] Four Justices continued to adhere to *Chevron Oil*, however,[648] so that with one Justice each retired from the different sides one may

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Blackmun, and Justice Scalia (with Justice Marshall joining the latter Justices) concurred, id. at 544, 547, 548 (respectively), but on other, and in the instance of the three latter Justices, and broader justifications. Justices O'Connor and Kennedy and Chief Justice Rehnquist dissented. Id. at 549.

[644] 501 U.S. at 549 (dissenting opinion of Justices O'Connor and Kennedy and Chief Justice Rehnquist), and id. at 544 (Justice White concurring). *See also Smith*, 496 U.S. at 171 (plurality opinion of Justices O'Connor, White, Kennedy, and Chief Justice Rehnquist).

[645] 501 U.S. at 547, 548 (Justices Blackmun, Scalia, and Marshall concurring). In *Smith*, 496 U.S. at 205, these three Justices had joined the dissenting opinion of Justice Stevens arguing that constitutional decisions must be given retroactive effect.

[646] 509 U.S. 86 (1993).

[647] 509 U.S. at 97. Although the conditional language in this passage might suggest that the Court was leaving open the possibility that in some cases it might rule purely prospectively, and not even apply its decision to the parties before it, other language belies that possibility. "This rule extends *Griffith's* ban against 'selective application of new rules.'" (Citing Griffith, 479 U.S. at 323.) Because *Griffith* rested in part on the principle that "the nature of judicial review requires that [the Court] adjudicate specific cases," 479 U.S. at 322, deriving from Article III's case or controversy requirement for federal courts and forbidding federal courts from acting legislatively, "'the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" 509 U.S. at 97 (quoting *Smith*, 496 U.S. at 214 (Justice Stevens dissenting)). The point is made more clearly in Justice Scalia's concurrence, in which he denounces all forms of nonretroactivity as "the handmaid of judicial activism." Id. at 105.

[648] 509 U.S. at 110 (Justice Kennedy, with Justice White, concurring); 113 (Justice O'Connor, with Chief Justice Rehnquist, dissenting). However, these Justices disagreed in this case about the proper application of *Chevron Oil*.

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not regard the issue as definitively settled.[649] Future cases must, therefore, be awaited for resolution of this issue.

Political Questions

In some cases, a court will refuse to adjudicate a case despite the fact that it presents all the qualifications that we have considered to make it a justiciable controversy; it is in its jurisdiction, presented by parties with standing, and it is a case in which adverseness and ripeness exist. Such are cases that present a "political question." Although the Court has referred to the political question doctrine as "one of the rules basic to the federal system and this Court's appropriate place within that structure,"[650] it has also been remarked that "[i]t is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law. The origin, scope, and purpose of the concept have eluded all attempts at precise statements."[651]

It has been suggested that it may be more useful to itemize the categories of questions that have been labeled political rather than to attempt to isolate the factors that a court will consider to identify such cases.[652] The Court has to some extent agreed, noting that the criteria applied by the Court in political questions cases can vary depending on the issue involved.[653] Regardless of which approach is taken, however, the Court's narrowing of the rationale for political questions in *Baker v. Carr*,[654] discussed below, appears to have changed the nature of the inquiry radically.

Origins and Development.—In the first decade after ratification of the Constitution, the Court in *Ware v. Hylton*[655] refused to pass on the question whether a treaty had been broken, and in *Mar-*

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[649] *But see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U.S. Supreme Court invalidation of that state's statute of limitations in certain suits, in an opinion by Justice Breyer, Justice Blackmun's successor); Ryder v. United States, 515 U.S. 177, 184–85 (1995) ("whatever the continuing validity of *Chevron Oil* after" *Harper* and *Reynoldsville Casket*).

[650] Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); *cf.* Baker v. Carr, 369 U.S. 186, 278 (1962) (Justice Frankfurter dissenting). The most successful effort at conceptualization of the doctrine is Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966). *See* Hart & Wechsler (6th ed.), supra at 222–248.

[651] Frank, *Political Questions*, in Supreme Court and Supreme Law (E. Cahn, ed., 1954), at 36.

[652] The concept of political question is "more amenable to description by infinite itemization than by generalization" Id.

[653] Baker v. Carr , 369 U.S. 186, 217 (1962).

[654] 369 U.S. at 208–232.

[655] 3 U.S. (3 Dall.) 199 (1796).

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tin v. Mott,[656] the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But the roots of the doctrine are most clearly seen in *Marbury v. Madison*,[657] where Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."[658]

In *Luther v. Borden*,[659] however, the Court made clear that the doctrine went beyond considerations of interference with executive functions. This case, arising from the Dorr Rebellion (a period of political unrest in Rhode Island), considered the claims of two competing factions vying to be declared the lawful government of Rhode Island.[660] Chief Justice Taney, for the Court, began by saying that the answer was primarily a matter of state law that had been decided in favor of one faction by the state courts.[661] Insofar as the Federal Constitution had anything to say on the subject, the Chief Justice continued, that was embodied in the clause empowering the United States to guarantee to every state a republican form of government,[662] and this clause committed the determination of that issue to Congress.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the govern-

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[656] 25 U.S. (12 Wheat.) 19 (1827).

[657] 5 U.S. (1 Cr.) 137 (1803).

[658] 5 U.S. (1 Cr.) at 170. In Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840), the Court, refusing an effort by mandamus to compel the Secretary of the Navy to pay a pension, said: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." It therefore follows that mandamus will lie against an executive official only to compel the performance of a ministerial duty, which admits of no discretion, and may not be invoked to control executive or political duties which admit of discretion. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[659] 48 U.S. (7 How.) 1 (1849).

[660] *Cf.* Baker v. Carr, 369 U.S. 186, 218–22 (1962); id. at 292–97 (Justice Frankfurter dissenting).

[661] *Luther*, 48 U.S. (7 How.) at 40.

[662] 48 U.S. at 42 (citing Article IV, § 4).

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ment under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[663] Here, the contest had not proceeded to a point where Congress had made a decision, "[y]et the right to decide is placed there, and not in the courts."[664]

Moreover, in effectuating the provision in the same clause that the United States should protect states against domestic violence, Congress had vested discretion in the President to use troops to protect a state government upon the application of the legislature or the governor. Before he could act upon the application of a legislature or a governor, the President "must determine what body of men constitute the legislature, and who is the governor . . . ." No court could review the President's exercise of discretion in this respect; no court could recognize as legitimate a group vying against the group recognized by the President as the lawful government.[665] Although the President had not actually called out the militia in Rhode Island, he had pledged support to one of the competing governments, and this pledge of military assistance if it were needed had in fact led to the capitulation of the other faction, thus making an effectual and authoritative determination not reviewable by the Court.[666]

The Doctrine Before Baker v. Carr.—Over the years, the political question doctrine has been applied to preclude adjudication of a variety of other issues. In particular, prior to *Baker v. Carr*,[667] cases challenging the distribution of political power through apportionment and districting,[668] weighted voting,[669] and restrictions on political action[670] were held to present nonjusticiable political questions. Certain factors appear more or less consistently through most of the cases decided before *Baker*, and it is perhaps best to indicate the cases and issues deemed political before attempting to isolate these factors.

1. Republican Form of Government. By far the most consistent application of the doctrine has been in cases in which litigants as-

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[663] 48 U.S. at 42.

[664] Id.

[665] 48 U.S. at 43.

[666] 48 U.S. at 44.

[667] 369 U.S. 186 (1962).

[668] Colegrove v. Green, 328 U.S. 549 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947).

[669] South v. Peters, 339 U.S. 276 (1950) (county unit system for election of statewide officers with vote heavily weighted in favor of rural, lightly populated counties).

[670] MacDougall v. Green, 335 U.S. 281 (1948) (signatures on nominating petitions must be spread among counties of unequal population).

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serted claims under the republican form of government clause.[671] The attacks were generally either on the government of the state itself[672] or involved a challenge regarding the manner in which it had acted.[673] There have, however, been cases involving this clause in which the Court has reached the merits.[674]

2. Recognition of Foreign States. Although there is language in the cases that would, if applied, serve to make all cases touching on foreign affairs and foreign policy political questions,[675] whether the courts can adjudicate a dispute in this area has often depended on the context in which it arises. Thus, the determination by the President whether to recognize the government of a foreign state[676] or who is the *de jure* or *de facto* ruler of a foreign state[677] is conclusive on the courts. In the absence of a definitive executive action, however, the courts will review the record to determine whether the United States has accorded a sufficient degree of recognition to allow the courts to take judicial notice of the existence of the state.[678] Moreover, the courts have often determined for themselves what effect, if any, should be accorded the acts of foreign powers, recognized or unrecognized.[679]

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[671] Article IV, § 4.

[672] As it was on the established government of Rhode Island in Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See also* Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Taylor v. Beckham, 178 U.S. 548 (1900).

[673] Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912) (challenging tax initiative); Kiernan v. City of Portland, 223 U.S. 151 (1912) (attacks on initiative and referendum); Marshall v. Dye, 231 U.S. 250 (1913) (state constitutional amendment procedure); O'Neill v. Leamer, 239 U.S. 244 (1915) (delegation to court to form drainage districts); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) (submission of legislation to referendum); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (workmen's compensation); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) (concurrence of all but one justice of state high court required to invalidate statute); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) (delegation of legislative powers).

[674] All the cases, however, predate the application of the doctrine in Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See* Attorney General of the State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–176 (1875) (denial of suffrage to women no violation of republican form of government).

[675] Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[676] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).

[677] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *See Ex parte* Hitz, 111 U.S. 766 (1884).

[678] United States v. The Three Friends, 166 U.S. 1 (1897); *In re* Baiz, 135 U.S. 403 (1890). *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[679] United States v. Reynes, 50 U.S. (9 How.) 127 (1850); Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838); Keene v. McDonough, 33 U.S. (8 Pet.) 308 (1834). *See also* Wil-

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3. Treaties. Similarly, the Court, when dealing with treaties and the treaty power, has treated as political questions whether the foreign party had constitutional authority to assume a particular obligation[680] and whether a treaty has lapsed because of the foreign state's loss of independence[681] or because of changes in the territorial sovereignty of the foreign state.[682] On the other hand, the Court will not only interpret the domestic effects of treaties,[683] but it will at times interpret the effects bearing on international matters.[684] The Court has generally deferred to the President and Congress with regard to the existence of a state of war and the dates of the beginning and ending and of states of belligerency between foreign powers, but the deference has sometimes been forced.[685]

4. Enactment or Ratification of Laws. Ordinarily, the Court will not look behind the fact of certification as to whether the standards requisite for the enactment of legislation[686] or ratification of a constitutional amendment[687] have in fact been met, although it will interpret the Constitution to determine what the basic standards are.[688] Further, the Court will decide certain questions if the political branches are in disagreement.[689]

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liams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Underhill v. Hernandez, 168 U.S. 250 (1897). *But see* United States v. Belmont, 301 U.S. 324 (1937). On the "act of state" doctrine, *compare* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *with* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). *See also* First National City Bank v. Banco Para el Comercio de Cuba, 462 U.S. 611 (1983); W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp., U.S. 400 (1990).

[680] Doe v. Braden, 57 U.S. (16 How.) 635 (1853).

[681] Terlinden v. Ames, 184 U.S. 270 (1902); Clark v. Allen, 331 U.S. 503 (1947).

[682] Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852). On the effect of a violation by a foreign state on the continuing effectiveness of the treaty, *see* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Charlton v. Kelly, 229 U.S. 447 (1913).

[683] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). *Cf.* Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (conflict of treaty with federal law). On the modern formulation, *see* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229–230 (1986).

[684] Perkins v. Elg, 307 U.S. 325 (1939); United States v. Rauscher, 119 U.S. 407 (1886).

[685] Commercial Trust Co v. Miller, 262 U.S. 51 (1923); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924); Ludecke v. Watkins, 335 U.S. 160 (1948); Lee v. Madigan, 358 U.S. 228 (1959); *The Divina Pastora*, 17 U.S. (4 Wheat.) 52 (1819). The cases involving the status of Indian tribes as foreign states usually but not always have presented political questions. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Sandoval, 231 U.S. 28 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[686] Field v. Clark, 143 U.S. 649 (1892); Harwood v. Wentworth, 162 U.S. 547 (1896); *cf.* Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868). *See*, for the modern formulation, United States v. Munoz-Flores, 495 U.S. 385 (1990).

[687] Coleman v. Miller, 307 U.S. 433 (1939) (Congress's discretion to determine what passage of time will cause an amendment to lapse, and effect of previous rejection by legislature).

[688] Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919); Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Twin City Na-

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From this limited review of the principal areas in which the political question doctrine seemed most established, it is possible to extract some factors that seemingly convinced the courts that the issues presented went beyond the judicial responsibility. These factors, stated baldly, would appear to be the lack of requisite information and the difficulty of obtaining it,[690] the necessity for uniformity of decision and deference to the wider responsibilities of the political departments,[691] and the lack of adequate standards to resolve a dispute.[692] But present in all the political cases was (and is) the most important factor: a "prudential" attitude about the exercise of judicial review, which emphasizes that courts should be wary of deciding on the merits any issue in which claims of principle as to the issue and of expediency as to the power and prestige of courts are in sharp conflict. The political question doctrine was (and is) thus a way of avoiding a principled decision damaging to the Court or an expedient decision damaging to the principle.[693]

Baker v. Carr.—In *Baker v. Carr*,[694] the Court undertook a major reformulation and rationalization of the political question doctrine, which has considerably narrowed its application. Following *Baker*, the whole of the apportionment-districting-election restriction controversy previously immune to federal-court adjudication was considered and decided on the merits,[695] and the Court's subse-

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tional Bank v. Nebeker, 167 U.S. 196 (1897); Lyons v. Woods, 153 U.S. 649 (1894); United States v. Ballin, 144 U.S. 1 (1892) (statutes); United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith (No. 1), 253 U.S. 221 (1920); *National Prohibition Cases*, 253 U.S. 350 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (constitutional amendments).

[689] *Pocket Veto Case*, 279 U.S. 655 (1929); Wright v. United States, 302 U.S. 583 (1938).

[690] *See*, *e.g.*, Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); Coleman v. Miller, 307 U.S. 433, 453, (1939).

[691] *See*, *e.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839). Similar considerations underlay the opinion in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which Chief Justice Taney wondered how a court decision in favor of one faction would be received with Congress seating the representatives of the other faction and the President supporting that faction with military force.

[692] Baker v. Carr, 369 U.S. 186, 217, 226 (1962) (opinion of the Court); id. at 268, 287, 295 (Justice Frankfurter dissenting)

[693] For a statement of the "prudential" view, *see generally* A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), *but see esp.* 23–28, 69–71, 183–198. *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Justice Frankfurter dissenting.) The opposing view, which has been called the "classicist" view, is that courts are duty bound to decide all cases properly before them. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). *See also* H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 11–15 (1961).

[694] 369 U.S. 186 (1962).

[695] Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Hadley v. Junior College District, 397 U.S. 50 (1970) (apportionment and districting, congressional, legislative, and local); Gray v. Sanders, 372 U.S. 368 (1963) (county

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quent rejection of the doctrine in other cases disclosed narrowing in other areas as well.[696]

According to Justice Brennan, who delivered the opinion of the Court, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[697] Thus, the "nonjusticiability of a political question is primarily a function of the separation of powers."[698] "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[699] Following a discussion of several areas in which the doctrine had been used, Justice Brennan continued: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."

The Justice went on to list a variety of factors to be considered, noting that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrass-

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unit system weighing statewide elections); Moore v. Ogilvie, 394 U.S. 814 (1969) (geographic dispersion of persons signing nominating petitions).

[696] *See, e.g.,* Powell v. McCormack, 395 U.S. 486 (1969). Nonetheless, the doctrine continues to be sighted.

[697] Baker v. Carr, 369 U.S. 186, 210 (1962). This formulation fails to explain cases like Moyer v. Peabody, 212 U.S. 78 (1909), in which the conclusion of the governor of a state that insurrection existed or was imminent justifying suspension of constitutional rights was deemed binding on the Court. *Cf.* Sterling v. Constantin, 287 U.S. 378 (1932). The political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. Harwood v. Wentworth, 162 U.S. 547 (1896); Lyons v. Woods, 153 U.S. 649 (1894); Clough v. Curtis, 134 U.S. 361 (1890). *See also In re* Sawyer, 124 U.S. 200 (1888); Walton v. House of Representatives, 265 U.S. 487 (1924).

[698] 369 U.S. at 210.

[699] 369 U.S. at 211.

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ment from multifarious pronouncements by various departments on one question."[700]

Powell v. McCormack.—Because *Baker* had apparently restricted the political question doctrine to intrafederal issues, there was no discussion of the doctrine when the Court held that it had power to review and overturn a state legislature's refusal to seat a member-elect because of his expressed views.[701] But in *Powell v. McCormack*,[702] the Court was confronted with a challenge to the exclusion of a member-elect by the United States House of Representatives. Its determination that the political question doctrine did not bar its review of the challenge indicates the narrowness of application of the doctrine in its present state. Taking Justice Brennan's formulation in *Baker* of the factors that go to make up a political question,[703] Chief Justice Warren determined that the only critical one in this case was whether there was a "textually demonstrable constitutional commitment" to the House to determine in its sole discretion the qualifications of members.[704]

In order to determine whether there was a textual commitment, the Court reviewed the Constitution, the Convention proceedings, and English and United States legislative practice to ascertain what power had been conferred on the House to judge the qualifications of its members; finding that the Constitution vested the House with power only to look at the qualifications of age, residency, and citizenship, the Court thus decided that in passing on Powell's conduct and character the House had exceeded the powers committed to it and thus judicial review was not barred by this fac-

[700] 369 U.S. at 217. It remains unclear after *Baker* whether the political question doctrine is applicable *solely* to intrafederal issues or only *primarily*, so that the existence of one or more of these factors in a case involving, say, a state, might still give rise to nonjusticiability. At one point, id. at 210, Justice Brennan says that nonjusticiability of a political question is "primarily" a function of separation of powers but in the immediately preceding paragraph he states that "it is" the intrafederal aspect "and not the federal judiciary's relationship to the States" that raises political questions. But subsequently, id. at 226, he balances the present case, which involves a state and not a branch of the Federal Government, against each of the factors listed in the instant quotation and notes that none apply. His discussion of why Guarantee Clause cases are political presents much the same difficulty, id. at 222–26, because he joins the conclusion that the clause commits resolution of such issues to Congress with the assertion that the clause contains no "criteria by which a court could determine which form of government was republican," id. at 222, a factor not present when the Equal Protection Clause is relied on. Id. at 226.

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

[702] 395 U.S. 486 (1969).

[703] Baker v. Carr, 369 U.S. 186, 217 (1962).

[704] 395 U.S. at 319.

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tor of the political question doctrine.[705] Although this approach accords with the "classicist" theory of judicial review,[706] it circumscribes the political question doctrine severely, inasmuch as all constitutional questions turn on whether a governmental body has exceeded its specified powers, a determination the Court traditionally makes, whereas traditionally the doctrine precluded the Court from inquiring whether the governmental body had exceeded its powers. In short, the political question consideration may now be one on the merits rather than a decision not to decide.

Chief Justice Warren disposed of the other factors present in political question cases in slightly more than a page. Because resolution of the question turned on an interpretation of the Constitution, a judicial function which must sometimes be exercised "at variance with the construction given the document by another branch," there was no lack of respect shown another branch. Nor, because the Court is the "ultimate interpreter of the Constitution," will there be "multifarious pronouncements by various departments on one question," nor, since the Court is merely interpreting the Constitution, is there an "initial policy determination" not suitable for courts. Finally, "judicially . . . manageable standards" are present in the text of the Constitution.[707] The effect of *Powell* was to discard all the *Baker* factors inhering in a political question, with the exception of the textual commitment factor, and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.

The Doctrine Reappears.—Despite the apparent narrowing of the doctrine in *Baker* and *Powell*, the Court has not abandoned it. Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmen-

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[705] 395 U.S. at 519–47. The Court noted, however, that even if this conclusion had not been reached from unambiguous evidence, the result would have followed from other considerations. Id. at 547–48.

[706] *See* H. Wechsler, supra at 11–12. Professor Wechsler believed that congressional decisions about seating members were immune to review. Id. Chief Justice Warren noted that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution." Powell v. McCormack, 395 U.S. 486, 521 n.42 (1969). *See also* id. at 507 n.27 (reservation on limitations that might exist on Congress's power to expel or otherwise punish a sitting member).

[707] 395 U.S. at 548–549. With the formulation of Chief Justice Warren, *compare* that of then-Judge Burger in the lower court. 395 F.2d 577, 591–96 (D.C. Cir. 1968).

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tal action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [708]

The suggestion of the infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise." [709] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[710] A challenge to the Senate's interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.[711]

Despite the occasional resort to the doctrine, the Court continues to reject its application in language that confines its scope. Thus, when parties challenged the actions of the Secretary of Commerce in declining to certify, as required by statute, that Japanese whaling practices undermined the effectiveness of international conventions, the Court rejected the Government's argument that the political question doctrine precluded decision on the merits. The Court's prime responsibility, it said, is to interpret statutes, treaties, and executive agreements; the interplay of the statutes and the agree-

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[708] Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, the decisions in O'Shea v. Littleton, 414 U.S. 488 (1974), and Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

[709] 413 U.S. at 11. Other considerations of justiciability, however, id. at 10, preclude using the case as square precedent on political questions. Notice that in Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court denied that the Gilligan v. Morgan holding barred adjudication of damage actions brought against state officials by the estates of students killed in the course of the conduct that gave rise to both cases.

[710] O'Brien v. Brown, 409 U.S. 1 (1972) (granting stay). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id. at 816 (remanding to dismiss as moot). It was also not before the Court in Cousins v. Wigoda, 419 U.S. 477 (1975), but it was alluded to there. *See* id. at 483 n.4, and id. at 491 (Justice Rehnquist concurring). *See also* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). *But see* id. at 997, 998 (Justice Powell rejecting analysis for this type of case).

[711] Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with Powell v. McCormack. Id. at 236–38.

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ments in this case implicated the foreign relations of the Nation. "But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." [712]

After requesting argument on the issue, the Court held that a challenge to a statute on the ground that it did not originate in the House of Representatives as required by the Origination Clause was justiciable.[713] Turning back reliance on the various factors set out in *Baker*, in much the same tone as in *Powell v. McCormack*, the Court continued to evidence the view that only questions textually committed to another branch are political questions. Invalidation of a statute because it did not originate in the right House would not demonstrate a "lack of respect" for the House that passed the bill. "[D]isrespect," in the sense of rejecting Congress's reading of the Constitution, "cannot be sufficient to create a political question. If it were *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." [714] That the House of Representatives has the power and incentives to protect its prerogatives by not passing a bill violating the Origination Clause did not make this case nonjusticiable. "[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." [715]

The Court also rejected the contention that, because the case did not involve a matter of individual rights, it ought not be adjudicated. Political questions are not restricted to one kind of claim, but the Court frequently has decided separation-of-power cases brought by people in their individual capacities. Moreover, the allocation of powers within a branch, just as the separation of powers among branches, is designed to safeguard liberty.[716] Finally, the Court was sanguine that it could develop "judicially manageable standards" for disposing of Origination Clause cases, and, thus, it did not view the issue as political in that context.[717]

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[712] Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986). *See also* Davis v. Bandemer, 478 U.S. 109 (1986) (challenge to political gerrymandering is justiciable). *But see* Vieth v. Jubelirer, 541 U.S. 267 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

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

[714] 495 U.S. at 390 (emphasis in original).

[715] 495 U.S. at 393.

[716] 495 U.S. at 393–95.

[717] 495 U.S. at 395–96.

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In *Zivotosky v. Clinton,*[718] the Court declined to find a political question where a citizen born in Jerusalem sought, pursuant to federal statute, to have "Israel" listed on his passport as his place of birth, the Executive Branch having declined to recognize Israeli sovereignly over that city. Justice Roberts, for the Court, failed to even acknowledge the numerous factors set forth in Justice Brennan's *Baker* opinion save two—whether there is a textually demonstrable commitment of the issue to another department or a lack of judicially discoverable and manageable standards for resolving it.[719] The Court noted that while the decision as whether or not to recognized Jerusalem as the capital of Israel might be exclusively the province of the Executive Branch, there is "no exclusive commitment to the Executive of the power to determine the constitutionality of a statute,"[720] such as whether Congress is encroaching on Presidential powers. Similarly, this latter question, while perhaps a difficult one, is amenable to the type of separation of powers "standards" used by the Court in other separation of powers cases.

In short, the political question doctrine may not be moribund, but it does seem applicable to a very narrow class of cases. Significantly, the Court made no mention of the doctrine when it resolved issues arising from Florida's recount of votes in the closely contested 2000 presidential election,[721] despite the fact that the Constitution vests in Congress the authority to count electoral votes, and further provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes.[722]

JUDICIAL REVIEW

The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed. But it is hardly noteworthy that its legitimacy has been challenged from the first, and, while now accepted generally, it still has detractors and its

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[718] 566 U.S. ___, No. 10–699, slip op. (2010).

[719] This left it to Justice Sotomayor and Justice Breyer to raise and address the other considerations, respectively, in concurrence and dissent.

[720] 566 U.S. ___, No. 10–699, slip op. at 8.

[721] *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); and Bush v. Gore, 531 U.S. 98 (2000).

[722] 12th Amendment.

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supporters disagree about its doctrinal basis and its application.[723] Although it was first asserted in *Marbury v. Madison*[724] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters,[725] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[726]

Practically all of the framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality of legislation,[727]

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[723] *See* the richly detailed summary and citations to authority in G. Gunther, Constitutional Law 1–38 (12th ed. 1991); For expositions on the legitimacy of judicial review, *see* L. Hand, The Bill of Rights (1958); H. Wechsler, Principles, Politics, and Fundamental Law:Selected Essays 1–15 (1961); A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1–33 (1962); R. Berger, Congress v. The Supreme Court (1969). For an extensive historical attack on judicial review, *see* 2 W. Crosskey, Politics and the Constitution in the History of the United States chs. 27–29 (1953), with which *compare* Hart, *Book Review*, 67 Harv. L. Rev. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, *Introduction: Charles Beard and American Debate over Judicial Review, 1790–1961*, in C. Beard, The Supreme Court and the Constitution 1–34 (1962 reissue of 1938 ed.), and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[724] 5 U.S. (1 Cr.) 137 (1803). A state act was held inconsistent with a treaty in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[725] J. Goebel, supra at 60–95.

[726] Id. at 96–142.

[727] M. Farrand, supra at 97–98 (Gerry), 109 (King), 2 id. at 28 (Morris and perhaps Sherman). 73 (Wilson), 75 (Strong, but the remark is ambiguous). 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92–93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison), 589 (Madison); 3 id. at 220 (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer . . . disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 id. at 298. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Id. at 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution (1836). 131 (Samuel Adams, Massachusetts), 196–197 (Ellsworth, Connecticut). 348, 362 (Hamilton, New York): 445–446. 478 (Wilson, Pennsylvania), 3 id. at 324–25, 539, 541 (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 id. at 71 (Steele, North Carolina), 156–157 (Davie, North Carolina). In the Virginia convention, John Marshall observed if Congress "were

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and prior to *Marbury* the power seems very generally to have been assumed to exist by the Justices themselves.[728] In enacting the Ju-

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to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . They would declare it void . . . . To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 id. at 553–54. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. THE FEDERALIST (J. Cooke ed. 1961). *See* Nos. 39 and 44, at 256, 305 (Madison), Nos. 78 and 81, at 524–530, 541–552 (Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiescence if not agreements by the other Framers.

To be sure, subsequent comments of some of the Framers indicate an understanding contrary to those cited in the convention. *See, e.g.*, Charles Pinckney in 1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 412 (F. Wharton ed., 1849).

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in The Federalist, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 ANNALS OF CONGRESS 457 (1789); 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed., 1904). Yet, in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id. at 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserted the power of the states, though not of one state or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 460–464, 467–471 (1950); Report on the Resolutions of 1798, 6 Writings of James Madison, op. cit., 341–406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant, *supra*, 481–485, 488–489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For a recent compilation reviewing the previous efforts, *see* R. Berger, supra, chs. 3–4.

[728] Thus, the Justices on circuit refused to administer a pension act on the grounds of its unconstitutionally, *see Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and "Finality of Judgment as an Attribute of Judicial Power," supra. Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitu-

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diciary Act of 1789, Congress explicitly provided for the exercise of the power,[729] and in other debates questions of constitutionality and of judicial review were prominent.[730] Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from them, these provisions do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Marshall's achievement that, in doubtful circumstances and an awkward position, he carried the day for the device, which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence.

Marbury v. Madison.—Chief Justice Marshall's argument for judicial review of congressional acts in *Marbury v. Madison*[731] had been largely anticipated by Hamilton.[732] Hamilton had written, for example: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to

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tional, although they never mailed the letter, supra, in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, supra, at 589–592.

[729] In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In § 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) ". . . where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity;" (2) ". . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity;" or (3) ". . . where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. The ruling below was to be "re-examined and reversed or affirmed in the Supreme Court . . . ."

[730] *See* in particular the debate on the President's removal powers, discussed supra, "The Removal Power" with statements excerpted in R. Berger, supra at 144–150. Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, supra at 107–124.

[731] 5 U.S. (1 Cr.) 137 (1803).

[732] THE FEDERALIST, Nos. 78 and 81 (J. Cooke ed. 1961), 521–530, 541–552.

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the statute, the intention of the people to the intention of their agents."[733]

At the time of the change of administration from Adams to Jefferson, several commissions of appointment to office had been signed but not delivered and were withheld on Jefferson's express instruction. Marbury sought to compel the delivery of his commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction against Secretary of State Madison. Jurisdiction was based on § 13 of the Judiciary Act of 1789,[734] which Marbury, and ultimately the Supreme Court, interpreted to authorize the Court to issue writs of mandamus in suits in its original jurisdiction.[735] Though deciding all the other issues in Marbury's favor, the Chief Justice wound up concluding that the § 13 authorization was an attempt by Congress to expand the Court's original jurisdiction beyond the constitutional prescription and was therefore void.[736]

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States," Marshall began his discussion of this final phase of the case, "but, happily, not of an intricacy proportioned to its interest."[737] First, Marshall recognized certain fundamental principles. The people had come together to establish a government. They provided for its organization and assigned to its various departments their powers and established certain limits not to be transgressed by those departments. The limits were expressed in a written constitution, which would serve no purpose "if these limits may, at any time, be passed by those intended to be restrained." Be-

[733] Id., No. at 78, 525.

[734] 1 Stat. 73, 80.

[735] The section first denominated the original jurisdiction of the Court and then described the Court's appellate jurisdiction. Following and indeed attached to the sentence on appellate jurisdiction, being separated by a semicolon, is the language saying "and shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The Chief Justice could easily have interpreted the authority to have been granted only in cases under appellate jurisdiction or as authority conferred in cases under both original and appellate jurisdiction when the cases are otherwise appropriate for one jurisdiction or the other. Textually, the section does not compel a reading that Congress was conferring on the Court an original jurisdiction to issue writs of mandamus *per se*.

[736] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 173–180 (1803). For a classic treatment of *Marbury*, *see* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1.

[737] 5 U.S. at 176. One critic has written that by this question Marshall "had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." A. Bickel, supra at 3. Marshall, however, soon reached this question, though more by way of assertion than argument. 5 U.S. (1 Cr.) at 177–78.

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cause the Constitution is "a superior paramount law, unchangeable by ordinary means, . . . a legislative act contrary to the constitution is not law."[738] "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" The answer, thought the Chief Justice, was obvious. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[739]

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[740]

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[741] To declare otherwise, Chief Justice Marshall said, would be to permit the legislature to "pass[ ] at pleasure" the limits imposed on its powers by the Constitution.[742]

The Chief Justice then turned from the philosophical justification for judicial review as arising from the very concept of a written constitution, to specific clauses of the Constitution. The judicial power, he observed, was extended to "all cases arising under the constitution."[743] It was "too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises."[744] Suppose, he said, that Congress laid a duty on an article exported from a state or passed a bill of attainder or an *ex post facto* law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he con-

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[738] 5 U.S. at 176–77.

[739] 5 U.S. at 177.

[740] 5 U.S. at 178.

[741] 5 U.S. at 177–78.

[742] 5 U.S. at 178.

[743] 5 U.S. at 178. The reference is, of course, to the first part of clause 1, § 2, Art. III: "The judicial power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." *Compare* A. Bickel, supra at 5–6, *with* R. Berger, supra at 189–222.

[744] 5 U.S. at 179.

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tinued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.[745] Finally, the Chief Justice noted that the Supremacy Clause (Art. VI, cl. 2) gave the Constitution precedence over laws and treaties, providing that only laws "which shall be made in *pursuance* of the constitution" shall be the supreme law of the land.[746]

The decision in *Marbury v. Madison* has never been disturbed, although it has been criticized and has had opponents throughout our history. It not only carried the day in the federal courts, but from its announcement judicial review by state courts of local legislation under local constitutions made rapid progress and was securely established in all states by 1850.[747]

Judicial Review and National Supremacy.—Even many persons who have criticized the concept of judicial review of congressional acts by the federal courts have thought that review of state acts under federal constitutional standards is soundly based in the Supremacy Clause, which makes the Constitution, laws enacted pursuant to the Constitution, and treaties the supreme law of the land,[748] and which Congress effectuated by enacting § 25 of the Judiciary Act of 1789.[749] Five years before *Marbury v. Madison*, the Court held invalid a state law as conflicting with the terms of a treaty,[750] and seven years after Chief Justice Marshall's opinion it voided a state law as conflicting with the Constitution.[751]

Virginia provided a states' rights challenge to a broad reading of the Supremacy Clause and to the validity of § 25 in *Martin v. Hunter's Lessee*[752] and in *Cohens v. Virginia*.[753] In both cases, it

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[745] 5 U.S. at 179–80. The oath provision is contained in Art. VI, cl. 3. *Compare* A. Bickel, supra at 7–8, *with* R. Berger, supra at 237–244.

[746] 5 U.S. at 180. *Compare* A. Bickel, *supra* at 8–12, *with* R. Berger, *supra* at 223–284.

[747] E. Corwin, The Doctrine of Judicial Review 75–78 (1914); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitution Theory in the State, 1790–1860*, 120 U. Pa. L. Rev. 1166 (1972).

[748] 2 W. Crosskey, supra at 989. *See* the famous remark of Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States." O. Holmes, Collected Legal Papers 295–296 (1921).

[749] 1 Stat. 73, 85, quoted supra.

[750] Ware v. Hylton, 3 U.S. (3 Dall.) 190 (1796).

[751] Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810). The case came to the Court by appeal from a circuit court and not from a state court under § 25. Famous early cases coming to the Court under § 25 in which state laws were voided included Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[752] 14 U.S. (1 Wheat.) 304 (1816).

[753] 19 U.S. (6 Wheat.) 264 (1821).

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was argued that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land," as set out in the Supremacy Clause, over conflicting state constitutional provisions and laws, it was only by their own interpretation of the supreme law that they as courts of a sovereign state were bound. Furthermore, it was contended that cases did not "arise" under the Constitution unless they were brought in the first instance by someone claiming such a right, from which it followed that "the judicial power of the United States" did not "extend" to such cases unless they were brought in the first instance in the courts of the United States. But Chief Justice Marshall rejected this narrow interpretation: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either." [754] Passing on to the power of the Supreme Court to review such decisions of the state courts, he said: "Let the nature and objects of our Union be considered: let the great fundamental principles on which the fabric stands, be examined: and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction." [755]

Limitations on the Exercise of Judicial Review

Constitutional Interpretation.—Under a written constitution, which is law and is binding on government, the practice of judicial review raises questions of the relationship between constitutional interpretation and the Constitution—the law that is construed. The legitimacy of construction by an unelected entity in a republican or democratic system becomes an issue whenever the construction is controversial, as it frequently is. Full consideration would

[754] 19 U.S. at 379.

[755] 19 U.S. at 422–23. Justice Story traversed much of the same ground in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), the Wisconsin Supreme Court had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, raising again the Virginia arguments. Chief Justice Taney emphatically rebuked the assertions on grounds both of dual sovereignty and national supremacy. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the states from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree perhaps beyond that envisaged even by Story and Marshall. As late as Williams v. Bruffy, 102 U.S. 248 (1880), the concepts were again thrashed out with the refusal of a Virginia court to enforce a mandate of the Supreme Court. *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

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carry us far afield, in view of the immense corpus of writing with respect to the proper mode of interpretation during this period.

Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue.[756] These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. The historical argument is largely, though not exclusively, associated with the theory of original intent or original understanding, under which constitutional and legal interpretation is limited to attempting to discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question. The textual argument, closely associated in many ways to the doctrine of original intent, concerns whether the judiciary or another is bound by the text of the Constitution and the intentions revealed by that language, or whether it may go beyond the four corners of the constitutional document to ascertain the meaning, a dispute encumbered by the awkward constructions, interpretivism and noninterpretivism.[757] Using a structural argument, one seeks to infer structural rules from the relationships that the Constitution mandates.[758] The remaining three modes are not necessarily tied to original intent, text, or structure, though they may have some relationship. Doctrinal arguments proceed from the application of precedents. Prudential arguments seek to balance the costs and benefits of a particular rule. Ethical arguments derive rules from those moral commitments of the American ethos that are reflected in the Constitution.

Although the scholarly writing ranges widely, a much more narrow scope is seen in the actual political-judicial debate. Rare is the judge who will proclaim a devotion to ethical guidelines, such, for example, as natural-law precepts. The usual debate ranges from those

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[756] The six forms, or "modalities" as he refers to them, are drawn from P. Bobbitt, Constitutional Fate: Theory of the Constitution (1982); P. Bobbitt, Constitutional Interpretation (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. *E.g.*, Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); Post, *Theories of Constitutional Interpretation*, in Law and the Order of Culture 13–41 (R. Post ed., 1991).

[757] Among the vast writing, *see, e.g.*, R. Bork, The Tempting of America (1990); J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); L. Tribe & M. Dorf, On Reading the Constitution (1991); H. Wellington, Interpreting the Constitution (1990); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N. Y. U. L. Rev. 259 (1981); Symposium, *Judicial Review and the Constitution: The Text and Beyond*, 8 U. Dayton L. Rev. 43 (1983); Symposium, *Judicial Review Versus Democracy*, 42 Ohio St. L.J. 1 (1981); Symposium, *Democracy and Distrust: Ten Years Later*, 77 Va. L. Rev. 631 (1991). *See also* Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085 (1989).

[758] This mode is most strongly association with C. Black, Structure and Relationship in Constitutional Law (1969).

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adherents of strict construction and original intent to those with loose construction and adaptation of text to modern-day conditions.[759] However, it is with regard to more general rules of prudence and self-restraint that one usually finds the enunciation and application of limitations on the exercise of constitutional judicial review.

Prudential Considerations.—Implicit in the argument of *Marbury v. Madison*[760] is the thought that the Court is obligated to take and decide cases meeting jurisdictional standards. Chief Justice Marshall spelled this out in *Cohens v. Virginia*:[761] "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases[762] and are without will or discretion,[763] its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.[764] But, although there are hints of Chief Justice Marshall's activism in some modern cases,[765] the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exer-

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[759] *E.g.*, Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 Pub. Admin. Rev. 701 (1985); Addresses: Construing the Constitution, 19 U. C. Davis L. Rev. 1 (1985), containing addresses by Justice Brennan, id. at 2, Justice Stevens, id. at 15, and Attorney General Meese. Id. at 22. *See also* Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

[760] 5 U.S. (1 Cr.) 137 (1803).

[761] 19 U.S. (6 Wheat.) 264, 404, (1821).

[762] *See, e.g.*, Justice Sutherland in Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923), and Justice Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).

[763] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Chief Justice Marshall). *See also* Justice Roberts in United States v. Butler, 297 U.S. 1, 62–63 (1936).

[764] The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, *see* Ashwander v. TVA, 297 U.S. 288, 346–56 (1936) (Justice Brandeis concurring).

[765] Powell v. McCormack, 395 U.S. 486, 548–49 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

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cise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but in effect in practice as well with regard to what remains of appeals.[766]

At various times, the Court has followed more strictly than other times the prudential theorems for avoidance of decisionmaking when it deemed restraint to be more desirable than activism.[767]

The Doctrine of "Strict Necessity".—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[768]

Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental ac-

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[766] 28 U.S.C. §§ 1254–1257. *See* F. Frankfurter & J. Landis, supra at ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, *Address on the Work of the Federal Court*, in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on *certiorari*." Chief Justice Warren, quoted in Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).

[767] *See* Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346 (1936). *And contrast* A. Bickel, supra at 111–198, *with* Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

[768] Rescue Army v. Municipal Court, 331 U.S. 549, 568–75 (1947). *See also* Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Carter v. Carter Coal Co., 298 U.S. 238, 325 (1936); Coffman v. Breeze Corp., 323 U.S. 316, 324–325 (1945); Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944); Alma Motor v. Timken Co., 329 U.S. 129 (1946). Judicial restraint as well as considerations of comity underlie the Court's abstention doctrine when the constitutionality of state laws is challenged.

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tion for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." [769]

The Doctrine of Clear Mistake.—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." [770] Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin [771] and of modern adherence.[772] In operation, however, the rule is subject to two influences, which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain categories of cases. Statutory interferences with "liberty of contract" were once presumed to be unconstitutional until proved to be valid; [773] more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have

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[769] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

[770] *The Origin and Scope of the American Doctrine of Constitutional Law*, in J. THAYER, LEGAL ESSAYS 1, 21 (1908).

[771] *See* Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 395, 399 (1798).

[772] *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[773] "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923).

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been said to occupy a "preferred position" in the constitutional scheme of things.[774]

Exclusion of Extra-Constitutional Tests.—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives, policy, or wisdom,[775] or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution.[776] In various forms this maxim has been repeated to such an extent that it has become trite, and has increasingly come to be incorporated in cases in which a finding of unconstitutionality has been made as a reassurance of the Court's limited review. And it should be noted that at times the Court has absorbed natural rights doctrines into the text of the Constitution, so that it was able to reject natural law *per se* and still partake of its fruits and the same thing is true of the *laissez faire* principles incorporated in judicial decisions from about 1890 to 1937.[777]

Presumption of Constitutionality.—"It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed," wrote Justice Bushrod Washington, "to presume in favor of its validity, until its violation of the Consti-

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[774] Kovacs v. Cooper, 336 U.S. 77, 88 (1949). Justice Frankfurter's concurrence, id. at 89–97, is a lengthy critique and review of the "preferred position" cases up to that time. The Court has not used the expression in recent years but the worth it attributes to the values of free expression probably approaches the same result. Today, the Court's insistence on a "compelling state interest" to justify a governmental decision to classify persons by "suspect" categories, such as race, Loving v. Virginia, 388 U.S. 1 (1967), or to restrict the exercise of a "fundamental" interest, such as the right to vote, Kramer v. Union Free School District, 395 U.S. 621 (1969), or the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), clearly imports presumption of unconstitutionality.

[775] "We fully understand . . . the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern." Noble State Bank v. Haskell, 219 U.S. 104 (1911) (Justice Holmes for the Court). *See also* Trop v. Dulles, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).

A supposedly hallowed tenet is that the Court will not look to the motives of legislators in determining the validity of a statute. Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); United States v. O'Brien, 391 U.S. 367 (1968); Palmer v. Thompson, 403 U.S. 217 (1971). Yet an intent to discriminate is a requisite to finding at least some equal protection violations, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and a secular or religious purpose is one of the parts of the tripartite test under the Establishment Clause. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissent). Other constitutional decisions have also turned upon the Court's assessment of purpose or motive. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); *Child Labor Tax Case*, 259 U.S. 20 (1922).

[776] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Justice Black dissenting). But note above the reference to the ethical mode of constitutional argument.

[777] *E.g.*, Lochner v. New York, 198 U.S. 45 (1905); United States v. Butler, 297 U.S. 1 (1936).

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tution is proved beyond a reasonable doubt."[778] A corollary of this maxim is that if the constitutional question turns upon circumstances, courts will presume the existence of a state of facts which would justify the legislation that is challenged.[779] It seems apparent, however, that with regard to laws which trench upon First Amendment freedoms and perhaps other rights guaranteed by the Bill of Rights such deference is far less than it would be toward statutory regulation of economic matters.[780]

Disallowance by Statutory Interpretation.—If it is possible to construe a statute so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed,[781] even though in some instances this "constitutional doubt" maxim has caused the Court to read a statute in a manner that defeats or impairs the legislative purpose.[782] Of course, the Court stresses that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."[783] The maxim is not followed if the provision would survive constitutional attack or if the text is clear.[784] Closely related to this principle is the maxim that, when part of a statute is valid and part is void, the courts will separate the valid from the invalid and save as much as possible.[785] Statutes today ordinarily expressly pro-

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[778] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827). *See also* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810); Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 531 (1871).

[779] Munn v. Illinois, 94 U.S. 113, 132 (1877); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935).

[780] *E.g.*, United States v. Robel, 389 U.S. 258 (1967); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). *But see* McGowan v. Maryland, 366 U.S. 420, 426 (1961). The development of the "compelling state interest" test in certain areas of equal protection litigation also bespeaks less deference to the legislative judgment.

[781] Bond v. United States, 572 U.S. ___, No. 12–158, slip op. (2014); United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994); Rust v. Sullivan, 500 U.S. 173, 190–91 (1991); Public Citizen v. Department of Justice, 491 U.S. 440, 465–67 (1989) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[782] *E.g.*, Michaelson v. United States, 266 U.S. 42 (1924) (narrow construction of Clayton Act contempt provisions to avoid constitutional questions); United States v. Harriss, 347 U.S. 612 (1954) (lobbying act); United States v. Seeger, 380 U.S. 163 (1965): Welsh v. United States, 398 U.S. 333 (1970) (both involving conscientious objection statute).

[783] United States v. Locke, 471 U.S. 84, 96 (1984) (quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)).

[784] Rust v. Sullivan, 500 U.S. 173, 191 (1991); *but compare* id. at 204–07 (Justice Blackmun dissenting), and 223–225 (Justice O'Connor dissenting). *See also* Peretz v. United States, 501 U.S. 923, 929–930 (1991).

[785] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895); *but see* Baldwin v. Franks, 120 U.S. 678, 685 (1887), now repudiated. Griffin v. Breckenridge, 403 U.S. 88, 104 (1971). In

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vide for separability, but it remains for the courts in the last resort to determine whether the provisions are separable.[786]

Stare Decisis in Constitutional Law.—Adherence to precedent ordinarily limits and shapes the approach of courts to decision of a presented question. "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[787] *Stare decisis* is a principle of policy, not a mechanical formula of adherence to the latest decision "however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder,

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Kimbrough v. United States, 128 S. Ct. 558, 577 (2007), Justice Thomas, dissenting, referred to "our longstanding presumption of the severability of unconstitutional applications of statutory provisions."

[786] *See* Whole Woman's Health v. Hellerstedt, 579 U.S. ___, No. 15–274, slip op. at 37 (2016) (noting that while as a "general matter" courts will honor a legislature's preference with regard to severability, severability clauses do not impose a requirement on courts that are confronted with *facially* unconstitutional statutory provisions, as such an approach would "inflict enormous costs on both courts and litigants" in parsing out what remains of the statute); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (discussing how a severability clause is not grounds for a court to "devise a judicial remedy that . . . entail[s] quintessentially legislative work."); Reno v. ACLU, 521 U.S. 844, 884–85 n.49 (1997) (noting the limits on how broadly a court can read a severability clause); *see generally* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (concluding that a severability clause is an "aid merely; not an inexorable command.")

[787] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–408 (1932) (Justice Brandeis dissenting). For recent arguments with respect to overruling or not overruling previous decisions, see the self-consciously elaborate opinion for a plurality in Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (Justices O'Connor, Kennedy, and Souter) (acknowledging that as an original matter they would not have decided Roe v. Wade, 410 U.S. 113 (1973), as the Court did and that they might consider it wrongly decided, but nonetheless applying the principles of *stare decisis*—they stressed the workability of the case's holding, the fact that no other line of precedent had undermined *Roe*, the vitality of that case's factual underpinnings, the reliance on the precedent in society, and the effect upon the Court's legitimacy of maintaining or overruling the case). *See* id. at 953–66 (Chief Justice Rehnquist concurring in part and dissenting in part), 993–1001 (Justice Scalia concurring in part and dissenting in part). *See also* Payne v. Tennessee, 501 U.S. 808, 827–30 (1991) (suggesting, *inter alia*, that reliance is relevant in contract and property cases), and id. at 835, 842–44 (Justice Souter concurring), 844, 848–56 (Justice Marshall dissenting).

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and verified by experience."[788] The limitation of *stare decisis* seems to have been progressively weakened since the Court proceeded to correct "a century of error" in *Pollock v. Farmers' Loan & Trust Co.*[789] Since then, more than 200 decisions have been overturned,[790] and the merits of *stare decisis* seem more often celebrated in dissents than in majority opinions.[791] Of lesser formal effect than outright overruling but with roughly the same result is a Court practice of "distinguishing" precedents, which often leads to an overturning of the principle enunciated in a case while leaving the actual case more or less alive.[792]

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[788] Helvering v. Hallock, 309 U.S. 106, 110 (1940) (Justice Frankfurter for Court). *See also* Coleman v. Alabama, 399 U.S. 1, 22 (1970) (Chief Justice Burger dissenting). *But see* id. at 19 (Justice Harlan concurring in part and dissenting in part); Williams v. Florida, 399 U.S. 78, 117–119 (1970) (Justice Harlan concurring in part and dissenting in part). Recent discussions of and both applications of and refusals to apply *stare decisis* may be found in Hohn v. United States, 524 U.S. 236, 251–52 (1998), and id. at 260–63 (Justice Scalia dissenting); State Oil Co. v. Khan, 522 U.S. 3, 20–2 (1997); Agostini v. Felton, 521 U.S. 203, 235–36 (1997), and id. at 523–54 (Justice Souter dissenting); United States v. IBM Corp., 517 U.S. 843, 854–56 (1996) (noting principles of following precedent and declining to consider overturning an old precedent when parties have not advanced arguments on the point), with which *compare* id. at 863 (Justice Kennedy dissenting) (arguing that the United States had presented the point and that the old case ought to be overturned); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion) (discussing *stare decisis*, citing past instances of overrulings, and overruling 1990 decision), with which *compare* the dissents, id. at 242, 264, 271; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 61–73 (1996) (discussing policy of *stare decisis*, why it should not be followed with respect to a 1989 decision, and overruling that precedent), with which *compare* the dissents, id. at 76, 100. Justices Scalia and Thomas have argued for various departures from precedent. *E.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia concurring) (negative commerce jurisprudence); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 631 (1996) (Justice Thomas concurring in part and dissenting in part) (rejecting framework of Buckley v. Valeo and calling for overruling of part of case). *Compare* id. at 626 (Court notes those issues not raised or argued).

[789] 157 U.S. 429, 574–579 (1895).

[790] *See* Appendix. The list encompasses both constitutional and statutory interpretation decisions. The Court adheres, at least formally, to the principle that *stare decisis* is a stricter rule for statutory interpretation, Patterson v. McLean Credit Union, 491 U.S. 164, 171–175 (1989), at least in part since Congress may much more easily revise those decisions, *but compare* id. at 175 n.1, *with* id. at 190–205 (Justice Brennan concurring in the judgment in part and dissenting in part). *See also* Flood v. Kuhn, 407 U.S. 258 (1972).

[791] *E.g.*, United States v. Rabinowitz, 339 U.S. 56, 86 (1950) (Justice Frankfurter dissenting); Baker v. Carr, 369 U.S. 186, 339–340 (1962) (Justice Harlan dissenting); Gray v. Sanders, 372 U.S. 368, 383 (1963) (Justice Harlan dissenting). *But see* Green v. United States, 356 U.S. 165, 195 (1958) (Justice Black dissenting). *Compare* Justice Harlan's views in Mapp v. Ohio, 367 U.S. 643 (1961) (dissenting), *with* Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (opinion of the Court).

[792] Note that, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), while the Court purported to uphold and retain the "central meaning" of Roe v. Wade, it overruled several aspects of that case's requirements. *See also*, *e.g.*, the Court's treatment of Pope v. Williams, 193 U.S. 621 (1904), in Dunn v. Blumstein, 405 U.S. 330, 337, n.7 (1972). *See also* id. at 361 (Justice Blackmun concurring.)

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Conclusion.—The common denominator of all these maxims of prudence is the concept of judicial restraint. "We do not sit," said Justice Frankfurter, "like a kadi under a tree dispensing justice according to considerations of individual expediency."[793] "[A] jurist is not to innovate at pleasure," wrote Justice Cardozo. "He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."[794] All Justices will, of course, claim adherence to proper restraint,[795] but in some cases at least, such as Justice Frankfurter's dissent in the *Flag Salute Case*,[796] the practice can be readily observed. The degree of restraint, however, the degree to which legislative enactments should be subjected to judicial scrutiny, is a matter of uncertain and shifting opinion

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

Cases arising under the Constitution are cases that require an interpretation of the Constitution for their correct decision.[797] They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a state legislature, and asks for judicial relief. The clause furnishes the principal textual basis for the implied power of judicial review of the constitutionality of legislation and other official acts.

Development of Federal Question Jurisdiction.—Almost from the beginning, the Convention demonstrated an intent to create "federal question" jurisdiction in the federal courts with regard to federal laws;[798] such cases involving the Constitution and treaties were added fairly late in the Convention as floor amendments.[799] But when Congress enacted the Judiciary Act of 1789, it did not confer gen-

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[793] Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (dissenting).

[794] B. Cardozo, The Nature of the Judicial Process 141 (1921).

[795] *Compare* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Justice Douglas), *with* id. at 507 (Justice Black).

[796] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting).

[797] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

[798] M. Farrand, supra at 22, 211–212, 220, 244; 2 id. at 146–47, 186–87.

[799] Id. at 423–24, 430, 431.

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eral federal question jurisdiction on the inferior federal courts, but left litigants to remedies in state courts with appeals to the United States Supreme Court if judgment went against federal constitutional claims.[800] Although there were a few jurisdictional provisions enacted in the early years,[801] it was not until the period following the Civil War that Congress, in order to protect newly created federal civil rights and in the flush of nationalist sentiment, first created federal jurisdiction in civil rights cases,[802] and then in 1875 conferred general federal question jurisdiction on the lower federal courts.[803] Since that time, the trend generally has been toward conferral of ever-increasing grants of jurisdiction to enforce the guarantees recognized and enacted by Congress.[804]

When a Case Arises Under.—The 1875 statute and its present form both speak of civil suits "arising under the Constitution, laws, or treaties of the United States,"[805] the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall's construction of the constitutional language to interpret the statutory language.[806] The result was probably to accept more jurisdiction than Congress had intended to convey.[807] Later cases take a somewhat more restrictive course.[808]

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff's pleadings and not upon the re-

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[800] 1 Stat. 73. The district courts were given cognizance of "suits for penalties and forfeitures incurred, under the laws of the United States" and "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States . . . ." Id. at 77. Plenary federal question jurisdiction was conferred by the Act of February 13, 1801,§ 11, 2 Stat. 92, but this law was repealed by the Act of March 8, 1802, 2 Stat. 132. On § 25 of the 1789 Act, providing for appeals to the Supreme Court from state court constitutional decisions, *see* supra.

[801] Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322 (suits relating to patents). Limited removal provisions were also enacted.

[802] Act of April 9, 1866, § 3, 14 Stat, 27; Act of May 31, 1870, § 8, 16 Stat. 142; Act of February 28, 1871,§ 15, 16 Stat. 438; Act of April 20, 1871, §§ 2, 6, 17 Stat. 14, 15.

[803] Act of March 3, 1875, § 1, 18 Stat. 470, now 28 U.S.C. § 1331(a). The classic treatment of the subject and its history is F. Frankfurter & J. Landis, supra.

[804] For a brief summary, *see* Hart & Wechsler (6th ed.), supra at 743–748.

[805] 28 U.S.C. § 1331(a). The original Act was worded slightly differently.

[806] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).

[807] C. Wright, Handbook of the Law of Federal Courts § 17 (4th ed. 1983).

[808] *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. ___, No. 14–1132, slip op. at 9–10 (2016) ("This Court has long read the words 'arising under' in Article III to extend quite broadly, to all cases in which a federal question is an ingredient of the action . . . In the statutory context, however, we . . . give those same words a narrower scope in the light of § 1331's history, the demands of reason and coherence, and the dictates of sound judicial policy.") (internal brackets, citations, and quotations omitted).

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sponse or the facts as they may develop.[809] Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is "well-pleaded" and the claim must be real and substantial and may not be without color of merit.[810] Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action.[811] But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that, when federal law is an ingredient of the claim, there is a federal question.[812]

Many suits will present federal questions because a federal law creates the action.[813] Perhaps Justice Cardozo presented the most understandable line of definition, while cautioning that "[t]o define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards [approaching futility]."[814] How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . .

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[809] *See generally* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[810] Newburyport Water Co. v. City of Newburyport, 193 U.S. 561, 576 (1904); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Binderup v. Pathe Exchange, 263 U.S. 291, 305–308 (1923). If the complaint states a case arising under the Constitution or federal law, then federal jurisdiction exists even though on the merits the party may have no federal right. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). Of course, dismissal for lack of jurisdiction is proper if the federal claim is frivolous or obviously insubstantial. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933).

[811] Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974).

[812] Such was the rule derived from Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

[813] American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). *Compare* Albright v. Teas, 106 U.S. 613 (1883), *and* People of Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), with Feibelman v. Packard, 109 U.S. 421 (1883), and The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913).

[814] Gully v. First National Bank in Meridian, 299 U.S. 109, 117 (1936).

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A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . .[815]

It was long evident, though the courts were not very specific about it, that the federal question jurisdictional statute is and always was narrower than the constitutional "arising under" jurisdictional standard.[816] Chief Justice Marshall in *Osborn* was interpreting the Article III language to its utmost extent, but the courts sometimes construed the statute equivalently, with doubtful results.[817]

Removal From State Court to Federal Court.—A limited right to "remove" certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789,[818] and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers.[819] The 1875 Act conferring general federal question jurisdiction on the federal courts provided for removal of such cases by either party, subject only to the jurisdictional amount limitation.[820] The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in "federal question" cases.[821] A special civil rights removal statute permits removal of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.[822]

The constitutionality of removal statutes was challenged and readily sustained. Justice Story analogized removal to a form of exer-

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[815] 299 U.S. at 112–13. *Compare* Wheeldin v. Wheeler, 373 U.S. 647 (1963), *with* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See also* J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[816] For an express acknowledgment, *see* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983). *See also* Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959).

[817] *E.g.*, *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); *see also* id. at 24 (Chief Justice Waite dissenting).

[818] § 12, 1 Stat. 79.

[819] The first was the Act of February 4, 1815, § 8, 3 Stat. 198. The series of statutes is briefly reviewed in Willingham v. Morgan, 395 U.S. 402, 405–406 (1969), and in Hart & Wechsler (6th ed.), supra at 396–398. *See* 28 U.S.C. §§ 1442, 1442a.

[820] Act of March 3, 1875, § 2, 18 Stat. 471. The present pattern of removal jurisdiction was established by the Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

[821] 28 U.S.C. § 1441.

[822] 28 U.S.C. § 1443.

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cise of appellate jurisdiction,[823] and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality.[824] In *Tennessee v. Davis*,[825] which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the national government to defend itself against state harassment and restraint. The power to provide for removal was discerned in the Necessary and Proper Clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary.[826] The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws "is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. . . ."

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from state courts before trial, those doubts soon disappeared."[827] The Court has broadly construed the modern version of the removal statute at issue in this case so that it covers all cases where federal officers can raise a colorable defense arising out of their duty

[823] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

[824] Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1872). Removal here was based on diversity of citizenship. *See also The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429–430 (1867); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868).

[825] 100 U.S. 257 (1880).

[826] 100 U.S. at 263–64.

[827] 100 U.S. at 264–65.

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to enforce federal law.[828] Other removal statutes, notably the civil rights removal statute, have not been so broadly interpreted.[829]

Corporations Chartered by Congress.—In *Osborn v. Bank of the United States*,[830] Chief Justice Marshall seized upon the authorization for the Bank to sue and be sued as a grant by Congress to the federal courts of jurisdiction in all cases to which the bank was a party.[831] Consequently, upon enactment of the 1875 law, the door was open to other federally chartered corporations to seek relief in federal courts. This opportunity was made actual when the Court in the *Pacific R.R. Removal Cases*[832] held that tort actions against railroads with federal charters could be removed to federal courts solely on the basis of federal incorporation. In a series of acts, Congress deprived national banks of the right to sue in federal court solely on the basis of federal incorporation in 1882,[833] deprived railroads holding federal charters of this right in 1915,[834] and finally in 1925 removed from federal jurisdiction all suits brought by federally chartered corporations on the sole basis of such incorporation, except where the United States holds at least half of the stock.[835]

Federal Questions Resulting from Special Jurisdictional Grants.—In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violation of collective bargaining agreements without respect to the amount in controversy or the citizenship of the parties.[836] Although it is likely that Congress meant no more than that labor unions could be suable in law or equity, in distinction from the usual rule, the Court construed the grant of jurisdiction to be more than procedural and to

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[828] Willingham v. Morgan, 395 U.S. 402 (1969). *See also* Maryland v. Soper, 270 U.S. 9 (1926). Removal by a federal officer must be predicated on the allegation of a colorable federal defense. Mesa v. California, 489 U.S. 121 (1989). However, a federal agency is not permitted to remove under the statute's plain meaning. International Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991).

[829] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Johnson v. Mississippi, 421 U.S. 213 (1975).

[830] 22 U.S. (9 Wheat.) 738 (1824).

[831] The First Bank could not sue because it was not so authorized. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809). The language, which Marshall interpreted as conveying jurisdiction, was long construed simply to give a party the right to sue and be sued without itself creating jurisdiction, Bankers Trust Co. v. Texas & P. Ry., 241 U.S. 295 (1916), but, in American National Red Cross v. S. G., 505 U.S. 247 (1992), a 5-to-4 decision, the Court held that, when a federal statutory charter expressly mentions the federal courts in its "sue and be sued" provision, the charter creates original federal-question jurisdiction as well, although a general authorization to sue and be sued in courts of general jurisdiction, including federal courts, without expressly mentioning them, does not confer jurisdiction.

[832] 115 U.S. 1 (1885).

[833] § 4, 22 Stat. 162.

[834] § 5, 38 Stat. 803.

[835] *See* 28 U.S.C. § 1349.

[836] § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185.

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empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws, in such suits.[837] State courts are not disabled from hearing actions brought under the section,[838] but they must apply federal law.[839] Developments under this section illustrate the substantive importance of many jurisdictional grants and indicate how the workload of the federal courts may be increased by unexpected interpretations of such grants.[840]

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[837] Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957). Earlier the Court had given the section a restricted reading in Association of Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955), at least in part because of constitutional doubts that § 301 cases in the absence of diversity of citizenship presented a federal question sufficient for federal jurisdiction. Id. at 449–52, 459–61 (opinion of Justice Frankfurter). In *Lincoln Mills*, the Court resolved this difficulty by ruling that federal law was at issue in § 301 suits and thus cases arising under § 301 presented federal questions. 353 U.S. at 457. The particular holding of *Westinghouse*, that no jurisdiction exists under § 301 for suits to enforce personal rights of employees claiming unpaid wages, was overturned in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[838] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[839] Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is not, however, to be totally disregarded. "State law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[840] For example, when federal regulatory statutes create new duties without explicitly creating private federal remedies for their violation, the readiness or unreadiness of the federal courts to infer private causes of action is highly significant. Although inference is an acceptable means of judicial enforcement of statutes, *e.g.*, Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916), the Court began broadly to construe statutes to infer private actions only with J. I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* Cort v. Ash, 422 U.S. 66 (1975). More recently, influenced by a separation of powers critique of implication by Justice Powell, the Court drew back and asserted that it will infer an action only in instances of fairly clear congressional intent. Cannon v. University of Chicago, 441 U.S. 677 (1979); California v. Sierra Club, 451 U.S. 287 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Merrill, Lynch v. Curran, 456 U.S. 353 (1982); Thompson v. Thompson, 484 U.S. 174 (1988); Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989).

The Court appeared more ready to infer private causes of action for constitutional violations, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980), but it has retreated here as well, refusing to apply *Bivens* when "any alternative, existing process for protecting the interest" that is threatened exists, or when "any special factors counseling hesitation" are present. Wilkie v. Robbins, 551 U.S. 537, 550 (2007). *Accord* Minneci v. Pollard, 565 U.S. ___, No. 10–1104, slip op. (2012) (state tort law provided alternative, if not wholly congruent, process for protecting constitutional interests of a prisoner allegedly abused by private prison guards). *See also* Chappell v. Wallace, 462 U.S. 296, 298 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicki, 487 U.S. 412 (1988); FDIC v. Meyer, 510 U.S. 471 (1994); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

"Federal common law" may exist in a number of areas where federal interests are involved and federal courts may take cognizance of such suits under their "arising under" jurisdiction. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972); International Paper Co. v. Ouellette, 479 U.S. 481 (1987). *See also* County of Oneida v.

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Civil Rights Act Jurisdiction.—Perhaps the most important of the special federal question jurisdictional statutes is that conferring jurisdiction on federal district courts to hear suits challenging the deprivation under color of state law or custom of any right, privilege, or immunity secured by the Constitution or by any act of Congress providing for equal rights.[841] Because it contains no jurisdictional amount provision[842] (while the general federal question statute at one time did)[843] and because the Court has held inapplicable the judicially created requirement that a litigant exhaust his state remedies before bringing federal action,[844] the statute has been heavily used, resulting in a formidable caseload, by plaintiffs attacking ra-

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Oneida Indian Nation, 470 U.S. 226, 236–240 (1985); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). The Court is, however, somewhat wary of finding "federal common law" in the absence of some congressional authorization to formulate substantive rules, Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981), and Congress may always statutorily displace the judicially created law. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). Finally, federal courts have federal question jurisdiction of claims created by state law if there exists an important necessity for an interpretation of an act of Congress. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[841] 28 U.S.C. § 1343(3). The cause of action to which this jurisdictional grant applies is 42 U.S.C. § 1983, making liable and subject to other redress any person who, acting under color of state law, deprives any person of any rights, privileges, or immunities secured by the Constitution and laws of the United States. For discussion of the history and development of these two statutes, *see* Monroe v. Pape, 365 U.S. 167 (1961); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Maine v. Thiboutot, 448 U.S. 1 (1980). Although the two statutes originally had the same wording in respect to "the Constitution and laws of the United States," when the substantive and jurisdictional aspects were separated and codified, § 1983 retained the all-inclusive "laws" provision, while § 1343(3) read "any Act of Congress providing for equal rights." The Court has interpreted the language of the two statutes literally, so that while claims under laws of the United States need not relate to equal rights but may encompass welfare and regulatory laws, Maine v. Thiboutot; *but see* Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1 (1981), such suits if they do not spring from an act providing for equal rights may not be brought under § 1343(3). Chapman v. Houston Welfare Rights Org., *supra*. This was important when there was a jurisdictional amount provision in the federal question statute but is of little significance today.

[842] *See* Hague v. CIO, 307 U.S. 496 (1939). Following *Hague*, it was argued that only cases involving personal rights, that could not be valued in dollars, could be brought under § 1343(3), and that cases involving property rights, which could be so valued, had to be brought under the federal question statute. This attempted distinction was rejected in Lynch v. Household Finance Corp., 405 U.S. 538, 546–48 (1972). On the valuation of constitutional rights, *see* Carey v. Piphus, 435 U.S. 247 (1978). *See also* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (compensatory damages must be based on injury to the plaintiff, not on some abstract valuation of constitutional rights).

[843] 28 U.S.C. § 1331 was amended in 1976 and 1980 to eliminate the jurisdictional amount requirement. Pub. L. 94–574, 90 Stat. 2721; Pub. L. 96–486, 94 Stat. 2369.

[844] Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). This had been the rule since at least McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963). *See also*

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cial discrimination, malapportionment and suffrage restrictions, illegal and unconstitutional police practices, state restrictions on access to welfare and other public assistance, and a variety of other state and local governmental practices.[845] Congress has encouraged use of the two statutes by providing for attorneys' fees under § 1983,[846] and by enacting related and specialized complementary statutes.[847] The Court in recent years has generally interpreted § 1983 and its jurisdictional statute broadly, but it has also sought to restrict the kinds of claims that may be brought in federal courts.[848] Note that § 1983 and § 1343(3) need not always go together, as § 1983 actions may be brought in state courts.[849]

Pendent Jurisdiction.—Once jurisdiction has been acquired through allegation of a federal question not plainly wanting in substance,[850] a federal court may decide any issue necessary to the disposition of a case, notwithstanding that other non-federal questions of fact and law may be involved therein.[851] "Pendent jurisdiction," as this form is commonly called, exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[852] Ordinarily, it is a rule of prudence that federal courts should not pass on federal constitutional claims if they may avoid it and should rest their conclusions upon principles of state law where possible.[853] But the federal court has

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Felder v. Casey, 487 U.S. 131 (1988) (state notice of claim statute, requiring notice and waiting period before bringing suit in state court under § 1983, is preempted).

[845] Thus, such notable cases as Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962), arose under the statutes.

[846] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, amending 42 U.S.C. § 1988. *See* Hutto v. Finney, 437 U.S. 678 (1978); Maine v. Thiboutot, 448 U.S. 1 (1980).

[847] *E.g.*, Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349 (1980), 42 U.S.C. §§ 1997 *et seq*.

[848] *E.g.*, Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977).

[849] Maine v. Thiboutot, 448 U.S. 1 (1980).

[850] Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Hagans v. Lavine, 415 U.S. 528, 534–543 (1974).

[851] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822–28 (1824); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909); Hurn v. Oursler, 289 U.S. 238 (1933); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[852] Osborn v. Bank, 22 U.S. at 725. This test replaced a difficult-to-apply test of Hurn v. Oursler, 289 U.S. 238, 245–46 (1933). *See also* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Peacock v. Thomas, 516 U.S. 349 (1996) (both cases using the new vernacular of "ancillary jurisdiction").

[853] Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917); Hagans v. Lavine, 415 U.S. 528, 546–550 (1974). In fact, it may be an abuse of discretion for a federal court to fail to decide on an available state law ground instead of reaching the federal constitutional question. Schmidt v. Oakland Unified School Dist., 457 U.S. 594 (1982) (per curiam). However, narrowing previous law, the Court held in Pennhurst State School

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discretion whether to hear the pendent state claims in the proper case. Thus, the trial court should look to "considerations of judicial economy, convenience and fairness to litigants" in exercising its discretion and should avoid needless decisions of state law. If the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, or if the state claim substantially predominated, the court would be justified in dismissing the state claim.[854]

A variant of pendent jurisdiction, sometimes called "ancillary jurisdiction," is the doctrine allowing federal courts to acquire jurisdiction entirely of a case presenting two federal issues, although it might properly not have had jurisdiction of one of the issues if it had been independently presented.[855] Thus, in an action under a federal statute, a compulsory counterclaim not involving a federal question is properly before the court and should be decided.[856] The concept has been applied to a claim otherwise cognizable only in admiralty when joined with a related claim on the law side of the federal court, and in this way to give an injured seaman a right to jury trial on all of his claims when ordinarily the claim cognizable only in admiralty would be tried without a jury.[857] And a colorable constitutional claim has been held to support jurisdiction over a federal statutory claim arguably not within federal jurisdiction.[858]

Still another variant is the doctrine of "pendent parties," under which a federal court could take jurisdiction of a state claim against one party if it were related closely enough to a federal claim against another party, even though there was no independent jurisdictional base for the state claim.[859] Although the Supreme Court at first tentatively found some merit in the idea,[860] in *Finley v. United States*,[861] by a 5-to-4 vote the Court firmly disapproved of the pendent party concept and cast considerable doubt on the other prongs of pendent jurisdiction as well. Pendent party jurisdiction, Justice Scalia wrote for the Court, was within the constitutional grant of judicial power, but to be operable it must be affirmatively granted

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& Hosp. v. Halderman, 465 U.S. 89 (1984), held that, when a pendent claim of state law involves a claim that is against a state for purposes of the Eleventh Amendment, federal courts may not adjudicate it.

[854] United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966).

[855] The initial decision was Freeman v. Howe, 65 U.S. (24 How.) 450 (1861), in which federal jurisdiction was founded on diversity of citizenship.

[856] Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

[857] Romero v. International Terminal Operating Co., 358 U.S. 354, 380–81 (1959); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).

[858] Rosado v. Wyman, 397 U.S. 397, 400–05 (1970).

[859] Judge Friendly originated the concept in Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

[860] Aldinger v. Howard, 427 U.S. 1 (1976).

[861] 490 U.S. 545 (1989).

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by congressional enactment.[862] Within the year, Congress supplied the affirmative grant, adopting not only pendent party jurisdiction but also codifying pendent jurisdiction and ancillary jurisdiction under the name of "supplemental jurisdiction." [863]

Thus, these interrelated doctrinal standards now seem well-grounded.

Protective Jurisdiction.—A conceptually difficult doctrine, which approaches the verge of a serious constitutional gap, is the concept of protective jurisdiction. Under this doctrine, it is argued that in instances in which Congress has legislative jurisdiction, it can confer federal jurisdiction, with the jurisdictional statute itself being the "law of the United States" within the meaning of Article III, even though Congress has enacted no substantive rule of decision and state law is to be applied. Put forward in controversial cases,[864] the doctrine has neither been rejected nor accepted by the Supreme Court. In *Verlinden B. V. v. Central Bank of Nigeria*,[865] the Court reviewed a congressional grant of jurisdiction to federal courts to hear suits by an alien against a foreign state, jurisdiction not within the "arising under" provision of article III. Federal substantive law was not applicable, that resting either on state or international law. Refusing to consider protective jurisdiction, the Court found that the statute regulated foreign commerce by promulgating rules governing sovereign immunity from suit and was a law requiring interpretation as a federal-question matter. That the doctrine does raise constitutional doubts is perhaps grounds enough to avoid reaching it.[866]

Supreme Court Review of State Court Decisions.—In addition to the constitutional issues presented by § 25 of the Judiciary Act of 1789 and subsequent enactments,[867] questions have contin-

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[862] 490 U.S. at 553, 556.

[863] Act of Dec. 1, 1990, Pub. L. 101–650, 104 Stat. 5089, § 310, 28 U.S.C. § 1367. In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998), the Court, despite the absence of language making § 1367 applicable, held that the statute gave district courts jurisdiction over state-law claims in cases originating in state court and then removed to federal court.

[864] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); *see also* the bankruptcy cases, Schumacher v. Beeler, 293 U.S. 367 (1934), and Williams v. Austrian, 331 U.S. 642 (1947).

[865] 461 U.S. 480 (1983).

[866] *E.g.*, Mesa v. California, 489 U.S. 121, 136–37 (1989) (would present grave constitutional problems).

[867] On § 25, *see* "Judicial Review and National Supremacy," supra. The present statute is 28 U.S.C. § 1257(a), which provides that review by writ of *certiorari* is available where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

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ued to arise concerning review of state court judgments which go directly to the nature and extent of the Supreme Court's appellate jurisdiction. Because of the sensitivity of federal-state relations and the delicate nature of the matters presented in litigation touching upon them, jurisdiction to review decisions of a state court is dependent in its exercise not only upon ascertainment of the existence of a federal question but upon a showing of exhaustion of state remedies and of the finality of the state judgment. Because the application of these standards to concrete facts is neither mechanical nor nondiscretionary, the Justices have often been divided over whether these requisites to the exercise of jurisdiction have been met in specific cases submitted for review by the Court.

The Court is empowered to review the judgments of "the highest court of a State in which a decision could be had."[868] This will ordinarily be the state's court of last resort, but it could well be an intermediate appellate court or even a trial court if its judgment is final under state law and cannot be reviewed by any state appellate court.[869] The review is of a final judgment below. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."T[870] The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal assumption of a

States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. Prior to 1988, there was a right to mandatory appeal in cases in which a state court had found invalid a federal statute or treaty or in which a state court had upheld a state statute contested under the Constitution, a treaty, or a statute of the United States. *See* the Act of June 25, 1948, 62 Stat. 929. The distinction between *certiorari* and appeal was abolished by the Act of June 27, 1988, Pub. L. 100–352, § 3, 102 Stat. 662.

[868] 28 U.S.C. § 1257(a). *See* R. Stern & E. Gressman, Supreme Court Practice ch. 3 (6th ed. 1986).

[869] Grovey v. Townsend, 295 U.S. 45, 47 (1935); Talley v. California, 362 U.S. 60, 62 (1960); Thompson v. City of Louisville, 362 U.S. 199, 202 (1960); Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960); Powell v. Texas, 392 U.S. 514, 516, 517 (1968); Koon v. Aiken, 480 U.S. 943 (1987). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the judgment reviewed was that of the Quarterly Session Court for the Borough of Norfolk, Virginia.

[870] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 551 (1945). *See also* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Flynt v. Ohio, 451 U.S. 619 (1981); Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981); Florida v. Thomas, 532 U.S. 774 (2001). The Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings to come in the lower state courts. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476–487 (1975). *See also* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); Duquesne Light Co. v. Barasch, 488 U.S. 299, 304 (1989); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 n.42 (1982).

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role in a controversy until the state court efforts are finally resolved.[871] For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below.[872]

When the judgment of a state court rests on an adequate, independent determination of state law, the Court will not review the resolution of the federal questions decided, even though the resolution may be in error.[873] "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."[874] The Court is faced with two interrelated decisions: whether the state court judgment is based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgment. It is, of course, the responsibility of the Court to determine for itself the answer to both questions.[875]

The first question, whether there is a nonfederal ground, may be raised by several factual situations. A state court may have based its decision on two grounds, one federal, one nonfederal.[876] It may

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[871] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67–69 (1948); Radio Station WOW v. Johnson, 326 U.S. 120, 123–24 (1945).

[872] New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *See also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77 (1988); Webb v. Webb, 451 U.S. 493, 501 (1981). The same rule applies on *habeas corpus* petitions. *E.g.*, Picard v. Connor, 404 U.S. 270 (1972).

[873] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Wilson v. Loew's, Inc., 355 U.S. 597 (1958).

[874] Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945). Whereas declining to review judgments of state courts that rest on an adequate and independent determination of *state* law protects the sovereignty of states, the Court has emphasized that review of state court decisions that invalidate state laws based on interpretations of *federal* law, "far from *undermining* state autonomy, is the only way to *vindicate* it" because a correction of a state court's federal errors necessarily returns power to the state government. *See* Kansas v. Carr, 577 U.S. ___, No. 14–449, slip op. at 9 (2016) (quoting Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring)) (emphasis in original).

[875] *E.g.*, Howlett v. Rose, 496 U.S. 356, 366 (1990); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455 (1958).

[876] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

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have based its decision solely on a nonfederal ground but the federal ground may have been clearly raised.[877] Both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without written opinion stating the ground relied on.[878] Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent non-federal ground.[879] In any event, it is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it.[880]

Several factors affect the answer to the second question, whether the nonfederal ground is adequate. In order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment;[881] it must be independent of the federal question;[882] and it must be tenable.[883] Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court

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[877] Wood v. Chesborough, 228 U.S. 672, 676–80 (1913).

[878] Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54–55 (1934); Williams v. Kaiser, 323 U.S. 471, 477 (1945); Durley v. Mayo, 351 U.S. 277, 281 (1956); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

[879] Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 375–376 (1968).

[880] Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206 (1938); Raley v. Ohio, 360 U.S. 423, 434–437 (1959). When there is uncertainty about what the state court did, the usual practice was to remand for clarification. Minnesota v. National Tea Co., 309 U.S. 551 (1940); California v. Krivda, 409 U.S. 33 (1972). *See* California Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1973). Now, however, in a controversial decision, the Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. Michigan v. Long, 463 U.S. 1032 (1983). *See* Harris v. Reed, 489 U.S. 255, 261 n.7 (1989) (collecting cases); Coleman v. Thompson, 501 U.S. 722 (1991) (applying the rule in a *habeas* case).

[881] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874). A new state rule cannot be invented for the occasion in order to defeat the federal claim. *E.g.*, Ford v. Georgia, 498 U.S. 411, 420–425 (1991).

[882] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 290 (1958).

[883] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ward v. Love County, 253 U.S. 17, 22 (1920); Staub v. City of Baxley, 355 U.S. 313 (1958).

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review as an adequate independent state ground,[884] so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.[885]

Suits Affecting Ambassadors, Other Public Ministers, and Consuls

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held the Congress might vest concurrent jurisdiction involving consuls in the inferior courts and sustained an indictment against a consul.[886] Many years later, the Supreme Court held that consuls could be sued in federal court,[887] and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where Supreme Court has been invested with original jurisdiction.[888] Nor does the grant of original jurisdiction to the Supreme Court in cases affecting ambassadors and consuls of itself preclude suits in state courts against consular officials. The leading case is *Ohio ex rel. Popovici v. Agler*,[889] in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony.

A number of incidental questions arise in connection with the phrase "affecting ambassadors and consuls." Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In *United States v. Ortega*,[890] the Court ruled that a prosecution of a person for violating international law and the laws of the United States

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[884] Beard v. Kindler, 558 U.S. ___, No. 08–992, slip op. (2009) (firmly established procedural rule adequate state ground even though rule is discretionary). *Accord*, Walker v. Martin, 562 ___, No. 09–996, slip op. (2010). *See also* Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). *But see* Davis v. Wechsler, 263 U.S. 22 (1923); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

[885] Davis v. Wechsler, 263 U.S. 22, 24–25 (1923); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455–458 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). This rationale probably explains Henry v. Mississippi, 379 U.S. 443 (1965). *See also* in the criminal area, Edelman v. California, 344 U.S. 357, 362 (1953) (dissenting opinion); Brown v. Allen, 344 U.S. 443, 554 (1953) (dissenting opinion); Williams v. Georgia, 349 U.S. 375, 383 (1955); Monger v. Florida, 405 U.S. 958 (1972) (dissenting opinion).

[886] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C. Pa. 1793).

[887] Bors v. Preston, 111 U.S. 252 (1884).

[888] Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 469 (1884).

[889] 280 U.S. 379, 383, 384 (1930). Now precluded by 28 U.S.C. § 1351.

[890] 24 U.S. (11 Wheat.) 467 (1826).

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by offering violence to the person of a foreign minister was not a suit "affecting" the minister but a public prosecution for vindication of the laws of nations and the United States. Another question concerns the official status of a person claiming to be an ambassador or consul.

The Court has refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.[891] A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.[892] However, in matters of especial delicacy, such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature in which a state is a party, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.[893] By its compliance with the congressional distribution of exclusive and concurrent original jurisdiction, the Court has tacitly sanctioned the power of Congress to make such jurisdiction exclusive or concurrent as it may choose.

Cases of Admiralty and Maritime Jurisdiction

The admiralty and maritime jurisdiction of the federal courts had its origins in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the English High Court of Admiralty. After independence, the states established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.[894] Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the states, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over admiralty and maritime cases.[895]

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[891] *In re* Baiz, 135 U.S. 403, 432 (1890).

[892] *Ex parte* Gruber, 269 U.S. 302 (1925).

[893] 1 Stat. 80–81 (1789). Jurisdiction in the Supreme Court since 1978 has been original but not exclusive. Pub. L. 95–393, § 8(b), 92 Stat. 810, 28 U.S.C. § 1251(b)(1).

[894] G. Gilmore & C. Black, The Law of Admiralty ch. 1 (1957).

[895] The records of the Convention do not shed light on the Framers' views about admiralty. The present clause was contained in the draft of the Committee on Detail. 2 M. Farrand, supra at 186–187. None of the plans presented to the Conven-

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The Constitution uses the terms "admiralty and maritime jurisdiction" without defining them. Though closely related, the words are not synonyms. In England the word "maritime" referred to the cases arising upon the high seas, whereas "admiralty" meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. A much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.[896] At the very beginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ."[897] This broad legislative interpretation of admiralty and maritime jurisdiction soon won the approval of the federal circuit courts, which ruled that the extent of admiralty and maritime jurisdiction was not to be determined by English law but by the principles of maritime law as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe.[898]

Although a number of Supreme Court decisions had earlier sustained the broader admiralty jurisdiction on specific issues,[899] it was not until 1848 that the Court ruled squarely in its favor, which it did by declaring that "whatever may have been the doubt, origi-

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tion, with the exception of an apparently authentic Charles Pinckney plan, 3 id. at 601–04, 608, had mentioned an admiralty jurisdiction in national courts. *See* Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

[896] G. Gilmore & C. Black, supra at ch. 1. In DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass 1815), Justice Story delivered a powerful historical and jurisprudential argument against the then-restrictive English system. *See also* Waring v. Clarke, 46 U.S. (5 How.) 441, 451–59 (1847); New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 34, 385–390 (1848).

[897] § 9, 1 Stat. 77 (1789), now 28 U.S.C. § 1333 in only slightly changed form. For the classic exposition, *see* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

[898] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *The Seneca*, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D. Pa. 1829) (Justice Washington).

[899] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805); *The Schooner Betsy*, 8 U.S. (4 Cr.) 443 (1808); *The Samuel*, 14 U.S. (1 Wheat.) 9 (1816); *The Octavig*, 14 U.S. (1 Wheat.) 20 (1816).

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nally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed."[900] The Court thereupon proceeded to hold that admiralty had jurisdiction *in personam* as well as *in rem* over controversies arising out of contracts of affreightment between New York and Providence.

Power of Congress To Modify Maritime Law.—The Constitution does not identify the source of the substantive law to be applied in the federal courts in cases of admiralty and maritime jurisdiction. Nevertheless, the grant of power to the federal courts in Article III necessarily implies the existence of a substantive maritime law which, if they are required to do so, the federal courts can fashion for themselves.[901] But what of the power of Congress in this area? In *The Lottawanna*,[902] Justice Bradley undertook a definitive exposition of the subject. No doubt, the opinion of the Court notes, there exists "a great mass of maritime law which is the same in all commercial countries," still "the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country."[903] "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it . . . ."

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under

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[900] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 334, 386 (1848); *see also* Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[901] Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 690, 691 (1950); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952); Romero v. International Terminal Operating Co., 358 U.S. 354, 360–61 (1959). For a recent example, *see* Moragne v. States Marine Lines, 398 U.S. 375 (1970); United States v. Reliable Transfer Co., 421 U.S. 397 (1975). *Compare The Lottawanna*, 88 U.S. (21 Wall.) 558, 576–77 (1875) ("But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department"). States can no more override rules of judicial origin than they can override acts of Congress. Wilburn Boat Co. v. Firemen's Fund Ins. Co., 348 U.S. 310, 314 (1955).

[902] 88 U.S. (21 Wall.) 558 (1875).

[903] 88 U.S. at 572.

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the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[904]

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[905] That Congress's power to enact substantive maritime law was conferred by the Commerce Clause was assumed in numerous opinions,[906] but later opinions by Justice Bradley firmly established that the source of power was the admiralty grant itself, as supplemented by the second prong of the Necessary and Proper Clause.[907] Thus, "[a]s the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures."[908] Rejecting an attack on a maritime statute as an infringement of intrastate commerce, Justice Bradley wrote: "It is unnecessary to invoke the power given the Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."[909]

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[904] 88 U.S. at 574–75.

[905] 88 U.S. at 577.

[906] *E.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1871); Moore v. American Transp. Co., 65 U.S. (24 How.) 1, 39 (1861); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883); *The Robert W. Parsons*, 191 U.S. 17 (1903).

[907] Butler v. Boston & S. S.S. Co., 130 U.S. 527 (1889); *In re* Garnett, 141 U.S. 1 (1891). The second prong of the Necessary and Proper Clause is the authorization to Congress to enact laws to carry into execution the powers vested in other departments of the Federal Government. *See* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934).

[908] Butler v. Boston & S. S.S. Co., 130 U.S. 527, 557 (1889).

[909] *In re* Garnett, 141 U.S. 1, 12 (1891). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920); Crowell v. Benson, 285 U.S. 22, 55 (1932). The Jones Act, under which injured seamen may maintain an action at law for damages, has been reviewed as an exercise of legislative power deducible from the Admiralty Clause. Panama R.R. v. Johnson, 264 U.S. 375, 386, 388, 391 (1924); Romero v. International Terminal Operating Co., 358 U.S. 354, 360–361 (1959). On the limits to the congressional power, *see* Panama R.R. v. Johnson, 264 U.S. at 386–87; Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43–44 (1934).

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The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the Admiralty and Maritime Clause and the Necessary and Proper Clause and, no doubt, the Commerce Clause, now that the Court's interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court.[910]

Admiralty and Maritime Cases.—Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters, and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category, which includes prize cases and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act, while in the second category subject matter is the primary determinative factor.[911] Specifically, contract cases include suits by seamen for wages,[912] cases arising out of marine insurance policies,[913] ac-

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[910] Thus, Justice McReynolds' assertion of the paramountcy of congressional power in Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917), was not disputed by the four dissenters in that case and is confirmed in subsequent cases critical of *Jensen* which in effect invite congressional modification of maritime law. *E.g.*, Davis v. Department of Labor and Industries, 317 U.S. 249 (1942). The nature of maritime law has excited some relevant controversy. In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 516, 545 (1828), Chief Justice Marshall declared that admiralty cases do not "arise under the Constitution or laws of the United States" but "are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our Courts to the cases as they arise." In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), the plaintiff sought a jury trial in federal court on a seaman's suit for personal injury on an admiralty claim, contending that cases arising under the general maritime law are "civil actions" that arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Five Justices in an opinion by Justice Frankfurter disagreed. Maritime cases do not arise under the Constitution or laws of the United States for federal question purposes and must, absent diversity, be instituted in admiralty where there is no jury trial. The dissenting four, Justice Brennan for himself and Chief Justice Warren and Justices Black and Douglas, contended that maritime law, although originally derived from international sources, is operative within the United States only by virtue of having been accepted and adopted pursuant to Article III, and accordingly judicially originated rules formulated under authority derived from that Article are "laws" of the United States to the same extent as those enacted by Congress.

[911] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[912] Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 710 (1831). A seaman employed by the government making a claim for wages cannot proceed in admiralty but must bring his action under the Tucker Act in the Court of Claims or in the district court

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tions for towage[914] or pilotage[915] charges, actions on bottomry or respondentia bonds,[916] actions for repairs on a vessel already used in navigation,[917] contracts of affreightment,[918] compensation for temporary wharfage,[919] agreements of consortship between the masters of two vessels engaged in wrecking,[920] and surveys of damaged vessels.[921] That is, admiralty jurisdiction "extends to all contracts, claims and services essentially maritime."[922] But the courts have never enunciated an unambiguous test which would enable one to determine in advance whether or not a given case is maritime.[923]

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if his claim does not exceed $10,000. Amell v. United States, 384 U.S. 158 (1966). In Kossick v. United Fruit Co., 365 U.S. 731 (1961), an oral agreement between a seaman and a shipowner whereby the latter in consideration of the seaman's forbearance to press his maritime right to maintenance and cure promised to assume the consequences of improper treatment of the seaman at a Public Health Service Hospital was held to be a maritime contract. *See also* Archawski v. Hanioti, 350 U.S. 532 (1956).

[913] Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 31 (1871); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). Whether admiralty jurisdiction exists if the vessel is not engaged in navigation or commerce when the insurance claim arises is open to question. Jeffcott v. Aetna Ins. Co., 129 F.2d 582 (2d Cir. 1942), *cert. denied*, 317 U.S. 663 (1942). Contracts and agreements to procure marine insurance are outside the admiralty jurisdiction. Compagnie Francaise De Navigation A Vapeur v. Bonnasse, 19 F.2d 777 (2d Cir. 1927).

[914] Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900). For recent Court difficulties with exculpatory features of such contracts, *see* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); United States v. Nielson, 349 U.S. 129 (1955); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Dixilyn Drilling Corp. v. Crescent Towage & Salvage Co., 372 U.S. 697 (1963).

[915] Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1875); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872). *See also* Sun Oil v. Dalzell Towing Co., 287 U.S. 291 (1932).

[916] *The Grapeshot*, 76 U.S. (9 Wall.) 129 (1870); O'Brien v. Miller, 168 U.S. 287 (1897); *The Aurora*, 14 U.S. (1 Wheat.) 94 (1816); Delaware Mut. Safety Ins. Co. v. Gossler, 96 U.S. 645 (1877). But ordinary mortgages even though the securing property is a vessel, its gear, or cargo are not considered maritime contracts. Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399 (1854); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 32 (1934).

[917] New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819). There is admiralty jurisdiction even though the repairs are not to be made in navigable waters but, perhaps, in dry dock. North Pacific SS. Co. v. Hall Brothers Marine R. & S. Co., 249 U.S. 119 (1919). But contracts and agreements pertaining to the original construction of vessels are not within admiralty jurisdiction. Peoples Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393 (1858); *North Pacific S.S. Co.*, 249 U.S. at 127.

[918] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848).

[919] *Ex parte* Easton, 95 U.S. 68 (1877).

[920] Andrews v. Wall, 44 U.S. (3 How.) 568 (1845).

[921] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 412, 415, 418 (1825); *The Tilton*, 23 Fed. Cas. 1277 (No. 14054) (C.C.D. Mass. 1830) (Justice Story).

[922] *Ex parte* Easton, 95 U.S. 68, 72 (1877). *See*, for a clearing away of some conceptual obstructions to the principle, Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991).

[923] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 183 (1837);

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"The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract. . . ."[924]

Maritime torts include injuries to persons,[925] damages to property arising out of collisions or other negligent acts,[926] and violent dispossession of property.[927] The Court has expressed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law."[928] Unlike contract cases, maritime tort jurisdiction historically depended exclusively upon the commission of the wrongful act upon navigable waters, regardless of any connection or lack of connection with shipping or commerce.[929] The Court has now held, however, that in addition to the requisite situs a significant relationship to traditional maritime activity must exist in order for the admiralty jurisdiction of the federal courts to be invoked.[930] Both the Court and Congress have created exceptions to

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The People's Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393, 401 (1858); New England Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 26 (1870); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 48 (1934).

[924] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).

[925] *The City of Panama*, 101 U.S. 453 (1880). Reversing a long-standing rule, the Court allowed recovery under general maritime law for the wrongful death of a seaman. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Miles v. Apex Marine Corp., 498 U.S. 19 (1991).

[926] *The Raithmoor*, 241 U.S. 166 (1916); Erie R.R. v. Erie Transportation Co., 204 U.S. 220 (1907).

[927] *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816); *In re* Fassett, 142 U.S. 479 (1892).

[928] East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions should be based on the contract law of warranty).

[929] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Philadelphia, W. & B. R.R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); *The Plymouth*, 70 U.S. (3 Wall.) 20, 33–34 (1865); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).

[930] Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972) (plane crash in which plane landed wholly fortuitously in navigable waters off the airport runway not in admiralty jurisdiction). However, so long as there is maritime activity and a general maritime commercial nexus, admiralty jurisdiction exists. Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats on navigable waters is within admiralty jurisdiction); Sisson v. Ruby, 497 U.S. 358 (1990) (fire on pleasure boat docked at marina on navigable water). *See also* Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River. The Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a "vessel" for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.

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the situs test for maritime tort jurisdiction to extend landward the occasions for certain connected persons or events to come within admiralty, not without a little controversy.[931]

From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of prize cases.[932] Also, in contrast to other phases of admiralty jurisdiction, prize law as applied by the British courts continued to provide the basis of American law so far as practicable,[933] and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction includes the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,[934] infraction of revenue laws,[935] and the like.[936]

Admiralty Proceedings.—Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law, but the differences that do exist are significant.[937] Suits in admiralty traditionally took the form of a proceeding *in rem* against the vessel, and,

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[931] Thus, the courts have enforced seamen's claims for maintenance and cure for injuries incurred on land. O'Donnell v. Great Lakes Co., 318 U.S. 36, 41–42 (1943). The Court has applied the doctrine of seaworthiness to permit claims by longshoremen injured on land because of some condition of the vessel or its cargo. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *But see* Victory Carriers v. Law, 404 U.S. 202 (1971). In the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, Congress gave seamen, or their personal representatives, the right to seek compensation from their employers for personal injuries arising out of their maritime employment. Respecting who is a seaman for Jones Act purposes, *see* Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991); McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991). The rights exist even if the injury occurred on land. O'Donnell v. Great Lakes Co., 318 U.S. at 43; Swanson v. Mara Brothers, 328 U.S. 1, 4 (1946). In the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, Congress provided an avenue of relief for persons injured in themselves or their property by action of a vessel on navigable water which is consummated on land, as by the collision of a ship with a bridge. By the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1251, amending 33 U.S.C. §§ 901–950, Congress broadened the definition of "navigable waters" to include in certain cases adjoining piers, wharfs, etc., and modified the definition of "employee" to mean any worker "engaged in maritime employment" within the prescribed meanings, thus extending the Act shoreward and changing the test of eligibility from "situs" alone to the "situs" of the injury and the "status" of the injured.

[932] Jennings v. Carson, 8 U.S. (4 Cr.) 2 (1807); Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858).

[933] Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cr.) 191 (1815); *The Siren*, 80 U.S. (13 Wall.) 389, 393 (1871).

[934] Hudson v. Guestier, 8 U.S. (4 Cr.) 293 (1808).

[935] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); Church v. Hubbard, 6 U.S. (2 Cr.) 187 (1804); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805).

[936] *The Brig Ann*, 13 U.S. (9 Cr.) 289 (1815); *The Sarah*, 21 U.S. (8 Wheat.) 391 (1823); Maul v. United States, 274 U.S. 501 (1927).

[937] Gilmore & Black, supra at 30–33. There are no longer separate rules of procedure governing admiralty, unification of civil admiralty procedures being achieved in 1966. 7 A J. Moore's Federal Practice §§ .01 *et seq* (New York: 1971).

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with exceptions to be noted, such proceedings *in rem* are confined exclusively to federal admiralty courts, because the grant of exclusive jurisdiction to the federal courts by the Judiciary Act of 1789 has been interpreted as referring to the traditional admiralty action, the *in rem* action, which was unknown to the common law.[938] The savings clause in that Act under which a state court may entertain actions by suitors seeking a common-law remedy preserves to the state tribunals the right to hear actions at law where a common-law remedy or a new remedy analogous to a common-law remedy exists.[939] Concurrent jurisdiction thus exists for the adjudication of *in personam* maritime causes of action against the owner of the vessel, and a plaintiff may ordinarily choose whether to bring his action in a state court or a federal court.

Forfeiture to the crown for violation of the laws of the sovereign was in English law an exception to the rule that admiralty has exclusive jurisdiction over *in rem* maritime actions and was thus considered a common-law remedy. Although the Supreme Court sometimes has used language that would confine all proceedings *in rem* to admiralty courts,[940] such actions in state courts have been sustained in cases of forfeiture arising out of violations of state law.[941]

Perhaps the most significant admiralty court difference in procedure from civil courts is the absence of a jury trial in admiralty actions, with the admiralty judge trying issues of fact as well as of law.[942] Indeed, the absence of a jury in admiralty proceedings ap-

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[938] *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). *But see* Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858). In Madruga v. Superior Court, 346 U.S. 556 (1954), the jurisdiction of a state court over a partition suit at the instance of the majority shipowners was upheld on the ground that the cause of action affected only the interest of the defendant minority shipowners and therefore was *in personam*. Justice Frankfurter's dissent argued: "If this is not an action against the thing, in the sense which that has meaning in the law, then the concepts of a *res* and an *in rem* proceeding have an esoteric meaning that I do not understand." Id. at 564.

[939] After conferring "exclusive" jurisdiction in admiralty and maritime cases on the federal courts, § 9 of the Judiciary Act of 1789, 1 Stat. 77, added "saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it. . . ." Fixing the concurrent federal-state line has frequently been a source of conflict within the Court. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[940] *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867).

[941] C. J. Henry Co. v. Moore, 318 U.S. 133 (1943).

[942] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805); *The Schooner Betsy*, 8 U.S. (4 Cr.) 443 (1808); *The Whelan*, 11 U.S. (7 Cr.) 112 (1812); *The Samuel*, 14 U.S. (1 Wheat.) 9 (1816). If diversity of citizenship and the requisite jurisdictional amounts are present, a suitor may sue on the "law side" of the federal court and obtain a jury. Romero v. International Terminal Operating Co., 358 U.S. 354, 362–363 (1959). Jones Act claims, 41 Stat. 1007 (1920), 46 U.S.C. § 688, may be brought on the "law side" with a jury, Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), and other admiralty claims joined with a Jones Act claim may be submitted to a jury. *Romero*, *supra*; Fitzgerald v. United States Lines

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pears to have been one of the principal reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts, since they provided a forum where the English authorities could enforce the Navigation Laws without "the obstinate resistance of American juries."[943]

Territorial Extent of Admiralty and Maritime Jurisdiction.—Although he was a vigorous exponent of the expansion of admiralty jurisdiction, Justice Story for the Court in *The Steamboat Thomas Jefferson*[944] adopted a restrictive English rule confining admiralty jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended.[945] The demands of commerce on western waters led Congress to enact a statute extending admiralty jurisdiction over the Great Lakes and connecting waters,[946] and in *The Genessee Chief v. Fitzhugh*[947] Chief Justice Taney overruled *The Thomas Jefferson* and dropped the tidal ebb and flow requirement. This ruling laid the basis for subsequent judicial extension of jurisdiction over all waters, salt or fresh, tidal or not, which are navigable in fact.[948] Some of the older cases contain language limiting jurisdiction to navigable waters which form some link in an interstate or international waterway or some link in commerce,[949] but these date from the time when it was thought the commerce power furnished the support for congressional legislation in this field.

Admiralty and Federalism.—Extension of admiralty and maritime jurisdiction to navigable waters within a state does not, however, of its own force include general or political powers of government. Thus, in the absence of legislation by Congress, the states

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Co., 374 U.S. 16 (1963). There is no constitutional barrier to congressional provision of jury trials in admiralty. Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963).

[943] C. J. Henry Co. v. Moore, 318 U.S. 133, 141 (1943).

[944] 23 U.S. (10 Wheat.) 428 (1825). On the political background of this decision, *see* 1 C. Warren, supra at 633–35.

[945] The tidal ebb and flow limitation was strained in some of its applications. Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[946] 5 Stat. 726 (1845).

[947] 53 U.S. (12 How.) 443 (1851).

[948] Some of the early cases include *The Magnolia*, 61 U.S. (20 How.) 296 (1857); *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). The fact that the body of water is artificial presents no barrier to admiralty jurisdiction. *Ex parte* Boyer, 109 U.S. 629 (1884); *The Robert W. Parsons*, 191 U.S. 17 (1903). In United States v. Appalachian Power Co., 311 U.S. 377 (1940), it was made clear that maritime jurisdiction extends to include waterways which by reasonable improvement can be made navigable. "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country." Southern S.S. Co. v. NLRB, 316 U.S. 31, 41 (1942).

[949] *E.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *The Montello*, 87 U.S. (20 Wall.) 430, 441–42 (1874).

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through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore.[950]

Determination of the boundaries of admiralty jurisdiction is a judicial function, and "no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits."[951] But, as with other jurisdictions of the federal courts, admiralty jurisdiction can only be exercised under acts of Congress vesting it in federal courts.[952]

The boundaries of federal and state competence, both legislative and judicial, in this area remain imprecise, and federal judicial determinations have notably failed to supply definiteness. During the last century, the Supreme Court generally permitted two overlapping systems of law to coexist in an uneasy relationship. The federal courts in admiralty applied the general maritime law,[953] supplemented in some instances by state law which created and defined certain causes of action.[954] Because the Judiciary Act of 1789 saved to suitors common-law remedies, persons suing in state courts or in federal courts in diversity of citizenship actions could look to common-law and statutory doctrines for relief in maritime-related cases in which the actions were noticeable.[955] In *Southern Pacific Co. v. Jensen*,[956] a sharply divided Court held that New York could not constitutionally apply its workmen's compensation system to employees injured or killed on navigable waters. For the Court, Justice McReynolds reasoned "that the general maritime law, as accepted by the federal courts, constituted part of our national law,

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[950] United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[951] *The Steamer St. Lawrence*, 66 U.S. (1 Bl.) 522, 527 (1862).

[952] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 418 (1825); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1875).

[953] *E.g.*, New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848); The Steamboat New York v. Rea, 59 U.S. (18 How.) 223 (1856); *The China*, 74 U.S. (7 Wall.) 53 (1868); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872); *La Bourgogne*, 210 U.S. 95 (1908).

[954] *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819); *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875) (enforcing state laws giving suppliers and repairmen liens on ships supplied and repaired). Another example concerns state-created wrongful death actions. *The Hamilton*, 207 U.S. 398 (1907).

[955] *E.g.*, Hazard's Administrator v. New England Marine Ins. Co., 33 U.S. (8 Pet.) 557 (1834); *The Belfast*, 74 U.S. (7 Wall.) 624 (1869); American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872); Quebec Steamship Co. v. Merchant, 133 U.S. 375 (1890); Belden v. Chase, 150 U.S. 674 (1893); Homer Ramsdell Transp. Co. v. La Compagnie Gen. Transatlantique, 182 U.S. 406 (1901).

[956] 244 U.S. 205 (1917). The worker here had been killed, but the same result was reached in a case of nonfatal injury. Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917). In Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), the *Jensen* holding was applied to preclude recovery in a negligence action against the injured party's employer under state law. Under *The Osceola*, 189 U.S. 158 (1903), the employee had a maritime right to wages, maintenance, and cure.

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applicable to matters within the admiralty and maritime jurisdiction."[957] Recognizing that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," still it was certain that "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations."[958] The "savings to suitors" clause was unavailing because the workmen's compensation statute created a remedy "of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."[959]

Congress required three opportunities to legislate to meet the problem created by the decision, the lack of remedy for maritime workers to recover for injuries resulting from the negligence of their employers. First, Congress enacted a statute saving to claimants their rights and remedies under state workmen's compensation laws.[960] The Court invalidated it as an unconstitutional delegation of legislative power to the states. "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations."[961] Second, Congress reenacted the law but excluded masters and crew members of vessels from those who might claim compensation for maritime injuries.[962]

The Court found this effort unconstitutional as well, because "the manifest purpose [of the statute] was to permit any State to alter the maritime law and thereby introduce conflicting require-

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[957] Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917).

[958] 244 U.S. at 216.

[959] 244 U.S. at 218. There were four dissenters: Justices Holmes, Pitney, Brandeis, and Clarke. The *Jensen* dissent featured such Holmesian epigrams as: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions," id. at 221, and the famous statement supporting the assertion that supplementation of maritime law had to come from state law because "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It always is the law of some State. . . ." Id. at 222.

[960] 40 Stat. 395 (1917).

[961] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920). The decision was again 5-to-4 with the same dissenters.

[962] 42 Stat. 634 (1922).

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ments."[963] Finally, in 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which provided accident compensation for injuries, including those resulting in death, sustained on navigable waters by employees, other than members of the crew, whenever "recovery . . . may not validly be provided by State law."[964]

With certain exceptions,[965] the federal-state conflict since *Jensen* has taken place with regard to three areas: (1) the interpretation of federal and state bases of relief for injuries and death as affected by the Longshoremen's and Harbor Workers' Compensation Act; (2) the interpretation of federal and state bases of relief for personal injuries by maritime workers as affected by the Jones Act; and (3) the application of state law to permit recovery in maritime wrongful death cases in which until recently there was no federal maritime right to recover.[966]

(1) The principal difficulty here was that after *Jensen* the Supreme Court did not maintain the line between permissible and impermissible state-authorized recovery at the water's edge, but created a "maritime but local" exception, by which some injuries incurred in or on navigable waters could be compensated under state workmen's compensation laws or state negligence laws.[967] "The application of the State Workmen's Compensation Acts has been sustained

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[963] Washington v. Dawson & Co., 264 U.S. 219, 228 (1924). Holmes and Brandeis remained of the four dissenters and again dissented.

[964] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–950. In 1984, the statute was renamed the Longshore and Harbor Workers' Compensation Act. Pub. L. 98–426.

[965] *E.g.*, Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (state direct action statute applies against insurers implicated in a marine accident); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (state statute determines effect of breach of warranty in marine insurance contract); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (federal rather than state law determines effect of exculpatory provisions in towage contracts); Kossick v. United Fruit Co., 365 U.S. 731 (1961) (state statute of frauds inapplicable to oral contract for medical care between seaman and employer).

[966] *Jensen*, though much criticized, is still the touchstone of the decisional process in this area with its emphasis on the general maritime law. *E.g.*, Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). In Askew v. American Waterways Operators, 411 U.S. 325, 337–44 (1973), the Court, in holding that the states may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, although still possessing vitality, have been confined to their facts; thus, it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id. at 344. *See also* Sun Ship v. Pennsylvania, 447 U.S. 715 (1980).

[967] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922); Miller's Indemnity Underwriters v. Braud, 270 U.S. 59 (1926). The exception continued to be applied following enactment of the Longshoremen's

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where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law 'would work no material prejudice to the essential features of the general maritime law.'"[968] Because Congress provided in the Longshoremen's and Harbor Workers' Compensation Act for recovery under the Act "if recovery . . . may not validly be provided by State law,"[969] it was held that the "maritime but local" exception had been statutorily perpetuated,[970] thus creating the danger for injured workers or their survivors that they might choose to seek relief by the wrong avenue to their prejudice. This danger was subsequently removed by the Court when it recognized that there was a "twilight zone," a "shadowy area," in which recovery under either the federal law or a state law could be justified, and held that in such a "twilight zone" the injured party should be enabled to recover under either.[971] Then, in *Calbeck v. Travelers Ins. Co.*,[972] the Court virtually read out of the Act its inapplicability when compensation would be afforded by state law and held that Congress's intent in enacting the statute was to extend coverage to all workers who sustain injuries while on navigable waters of the United States whether or not a particular injury was also within the constitutional reach of a state workmen's compensation law or other law. By the 1972 amendments to the LHWCA, Congress extended the law shoreward by refining the tests of "employee" and "navigable waters," so as to reach piers, wharfs, and the like in certain circumstances.[973]

(2) The passage of the Jones Act[974] gave seamen a statutory right of recovery for negligently inflicted injuries on which they could

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and Harbor Workers' Compensation Act. *See* cases cited in Davis v. Department of Labor and Industries, 317 U.S. 249, 253–254 (1942).

[968] Crowell v. Benson, 285 U.S. 22, 39 n.3 (1932). The internal quotation is from Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[969] § 3(a), 44 Stat. 1424 (1927), 33 U.S.C. § 903(a).

[970] Crowell v. Benson, 284 U.S. 22, 39, (1932); Davis v. Department of Labor and Industries, 317 U.S. 249, 252–53 (1942).

[971] Davis v. Dept of Labor and Industries, 317 U.S. 249 (1942). The quoted phrases appear at id. at 253, 256. *See also* Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959).

[972] 370 U.S. 114 (1962). In the 1972 amendments, § 2, 86 Stat. 1251, amending 33 U.S.C. § 903(a), Congress ratified *Calbeck* by striking out "if recovery . . . may not validly be provided by State law."

[973] 86 Stat. 1251, § 2, amending 33 U.S.C. § 902. The Court had narrowly turned back an effort to achieve this result through construction in Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). *See also* Victory Carriers v. Law, 404 U.S. 202 (1971). On the interpretation of the amendments, *see* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Director, Office of Workers Compensation Programs v. Perini, 459 U.S. 297 (1983).

[974] 41 Stat. 1007 (1920), 46 U.S.C. § 688. For the prior-Jones Act law, *see The Osceola*, 189 U.S. 158 (1903).

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sue in state or federal courts. Because injured parties could obtain a jury trial in Jones Act suits, there was little attempted recourse under the savings clause[975] to state law claims and thus no need to explore the line between applicable and inapplicable state law. But in the 1940s personal injury actions based on unseaworthiness[976] were given new life by Court decisions for seamen;[977] and the right was soon extended to longshoremen who were injured while on board ship or while working on the dock if the injury could be attributed either to the ship's gear or its cargo.[978] While these actions could have been brought in state court, federal law supplanted state law even with regard to injuries sustained in state territorial waters.[979] The 1972 LHWCA amendments, however, eliminated unseaworthiness recoveries by persons covered by the Act and substituted a recovery under the LHWCA itself for injuries caused by negligence.[980]

(3) In *The Harrisburg*,[981] the Court held that maritime law did not afford an action for wrongful death, a position to which the Court adhered until 1970.[982] The Jones Act,[983] the Death on the High Seas Act,[984] and the Longshoremen's and Harbor Workers' Compensa-

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[975] "Cases of Admiralty and Maritime Jurisdiction," supra.

[976] Unseaworthiness "is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . [T]he owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." Mitchell v. Trawler Racer, 362 U.S. 539, 549 (1960).

[977] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *See also* Mitchell v. Trawler Racer, 362 U.S. 539 (1960); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960); Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967).

[978] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Alaska S.S. Co. v. Patterson, 347 U.S. 396 (1954); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); *But see* Usner v. Luckenback Overseas Corp., 400 U.S. 494 (1971); Victory Carriers v. Law, 404 U.S. 202 (1971).

[979] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

[980] 86 Stat. 1263, § 18, amending 33 U.S.C. § 905. On the negligence standards under the amendment, *see* Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156 (1981).

[981] 119 U.S. 199 (1886). Subsequent cases are collected in Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[982] Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[983] 41 Stat. 1007 (1920). 46 U.S.C. § 688. Recovery could be had if death resulted from injuries because of negligence but not from unseaworthiness.

[984] 41 Stat. 537 (1920), 46 U.S.C. §§ 761 *et seq*. The Act applies to deaths caused by negligence occurring on the high seas beyond a marine league from the shore of any state. In Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), a unanimous Court held that this Act did not apply in cases of deaths on the artificial islands created on the continental shelf for oil drilling purposes but that the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331 *et seq*., incorpo-

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tion Act[985] created causes of action for wrongful death, but for cases not falling within one of these laws the federal courts looked to state wrongful death and survival statutes.[986] Thus, in *The Tungus v. Skovgaard*,[987] the Court held that a state wrongful death statute encompassed claims both for negligence and unseaworthiness in the instance of a land-based worker killed when on board ship in navigable water; the Court divided five-to-four, however, in holding that the standards of the duties to furnish a seaworthy vessel and to use due care were created by the state law as well and not furnished by general maritime concepts.[988] And, in *Hess v. United States*,[989] a suit under the Federal Tort Claims Act for recovery for a death by drowning in a navigable Oregon river of an employee of a contractor engaged in repairing the federally owned Bonneville Dam, a divided Court held that liability was to be measured by the standard of care expressed in state law, notwithstanding that the standard was higher than that required by maritime law. One area existed, however, in which beneficiaries of a deceased seaman were denied recovery.

The Jones Act provided a remedy for wrongful death resulting from negligence, but not for one caused by unseaworthiness alone; in *Gillespie v. United States Steel Corp.*,[990] the Court held that the survivors of a seaman drowned while working on a ship docked in an Ohio port could not recover under the state wrongful death statute even though the act recognized unseaworthiness as a basis for recovery, the Jones Act having superseded state laws.

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rated the laws of the adjacent state, so that Louisiana law governed. *See also* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). However, in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), the Court held that the Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from a platform.

[985] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–950.

[986] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Just v. Chambers, 312 U.S. 383 (1941); Levinson v. Deupree, 345 U.S. 648 (1953).

[987] 358 U.S. 588 (1959).

[988] Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the extent of the duties owed the decedent while on board ship should be governed by federal maritime law, though the cause of action originated in a state statute, just as would have been the result had decedent survived his injuries. *See also* United N.Y. & N.J. Sandy Hooks Pilot Ass'n v. Halecki, 358 U.S. 613 (1959).

[989] 361 U.S. 314 (1960). The four *Tungus* dissenters joined two of the *Tungus* majority solely "under compulsion" of the *Tungus* ruling; the other three majority Justices dissented on the ground that application of the state statute unacceptably disrupted the uniformity of maritime law.

[990] 379 U.S. 148 (1964). The decision was based on dictum in Lindgren v. United States, 281 U.S. 38 (1930), to the effect that the Jones Act remedy was exclusive.

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Thus did matters stand until 1970, when the Court, in a unanimous opinion in *Moragne v. States Marine Lines*,[991] overruled its earlier cases and held that a right of recovery for wrongful death is sanctioned by general maritime law and that no statute is needed to bring the right into being. The Court was careful to note that the cause of action created in *Moragne* would not, like the state wrongful death statutes in *Gillespie*, be held precluded by the Jones Act, so that the survivor of a seaman killed in navigable waters within a state would have a cause of action for negligence under the Jones Act or for unseaworthiness under the general maritime law.[992]

Cases to Which the United States Is a Party

Right of the United States to Sue.—In the first edition of his *Treatise*, Justice Story noted that while "an express power is no where given in the constitution," the right of the United States to sue in its own courts "is clearly implied in that part respecting the judicial power. . . . Indeed, all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns."[993] As early as 1818, the Supreme Court ruled that the United States could sue in its own name in all cases of contract without congressional authorization of such suits.[994] Later, this rule was extended to other types of actions. In the absence of statutory provisions to the contrary, such suits are initiated by the Attorney General in the name of the United States.[995]

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[991] 398 U.S. 375 (1970).

[992] 398 U.S. at 396 n.12. For development of the law under *Moragne*, *see* Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Miles v. Apex Marine Corp., 498 U.S. 19 (1990); and Norfolk Shipbuilding and Drydock Co. v. Garris, 532 U.S. 811 (2001) (maritime cause of action for death caused by violation of the duty of seaworthiness is equally applicable to death resulting from negligence). But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that *Moragne* does not provide the exclusive remedy in cases involving the death in territorial waters of a "nonseafarer"—a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.

[993] 3 J. Story, Commentaries on the Constitution of the United States 1274 (1833), (emphasis in original).

[994] Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818).

[995] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. Beebe, 127 U.S. 338 (1888); United States v. Bell Telephone Co., 128 U.S. 315 (1888). Whether without statutory authorization the United States may sue to protect the constitutional rights of its citizens has occasioned conflict. *Compare* United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D.N.Y. 1970), *and* United States v. Brittain, 319 F. Supp. 1658 (S.D.Ala. 1970), *with* United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979), and United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977). The

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By the Judiciary Act of 1789, and subsequent amendments to it, Congress has vested in the federal district courts jurisdiction to hear all suits of a civil nature at law or in equity brought by the United States as party plaintiff.[996] As in other judicial proceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought.[997] Under the long-settled principle that the courts have the power to abate public nuisances at the suit of the government, the provision in § 208(2) of the Labor Management Relations Act of 1949, authorizing federal courts to enjoin strikes that imperil national health or safety was upheld on the grounds that the statute entrusts the courts with the determination of a "case or controversy" on which the judicial power can operate and does not impose any legislative, executive, or non-judicial function. Moreover, the fact that the rights sought to be protected were those of the public in unimpeded production in industries vital to public health, as distinguished from the private rights of labor and management, was held not to alter the adversary ("case or controversy") nature of the litigation instituted by the United States as the guardian of the aforementioned rights.[998] Also, by reason of the highest public interest in the fulfillment of all constitutional guarantees, "including those that bear . . . directly on private rights, . . . it [is] perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief."[999]

Suits Against States.—Controversies to which the United States is a party include suits brought against states as party defendants. The first such suit occurred in *United States v. North Carolina*,[1000] which was an action by the United States to recover upon bonds

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result in *Mattson* and *Solomon* was altered by specific authorization in the Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349 (1980), 42 U.S.C. §§ 1997 *et seq*. *See also* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) (no standing to sue to correct allegedly unconstitutional police practices).

[996] 28 U.S.C. § 1345. By virtue of the fact that the original jurisdiction of the Supreme Court extends only to those cases enumerated in the Constitution, jurisdiction over suits brought by the United States against persons or corporations is vested in the lower federal courts. Suits by the United States against a state may be brought in the Supreme Court under its original jurisdiction, 28 U.S.C. § 1251(b)(2), although such suits may also be brought in the district courts. Case v. Bowles, 327 U.S. 92, 97 (1946).

[997] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

[998] United Steelworkers v. United States, 361 U.S. 39, 43–44 (1960), citing *In re* Debs, 158 U.S. 564 (1895).

[999] United States v. Raines, 362 U.S. 17, 27 (1960), upholding jurisdiction of the federal court over an action to enjoin state officials from discriminating against African-American citizens seeking to vote in state elections. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970), in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970.

[1000] 136 U.S. 211 (1890).

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issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the state, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court's original jurisdiction did not extend to cases to which the United States is a party.[1001] Stressing the inclusion within the judicial power of cases to which the United States and a state are parties, the elder Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States "was given by Texas when admitted to the Union upon an equal footing in all respects with the other States." [1002]

Suits brought by the United States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the state by the United States in breach of its trust obligations to the Indian.[1003] In *United States v. West Virginia*,[1004] the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments. A few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries with the states.[1005] Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of Cali-

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[1001] United States v. Texas, 143 U.S. 621 (1892).

[1002] 143 U.S. at 642–46. This suit, it may be noted, was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25. *See also* United States v. Louisiana, 339 U.S. 699, 701–02 (1950).

[1003] United States v. Minnesota, 270 U.S. 181 (1926). For an earlier suit against a state by the United States, *see* United States v. Michigan, 190 U.S. 379 (1903).

[1004] 295 U.S. 463 (1935).

[1005] United States v. Utah, 283 U.S. 64 (1931).

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fornia between the low-water mark and the three-mile limit.[1006] Like suits were decided against Louisiana and Texas in 1950.[1007]

Immunity of the United States From Suit.—Pursuant to the general rule that a sovereign cannot be sued in its own courts, the judicial power does not extend to suits against the United States unless Congress by statute consents to such suits. This rule first emanated in embryonic form in an *obiter dictum* by Chief Justice Jay in *Chisholm v. Georgia*, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid."[1008] In *Cohens v. Virginia*,[1009] also in dictum, Chief Justice Marshall asserted, "the universally received opinion is that no suit can be commenced or prosecuted against the United States." The issue was more directly in question in *United States v. Clarke*,[1010] where Chief Justice Marshall stated that, as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." He thereupon ruled that the act of May 26, 1830, for the final settlement of land claims in Florida condoned the suit. The doctrine of the exemption of the United States from suit was repeated in various subsequent cases, without discussion or examination.[1011] Indeed, it was not until *United States v. Lee*[1012] that the Court exam-

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[1006] United States v. California, 332 U.S. 19 (1947).

[1007] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). *See also* United States v. Maine, 420 U.S. 515 (1975).

[1008] 2 U.S. (2 Dall.) 419, 478 (1793).

[1009] 19 U.S. (6 Wheat.) 264, 412 (1821).

[1010] 33 U.S. (8 Pet.) 436, 444 (1834).

[1011] United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); De Groot v. United States, 72 U.S. (5 Wall.) 419, 431 (1867); United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1868); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869); *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1870); Carr v. United States, 98 U.S. 433, 437–439 (1879). It is also clear that the Federal Government, in the absence of its consent, is not liable in tort for the negligence of its agents or employees. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869); Peabody v. United States, 231 U.S. 530, 539 (1913); Koekuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 127 (1922). The reason for such immunity, as stated by Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), is that "there can be no legal right as against the authority that makes the law on which the right depends." *See also The Western Maid*, 257 U.S. 419, 433 (1922). As the Housing Act does not purport to authorize suits against the United States as such, the question is whether the Authority—which is clearly an agency of the United States—partakes of this sovereign immunity. The answer must be sought in the intention of the Congress. Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 570 (1922); Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935). This involves a consideration of the extent to which other government-owned corporations have been held liable for their wrongful acts. 39 Ops. Atty. Gen. 559, 562 (1938).

[1012] 106 U.S. 196 (1882).

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ined the rule and the reasons for it, and limited its application accordingly.

Because suits against the United States can be maintained only by congressional consent, it follows that they can be brought only in the manner prescribed by Congress and subject to the restrictions imposed.[1013] As only Congress may waive the immunity of the United States from liability, officers of the United States are powerless either to waive such immunity or to confer jurisdiction on a federal court.[1014] Even when authorized, suits may be brought only in designated courts,[1015] and this rule applies equally to suits by states against the United States.[1016] Congress may also grant or withhold immunity from suit on behalf of government corporations.[1017]

Suits Against United States Officials.—*United States v. Lee*, a 5-to-4 decision, qualified earlier holdings that a judgment affecting the property of the United States was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court

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[1013] Lonergan v. United States, 303 U.S. 33 (1938). Waivers of immunity must be express. Library of Congress v. Shaw, 461 U.S. 273 (1983) (Civil Rights Act provision that "the United States shall be liable for costs the same as a private person" insufficient to waive immunity from awards of interest). The result in *Shaw* was overturned by a specific waiver. Civil Rights Act of 1991, Pub. L. 102–166, 106 Stat. 1079, § 113, amending 42 U.S.C. § 2000e–16. Immunity was waived, with limitations, for contracts and takings claims in the Tucker Act, 28 U.S.C. § 1346(a)(2). Immunity of the United States for the negligence of its employees was waived, again with limitations, in the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671–2680. Other waivers of sovereign immunity include Pub. L. 94–574, § 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (waiver for nonstatutory review in all cases save for suits for money damages); Pub. L. 87–748, § 1(a), 76 Stat. 744 (1962), 28 U.S.C. § 1361 (giving district courts jurisdiction of mandamus actions to compel an officer or employee of the United States to perform a duty owed to plaintiff); Westfall Act, 102 Stat. 4563, 28 U.S.C. § 2679(d) (torts of federal employees acting officially), and the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412 (making United States liable for awards of attorneys' fees in some instances when it loses an administrative proceeding or a lawsuit). *See* FDIC v. Meyer, 510 U.S. 471 (1994) (FSLIC's "sue-and-be-sued" clause waives sovereign immunity, but a *Bivens* implied cause of action for constitutional torts cannot be used directly against FSLIC).

[1014] United States v. New York Rayon Co., 329 U.S. 654 (1947).

[1015] United States v. Shaw, 309 U.S. 495 (1940). Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[1016] Minnesota v. United States, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a state to acquire a right of way over lands owned by the United States and held in trust for Indian allottees. *See also* Block v. North Dakota, 461 U.S. 273 (1983).

[1017] Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943).

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concluded that the rule "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiff when the United States is not a defendant or a necessary party to the suit."[1018] Except, nevertheless, for an occasional case like *Kansas v. United States*,[1019] which held that a state cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the government and would in effect be a suit against the United States.[1020] Even more significant is *Stanley v. Schwalby*,[1021] holding that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Subsequent cases reaffirm the rule of *United States v. Lee* that, where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[1022] On the other hand, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed.[1023] But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases,"[1024] and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free

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[1018] United States v. Lee, 106 U.S. 196, 207–208 (1882). The Tucker Act, 20 U.S.C. § 1346(a)(2), now displaces the specific rule of the case, as it provides jurisdiction against the United States for takings claims.

[1019] 204 U.S. 331 (1907).

[1020] Louisiana v. McAdoo, 234 U.S. 627, 628 (1914).

[1021] 162 U.S. 255 (1896). Justice Gray endeavored to distinguish between this case and *Lee*. Id. at 271. It was Justice Gray who spoke for the dissenters in *Lee*.

[1022] Land v. Dollar, 330 U.S. 731, 737 (1947).

[1023] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. Garfield, 211 U.S. 70 (1908); New Mexico v. Lane, 243 U.S. 52 (1917); Wells v. Roper, 246 U.S. 335 (1918); Morrison v. Work, 266 U.S. 481 (1925); Minnesota v. United States, 305 U.S.. 382 (1939); Mine Safety Co. v. Forrestal, 326 U.S. 371 (1945). *See also* Minnesota v. Hitchcock, 185 U.S. 373 (1902).

[1024] Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883), quoted by Chief Justice Vinson in the opinion of the Court in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

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from casuistry."[1025] Justice Douglas' characterization of *Land v. Dollar*, "this is the type of case where the question of *jurisdiction* is dependent on decision of the *merits*,"[1026] is frequently applicable.

Larson v. Domestic & Foreign Corp.,[1027] illuminates these obscurities somewhat. A private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his official capacity, acting under a valid statute and therefore a suit against the United States. It held that, although an officer in such a situation is not immune from suits for his own torts, his official action, though tortious, cannot be enjoined or diverted, because it is also the action of the sovereign.[1028] The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void."[1029] The Court rejected the conten-

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[1025] *Larson*, 337 U.S. at 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.

[1026] 330 U.S. 731, 735 (1947) (emphasis added).

[1027] 337 U.S. 682 (1949).

[1028] 337 U.S. at 689–97.

[1029] 337 U.S. at 701–02. This rule was applied in Goldberg v. Daniels, 231 U.S. 218 (1913), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. This suit was held to be against the United States. *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In *Larson*, the Court not only refused to follow Goltra v. Weeks, 271 U.S. 536 (1926), but in effect overruled it. *Goltra* involved an attempt of the government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass. Also decided in harmony with the *Larson* decision are the following, wherein the suit was barred as being against the United States: (1) Malone v. Bowdoin, 369 U.S. 643 (1962), a suit to eject a Forest Service Officer from land occupied by him in his official capacity under a claim of title from the United States; and (2) Hawaii v. Gordon, 373 U.S. 57 (1963), an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that state. In Dugan v. Rank, 372 U.S. 609 (1963), the Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an

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tion that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[1030]

Suits against officers involving the doctrine of sovereign immunity have been classified into four general groups by Justice Frankfurter. First, there are those cases in which the plaintiff seeks an interest in property which belongs to the government or calls "for an assertion of what is unquestionably official authority."[1031] Such suits, of course, cannot be maintained.[1032] Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable.[1033] Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are maintainable.[1034] Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort.[1035] This category of cases presents the greatest difficulties because these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

Suits Against Government Corporations.—The multiplication of government corporations during periods of war and depres-

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action against the United States, for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. Damages were recoverable in a suit under the Tucker Act. 28 U.S.C. § 1346(a).

[1030] 337 U.S. at 703–04. Justice Frankfurter, dissenting, would have applied the rule of the *Lee* case. *See* Pub. L. 94–574, 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (action seeking relief, except for money damages, against officer, employee, or agency not to be dismissed as action against United States).

[1031] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 709–710 (1949) (dissenting opinion).

[1032] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. McAdoo, 234 U.S. 627 (1914); Wells v. Roper, 246 U.S. 335 (1918). *See also* Belknap v. Schild, 161 U.S. 10 (1896); International Postal Supply Co. v. Bruce, 194 U.S. 601 (1904).

[1033] Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939) (holding that one threatened with direct and special injury by the act of an agent of the government under a statute may challenge the constitutionality of the statute in a suit against the agent).

[1034] Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Waite v. Macy, 246 U.S. 606 (1918).

[1035] United States v. Lee, 106 U.S. 196 (1882); Goltra v. Weeks, 271 U.S. 536 (1926); Ickes v. Fox, 300 U.S. 82 (1937); Land v. Dollar, 330 U.S. 731 (1947). *See also* Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). An emerging variant is the constitutional tort case, which springs from Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and which involves different standards of immunity for officers. Butz v. Economou, 438 U.S. 478 (1978); Carlson v. Green, 446 U.S. 14 (1980); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

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sion has provided one motivation for limiting the doctrine of sovereign immunity. In *Keifer & Keifer v. RFC*,[1036] the Court held that the government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance is a matter of ascertaining the congressional will. Moreover, it has been held that waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally.[1037] On the other hand, Indian nations are exempt from suit without further congressional authorization; it is as though their former immunity as sovereigns passed to the United States for their benefit, as did their tribal properties.[1038]

Suits Between Two or More States

The extension of federal judicial power to controversies between states and the vesting of original jurisdiction in the Supreme Court of suits to which a state is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation, Congress was made "the last resort on appeal" to resolve "all disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were *ad hoc* arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten states.[1039] It is hardly surprising, therefore, that during its first 60 years the only state disputes coming to the Supreme Court were boundary disputes[1040] or that such disputes constitute the largest single number of suits between states. Since 1900, however, as the result of the increasing mobility of population and wealth and the

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[1036] 306 U.S. 381 (1939).

[1037] FHA v. Burr, 309 U.S. 242 (1940). Nonetheless, the Court held that a congressional waiver of immunity in the case of a governmental corporation did not mean that funds or property of the United States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.

[1038] United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).

[1039] Warren, *The Supreme Court and Disputes Between States*, 34 Bull. of William and Mary, No. 4 (1940), 7–11. For a more comprehensive treatment of background as well as the general subject, *see* C. Warren, The Supreme Court and the Sovereign States (1924).

[1040] Id. at 13. However, only three such suits were brought in this period, 1789–1849. During the next 90 years, 1849–1939, at least twenty-nine such suits were brought. Id. at 13, 14.

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effects of technology and industrialization, other types of cases have occurred with increasing frequency.

Boundary Disputes: The Law Applied.—Of the earlier examples of suits between states, that between New Jersey and New York [1041] is significant for the application of the rule laid down earlier in *Chisholm v. Georgia* that the Supreme Court may proceed *ex parte* if a state refuses to appear when duly summoned. The long drawn out litigation between Rhode Island and Massachusetts is of even greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between states, yet it does not exclude any,[1042] that a boundary dispute is a justiciable and not a political question,[1043] and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice Baldwin stated: "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." [1044]

Modern Types of Suits Between States.—Beginning with *Missouri v. Illinois & Chicago District*,[1045] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have become an increasing source of suits between

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[1041] New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1931).

[1042] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[1043] 37 U.S. at 736–37.

[1044] 37 U.S. at 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Id. at 752–53. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two states, to which neither state is a party, does not come within the original jurisdiction of the Supreme Court. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799). For recent boundary cases, *see* United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985); United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); Georgia v. South Carolina, 497 U.S. 336 (1990); Mississippi v. Louisiana, 506 U.S. 73 (1992).

[1045] 180 U.S. 208 (1901).

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states. Such suits have been especially frequent in the western states,[1046] where water is even more of a treasure than elsewhere, but they have not been confined to any one region. In *Kansas v. Colorado*,[1047] the Court established the principle of the equitable division of river or water resources between conflicting state interests. In *New Jersey v. New York*,[1048] where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the saline contents of the Delaware, Justice Holmes stated for the Court: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be."[1049]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a state as the donee of the bonds of another to collect thereon,[1050] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former,[1051] by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas,[1052] of one state against another to enforce a contract between the two,[1053] of a suit in equity between states for the determination of a dece-

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[1046] *E.g.* Montana v. Wyoming, 563 U.S. ___, No. 137, Orig., slip op. (2011).

[1047] 206 U.S. 46 (1907). *See also* Idaho ex rel. Evans v. Oregon and Washington, 444 U.S. 380 (1980).

[1048] 283 U.S. 336 (1931).

[1049] 283 U.S. at 342. *See also* Nebraska v. Wyoming, 325 U.S. 589 (1945); Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983). In Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court held it had jurisdiction of a suit by a state against citizens of other states to abate a nuisance allegedly caused by the dumping of mercury into streams that ultimately run into Lake Erie, but it declined to permit the filing because the presence of complex scientific issues made the case more appropriate for first resolution in a district court. *See also* Texas v. New Mexico, 462 U.S. 554 (1983); Nevada v. United States, 463 U.S. 110 (1983).

[1050] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[1051] Virginia v. West Virginia, 220 U.S. 1 (1911).

[1052] Arkansas v. Texas, 346 U.S. 368 (1953).

[1053] Kentucky v. Indiana, 281 U.S. 163 (1930).

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dent's domicile for inheritance tax purposes,[1054] and of a suit by two states to restrain a third from enforcing a natural gas measure that purported to restrict the interstate flow of natural gas from the state in the event of a shortage.[1055]

In *Texas v. New Jersey*,[1056] the Court adjudicated a multistate dispute about which state should be allowed to escheat intangible property consisting of uncollected small debts held by a corporation. Emphasizing that the states could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and chose the one easiest to apply and least likely to lead to continuing disputes.

In general, in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term "controversies between two or more States" enunciated in *Rhode Island v. Massachusetts*,[1057] and fortified by Chief Justice Marshall's dictum in *Cohens v. Virginia*,[1058] concerning jurisdiction because of the parties to a case, that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."[1059]

Cases of Which the Court Has Declined Jurisdiction.—In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. In *Ala-*

[1054] Texas v. Florida, 306 U.S. 398 (1939). In California v. Texas, 437 U.S. 601 (1978), the Court denied a state leave to file an original action against another state to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that Texas v. Florida had either been wrongly decided or was questionable. But, after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, Cory v. White, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. California v. Texas, 457 U.S. 164 (1982).

[1055] Pennsylvania v. West Virginia, 262 U.S. 553 (1923). The Court, in Maryland v. Louisiana, 451 U.S. 725 (1981), over strong dissent, relied on this case in permitting suit contesting a tax imposed on natural gas, the incidence of which fell on the suing state's consuming citizens. And, in Wyoming v. Oklahoma, 502 U.S. 437 (1992), the Court permitted a state to sue another to contest a law requiring that all in-state utilities burn a mixture containing at least 10% in-state coal, the plaintiff state having previously supplied 100% of the coal to those utilities and thus suffering a loss of coal-severance tax revenues.

[1056] 379 U.S. 674 (1965). *See also* Pennsylvania v. New York, 406 U.S. 206 (1972).

[1057] 37 U.S. (12 Pet.) 657 (1838).

[1058] 19 U.S. (6 Wheat.) 264 (1821).

[1059] 19 U.S. at 378. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 79–80 (1961); Texas v. New Jersey, 379 U.S. 674, 677 (1965); Pennsylvania v. New York, 407 U.S. 206 (1972).

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bama v. Arizona,[1060] where Alabama sought to enjoin nineteen states from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between states will be exercised only when absolutely necessary, that the equity requirements in a suit between states are more exacting than in a suit between private persons, that the threatened injury to a plaintiff state must be of great magnitude and imminent, and that the burden on the plaintiff state to establish all the elements of a case is greater than the burden generally required by a petitioner seeking an injunction in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident trustees. In holding that the complaint presented no justiciable controversy, the Court declared that to constitute such a controversy, the complainant state must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to . . . the common law or equity systems of jurisprudence." [1061] The fact that the trust property was sufficient to satisfy the claims of both states and that recovery by either would not impair any rights of the other distinguished the case from *Texas v. Florida*,[1062] where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a state may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[1063] Moreover, Massa-

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[1060] 291 U.S. 286 (1934). The Court in recent years, with a significant caseload problem, has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. Arizona v. New Mexico, 425 U.S. 794 (1976) (dispute subject of state court case brought by private parties); California v. West Virginia, 454 U.S. 1027 (1981). But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the "uncompromising language" of 28 U.S.C. § 1251(a) giving the Court "original and *exclusive* jurisdiction" of these kinds of suits.

[1061] Massachusetts v. Missouri, 308 U.S. 1, 15–16, (1939), citing Florida v. Mellon, 273 U.S. 12 (1927).

[1062] 306 U.S. 398 (1939).

[1063] 308 U.S. at 17, citing Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277, 286 (1911), and Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 394 (1938). *See also* New Hampshire v. Louisiana and New York v. Louisiana, 108 U.S. 76 (1883), which held that a state cannot bring a suit on behalf of its citizens to collect on

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chusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.[1064] Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.

The Problem of Enforcement: Virginia v. West Virginia.—A very important issue in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits, this issue may not arise, and if it does, it may be easily met. Thus, a judgment putting a state in possession of disputed territory is ordinarily self-executing. But if the losing state should oppose execution, refractory state officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction may be enforced against state officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, that require a state in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the proportion of the state debt of original Virginia owed by West Virginia after its separate admission to the Union under a compact which provided that West Virginia assume a share of the debt.

The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally, in 1917, Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment.[1065] Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion,[1066] the Court proceeded to hold that it applied with the same force to states as to other litigants [1067] and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: "As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the Federal Govern-

bonds issued by another state, and Louisiana v. Texas, 176 U.S. 1 (1900), which held that a state cannot sue another to prevent maladministration of quarantine laws.

[1064] 308 U.S. at 17, 19.

[1065] The various decisions in Virginia v. West Virginia are found at 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918).

[1066] 246 U.S. at 591.

[1067] 246 U.S. at 600.

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ment, judicial, legislative, or executive, which may be appropriately exercised."[1068] The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term. Before that could occur, West Virginia accepted the Court's judgment and entered into an agreement with Virginia to pay it.[1069]

Enforcement Authority Includes Ordering Disgorgement and Reformation of Certain Agreements.—More recently, the Court, noting that proceedings under its original jurisdiction are "basically equitable," has taken the view that its enforcement authority encompasses ordering disgorgement of part of one state's gain from its breach of an interstate compact, as well as reforming certain agreements adopted by the states.[1070] In so doing, the Court emphasized that its enforcement authority derives both from its "inherent authority" to apportion interstate streams between states equitably and from Congress's approval of interstate compacts. As to its inherent authority, the Court noted that states bargain for water rights "in the shadow of" the Court's broad power to apportion them equitably and it is "difficult to conceive" that a state would agree to enter an agreement as to water rights if the Court lacked the power to enforce the agreement.[1071] The Court similarly reasoned that its remedial authority "gains still greater force" because a compact between the states, "having received Congress's blessing, counts as federal law."[1072] The Court stated, however, that an interstate compact's "legal status" as federal law could also limit the Court's enforcement power because the Court cannot order relief that is inconsistent with a compact's express terms.[1073]

[1068] 246 U.S. at 601.

[1069] C. Warren, The Supreme Court and Sovereign States 78–79 (1924).

[1070] Kansas v. Nebraska, 574 U.S. ___, No. 126, Orig., slip op. at 14–17 (2015). Equity is "the system of law or body of principles originating in the English Court of Chancery." Black's Law Dictionary 656 (10th ed. 2014). Persons who sought equitable relief "sought to do justice in cases for which there was no adequate remedy at common law," A.H. Manchester, Modern Legal History of England and Wales, 1750–1950 135–36 (1980), i.e., cases in which the English courts of law could afford no relief to a plaintiff. While eventually courts of law and courts providing equitable relief merged into a single court in most jurisdictions, an equitable remedy refers to a remedy that equity courts would have historically granted. *See* 1 Dan B. Dobbs, Dobbs Law Of Remedies: Damages—Equity—Restitution § 2.1(2), at 59–61 (2d ed. 1993). Compensatory damages are a classic "legal" remedy, whereas an injunction is a classic "equitable" remedy. *See* Richard L. Hasen, Remedies 141 (2d ed. 2010).

[1071] *See Kansas*, slip op. at 8 (quoting Texas v. New Mexico, 462 U.S. 554, 567 (1983)).

[1072] *Id.*

[1073] *Id.*

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Controversies Between a State and Citizens of Another State

The decision in *Chisholm v. Georgia*[1074] that cases "between a state and citizens of another state" included those where a state was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a state and citizens of another state have included only those cases where the state has been a party plaintiff or has consented to be sued.[1075] As a party plaintiff, a state may bring actions against citizens of other states to protect its legal rights or in some instances as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which simultaneously comes within its original jurisdiction, by perhaps an even more rigorous application of the concepts of cases and controversies than that in cases between private parties.[1076] This it does by holding rigorously to the rule that all the party defendants be citizens of other states[1077] and by adhering to congressional distribution of its original jurisdiction concurrently with that of other federal courts.[1078]

Jurisdiction Confined to Civil Cases.—In *Cohens v. Virginia*,[1079] there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a state and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show that the corporation against which the suit was brought was chartered in another state.[1080] Subsequently, the Court has ruled that it will not entertain an action by a state to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them.[1081] In his dictum in *Cohens v. Virginia*, Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by states to enforce their penal laws.[1082] Sixty-seven years later, the Court wrote this dictum into law in *Wis-*

[1074] 2 U.S. (2 Dall.) 419 (1793).

[1075] *See* the discussion under the Eleventh Amendment.

[1076] Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); New Jersey v. Sargent, 269 U.S. 328 (1926).

[1077] Pennsylvania v. Quicksilver Co., 77 U.S. (10 Wall.) 553 (1871); California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[1078] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1079] 19 U.S. (6 Wheat.) 264, 398–99 (1821).

[1080] Pennsylvania v. Quicksilver Mining Co., 77 U.S. (10 Wall.) 553 (1871).

[1081] California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[1082] 19 U.S. (6 Wheat.) at 398–99.

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consin v. Pelican Ins. Co.[1083] Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789, which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a state is a party, and partly on Justice Iredell's dissent in *Chisholm v. Georgia*,[1084] where he confined the term "controversies" to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[1085]

The State's Real Interest.—Ordinarily, a state may not sue in its name unless it is the real party in interest with real interests. It can sue to protect its own property interests,[1086] and if it sues for its own interest as owner of another state's bonds, rather than as an assignee for collection, jurisdiction exists.[1087] Where a state, in order to avoid the limitation of the Eleventh Amendment, provided by statute for suit in the name of the state to collect on the bonds of another state held by one of its citizens, it was refused the right to sue.[1088] Nor can a state sue the citizens of other states on behalf of its own citizens to collect claims.[1089]

The State as Parens Patriae.—The distinction between suits brought by states to protect the welfare of their citizens as a whole and suits to protect the private interests of individual citizens is not easily drawn. Thus, in *Oklahoma v. Atchison, T. & S.F. Ry.*,[1090] the state was refused permission to sue to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, because the state was not engaged in shipping these commodities and had no proprietary interest in them. But, in *Georgia v. Pennsylvania R.Co.*,[1091] a closely divided Court accepted a suit by the state, suing as *parens patriae* and in its proprietary capacity—the latter being treated by the Court as something of a makeweight—seeking injunctive relief against 20 railroads on allegations that the rates were discriminatory against the state and its citizens and their economic interests and that the rates had been fixed through coercive

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[1083] 127 U.S. 265 (1888).

[1084] 2 U.S. (2 Dall.) 419, 431–32 (1793).

[1085] 127 U.S. at 289–300.

[1086] Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. (13 How.) 518, 559 (1852); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Georgia v. Evans, 316 U.S. 159 (1942).

[1087] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[1088] New Hampshire v. Louisiana, 108 U.S. 76 (1883).

[1089] Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938).

[1090] 220 U.S. 277 (1911).

[1091] 324 U.S. 439 (1945).

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action by the northern roads against the southern lines in violation of the Clayton Antitrust Act. For the Court, Justice Douglas observed that the interests of a state for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are proprietary but rather "embrace the so called 'quasi-sovereign' interests which . . . are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" [1092]

Discriminatory freight rates, the Justice continued, may cause a blight no less serious than noxious gases in that they may arrest the development of a state and put it at a competitive disadvantage. "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction." [1093]

The continuing vitality of this case is in some doubt, as the Court has limited it in a similar case.[1094] But the ability of states to act as *parens patriae* for their citizens in environmental pollution cases seems established, although as a matter of the Supreme Court's original jurisdiction such suits are not in favor.[1095]

[1092] 324 U.S. at 447–48 (quoting from Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), in which the state was permitted to sue as *parens patriae* to enjoin the defendant from emitting noxious gases from its works in Tennessee which caused substantial damage in nearby areas of Georgia). In Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607–08 (1982), the Court attempted to enunciate the standards by which to recognize permissible *parens patriae* assertions. *See also* Maryland v. Louisiana, 451 U.S. 725, 737–39 (1981).

[1093] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 468 (1945). Chief Justice Stone and Justices Roberts, Frankfurter, and Jackson dissented.

[1094] In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court, five-to-two, held that the state could not maintain an action for damages *parens patriae* under the Clayton Act and limited the previous case to instances in which injunctive relief is sought. Hawaii had brought its action in federal district court. The result in *Hawaii* was altered by Pub. L. 94–435, 90 Stat. 1383 (1976), 15 U.S.C. §§ 15c *et seq.*, but the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), reduced the significance of the law.

[1095] Most of the cases, *but see* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), concern suits by one state against another. Missouri v. Illinois, 180 U.S. 208 (1901); New York v. New Jersey, 256 U.S. 296 (1921); North Dakota v. Minnesota, 263 U.S. 365 (1923). Although recognizing that original jurisdiction exists when a state sues a political subdivision of another state or a private party as *parens patriae* for its citizens and on its own proprietary interests to abate environmental pollu-

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One clear limitation had seemed to be solidly established until later litigation cast doubt on its foundation. It is no part of a state's "duty or power," said the Court in *Massachusetts v. Mellon*,[1096] "to enforce [its citizens'] rights in respect to their relations with the Federal Government. In that field, it is the United States and not the state that represents them as *parens patriae* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." But, in *South Carolina v. Katzenbach*,[1097] while holding that the state lacked standing under *Massachusetts v. Mellon* to attack the constitutionality of the Voting Rights Act of 1965 [1098] under the Fifth Amendment's Due Process Clause and under the Bill of Attainder Clause of Article I,[1099] the Court decided on the merits the state's claim that Congress had exceeded its powers under the Fifteenth Amendment.[1100] Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion that is contrary to a number of supposedly venerated cases? [1101] Either possibility would be significant in a number of respects.[1102]

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tion, the Court has held that, because of the technical complexities of the issues and the inconvenience of adjudicating them on its original docket, the cases should be brought in federal district court under federal question jurisdiction founded on the federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Washington v. General Motors Corp., 406 U.S. 109 (1972). The Court had earlier thought the cases must be brought in state court. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

[1096] 262 U.S. 447, 486 (1923).

[1097] 383 U.S. 301 (1966). The state sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Oregon v. Hitchcock, 202 U.S. 60 (1906); Kansas v. United States, 204 U.S. 331 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a state by suing its officers. *Ex parte* Young, 209 U.S. 123 (1908).

[1098] 79 Stat. 437 (1965), 42 U.S.C. §§ 1973 *et seq*.

[1099] The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a state. It then added: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parents patriae of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[1100] The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court noted that "[o]riginal jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. *See* Georgia v. Pennsylvania R. Co., 324 U.S. 439." 383 U.S. at 307. But surely this did not refer to that case's *parens patriae* holding.

[1101] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944). *See especially* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). In Oregon v. Mitchell, 400 U.S. 112 (1970), four original actions

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Controversies Between Citizens of Different States

The records of the Federal Convention are silent on why the Framers included controversies between citizens of different states among the judicial power of the United States,[1103] but Congress has given "diversity jurisdiction" in one form or another to the federal courts since the Judiciary Act of 1789.[1104] The traditional explanation remains that offered by Chief Justice Marshall. "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."[1105] Other explanations have been offered and controverted,[1106] but diversity cases constitute a large bulk of cases on the dockets of the federal courts today, though serious proposals for restricting access to federal courts

were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. South Carolina v. Katzenbach was uniformly relied on by all parties as decisive of the jurisdictional question, and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id. at 117 n.1. *See also* id. at 152 n.1 (Justice Harlan concurring in part and dissenting in part); South Carolina v. Baker, 485 U.S. 505 (1988); South Carolina v. Regan, 465 U.S. 367 (1984).

[1102] Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 80–93.

[1103] Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928).

[1104] 1 Stat. 78, 11. The statute also created alienage jurisdiction of suits between a citizen of a state and an alien. *See* Holt, *The Origins of Alienage Jurisdiction*, 14 Okla. City L. Rev. 547 (1989). Early versions of the statute conferred diversity jurisdiction only when the suit was between a citizen of the state in which the suit was brought and a citizen of another state. The Act of March 3, 1875, § 1. 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1), merely requiring diverse citizenship, so that a citizen of Maryland could sue a citizen of Delaware in federal court in New Jersey. The statute also sets a threshold amount at controversy for jurisdiction to attach; the jurisdictional amount was as low as $3,000 in 1958, but set at $75,000 in 1996. 28 U.S.C. § 1332(a). Snyder v. Harris, 394 U.S. 332 (1969), held that in a class action in diversity the individual claims could not be aggregated to meet the jurisdictional amount. Zahn v. International Paper Co., 414 U.S. 291 (1974), extended *Snyder* in holding that even though the named plaintiffs had claims of more than $10,000, the extant jurisdictional amount, they could not represent a class in which many of the members had claims for less than $10,000. A separate provision on diversity and class actions sets the jurisdictional amount at $5 million. 28 U.S.C. § 1332(d).

[1105] Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61, 87 (1809).

[1106] Summarized and discussed in C. Wright, Handbook of the Law of Federal Courts 23 (4th ed. 1983); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 99–110, 458–464 (1969).

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in such cases have been before Congress for some time.[1107] The essential difficulty with this type of jurisdiction is that it requires federal judges to decide issues of local import on the basis of their reading of how state judges would decide them, an oftentimes laborious process, which detracts from the time and labor needed to resolve issues of federal import.

The Meaning of "State" and the District of Columbia Problem.—In *Hepburn v. Ellzey*,[1108] Chief Justice Marshall for the Court confined the meaning of the word "state" as used in the Constitution to "the members of the American confederacy" and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. Marshall noted that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration." [1109] The same rule was subsequently applied to citizens of the territories of the United States.[1110]

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Not until 1940, however, did Congress attempt to meet the problem by statutorily conferring on federal district courts jurisdiction of civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory." [1111] In *National Mutual Ins. Co. v. Tidewater Transfer Co.*,[1112] this act was upheld in a five-to-four decision but for widely divergent reasons by a coalition of Justices. Two Justices thought that Chief Justice Marshall's 1804 decision should be overruled, but the other seven Justices disagreed; however, three of the seven thought the statute could be sustained under Congress's power to enact legislation for the inhabitants of the District of Columbia, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied on, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination," [1113] means that *Hepburn v. Ellzey* is still good law insofar as it holds that the District of Columbia is not a state, but

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[1107] The principal proposals are those of the American Law Institute. Id. at 123–34.

[1108] 6 U.S. (2 Cr.) 445 (1805).

[1109] 6 U.S. at 453.

[1110] City of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816).

[1111] 54 Stat. 143 (1940), as revised, 28 U.S.C. § 1332(d).

[1112] 337 U.S. 582 (1948).

[1113] 337 U.S. at 655 (Justice Frankfurter dissenting).

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is overruled insofar as it holds that District citizens may not use federal diversity jurisdiction.[1114]

Citizenship of Natural Persons.—For purposes of diversity jurisdiction, state citizenship is determined by the concept of domicile [1115] rather than of mere residence.[1116] That is, while the Court's definition has varied throughout the cases,[1117] a person is a citizen of the state in which he has his true, fixed, and permanent home and principal establishment and to which he intends to return whenever he is absent from it.[1118] Acts may disclose intention more clearly and decisively than declarations.[1119] One may change his domicile in an instant by taking up residence in the new place and by intending to remain there indefinitely and one may obtain the benefit of diversity jurisdiction by so changing for that reason alone,[1120] provided the change is more than a temporary expedient.[1121]

If the plaintiff and the defendant are citizens of different states, diversity jurisdiction exists regardless of the state in which suit is brought.[1122] Chief Justice Marshall early established that in multiparty litigation, there must be complete diversity, that is, that no party on one side could be a citizen of any state of which any party on the other side was a citizen.[1123] It has now apparently been decided that this requirement flows from the statute on diversity rather than from the constitutional grant and that therefore minimal diversity is sufficient.[1124] The Court has also placed some issues be-

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[1114] The statute's provision allowing citizens of Puerto Rico to sue in diversity was sustained in Americana of Puerto Rico v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), under Congress's power to make rules and regulations for United States territories. *Cf.* Examining Bd. v. Flores de Otero, 426 U.S. 572, 580–597 (1976) (discussing congressional acts with respect to Puerto Rico).

[1115] Chicago & N.W.R.R. v. Ohle, 117 U.S. 123 (1886).

[1116] Sun Printing & Pub. Ass'n v. Edwards, 194 U.S. 377 (1904).

[1117] Knox v. Greenleaf, 4 U.S. (4 Dall.) 360 (1802); Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848); Williamson v. Osenton, 232 U.S. 619 (1914).

[1118] Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

[1119] Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848).

[1120] Williamson v. Osenton, 232 U.S. 619 (1914).

[1121] Jones v. League, 59 U.S. (18 How.) 76 (1855).

[1122] 28 U.S.C. § 1332(a)(1).

[1123] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1124] In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530–31 (1967), holding that congressional provision in the interpleader statute of minimal diversity, 28 U.S.C. § 1335(a)(1), was valid, the Court said of *Strawbridge*, "Chief Justice Marshall there purported to construe only 'The words of the act of Congress,' not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." Of course, the diversity jurisdictional statute not having been changed, complete diversity of citizenship, outside the interpleader situation, is still required. In class actions, only the citizenship of the named representatives is considered and other members of the class can be citizens of the same state as one or more of the

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yond litigation in federal courts in diversity cases, apparently solely on policy grounds.[1125]

Citizenship of Corporations.—In *Bank of the United States v. Deveaux*,[1126] Chief Justice Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." Nevertheless, the Court upheld diversity jurisdiction in the case because the members of the bank as a corporation were citizens of one state and Deveaux was a citizen of another. The holding that corporations were citizens of the states where their stockholders lived was reaffirmed a generation later,[1127] but pressures were building for change. While corporations were assuming an ever more prominent economic role, the *Strawbridge* rule, which foreclosed diversity suits if any plaintiff had common citizenship with any defendant,[1128] was working to close the doors of the federal courts to corporations with stockholders in many states.

Deveaux was overruled in 1844, when, after elaborate argument, a divided Court held that "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." [1129] Ten years later, the Court abandoned this rationale, but it achieved the same result by "indulg[ing] in the fiction that, although a corporation was not itself a citizen for diversity purposes, its shareholders would be conclusively presumed citizens of the incorporating State." [1130] "State of incorporation" remained the guiding rule for determining the place of corporate citizenship until Congress amended the jurisdictional statute in 1958. Concern over growing

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parties on the other side. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Snyder v. Harris, 394 U.S. 332, 340 (1969).

[1125] In domestic relations cases and probate matters, the federal courts will not act, though diversity exists. Barber v. Barber, 62 U.S. (21 How.) 582 (1858); *Ex parte* Burrus, 136 U.S. 586 (1890); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1875). These cases merely enunciated the rule, without justifying it; when the Court squarely faced the issue quite recently, it adhered to the rule, citing justifications. Ankenbrandt v. Richards, 504 U.S. 689 (1992).

[1126] 9 U.S. (5 Cr.) 61, 86 (1809).

[1127] Commercial & Railroad Bank v. Slocomb, 39 U.S. (14 Pet.) 60 (1840).

[1128] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1129] Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

[1130] United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965), citing Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314 (1854). *See* Muller v. Dows, 94 U.S. 444 (1877); St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896); Carden v. Arkoma Associates, 494 U.S. 185, 189 (1990).

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dockets and companies incorporating in states of convenience then led to a dual citizenship rule whereby "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[1131] The right of foreign corporations to resort to federal courts in diversity is not one that the states may condition as a qualification for doing business in the state.[1132]

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same privilege as a corporation; the actual citizenship of each of its members must be considered in determining whether diversity exists.[1133]

Manufactured Diversity.—A litigant who, because of diversity of citizenship, can choose whether to sue in state or federal court, will properly consider where the advantages and disadvantages balance, and if diversity is lacking, a litigant who perceives the balance to favor the federal forum will sometimes attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.[1134] One could create diversity by a *bona fide* change of domicile even with the sole motive of creating

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[1131] 28 U.S.C. § 1332(c)(1). In Hertz Corp. v. Friend, 559 U.S. ___, No. 08–1107, slip op. (2010), the Court recounted the development of the rules on corporate jurisdictional citizenship in deciding that a corporation's "principal place of business" under the statute is its "nerve center," the place where the corporation's officers direct, control, and coordinate the corporation's activities.

The jurisdictional statute additionally deems the place of an insured's citizenship as an additional place of citizenship of an insurer being sued in a direct action case.

[1132] In Terral v. Burke Constr. Co., 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute that required the cancellation of the license of a foreign corporation to do business in the state upon notice that the corporation had removed a case to a federal court.

[1133] Chapman v. Barney, 129 U.S. 677 (1889); Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Thomas v. Board of Trustees, 195 U.S. 207 (1904); United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Carden v. Arkoma Associates, 494 U.S. 185 (1990). *But compare* People of Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), distinguished in *Carden*, 494 U.S. at 189–190, and Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980), distinguished in *Carden*, 494 U.S. at 191–192.

[1134] Ch. XIX, § 11, 1 Stat. 78, sustained in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *See* Kramer v. Caribbean Mills, 394 U.S. 823 (1969).

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domicile.[1135] Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.[1136] Most attempts to manufacture or create diversity have involved corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another state,[1137] and for a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.[1138] But, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[1139] it became highly important to the plaintiff company to bring its suit in federal court rather than in a state court. Thus, Black & White, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation; the only change made was the state of incorporation, the name, officers, shareholders, and location of the business remaining the same. A majority of the Court, over a strong dissent by Justice Holmes,[1140] saw no collusion and upheld diversity, meaning that the company won whereas it would have lost had it sued in the state court. *Black & White Taxicab* probably more than anything led to a reexamination of the decision on the choice of law to be applied in diversity litigation.

The Law Applied in Diversity Cases.—By virtue of § 34 of the Judiciary Act of 1789,[1141] state law expressed in constitutional and statutory form was regularly applied in federal courts in diversity actions to govern the disposition of such cases. But, in *Swift v. Tyson*,[1142] Justice Story for the Court ruled that state court decisions were not laws within the meaning of § 34 and though entitled to respect were not binding on federal judges, except with regard to matters of a "local nature," such as statutes and interpretations

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[1135] Williamson v. Osenton, 232 U.S. 619 (1914); Morris v. Gilmer, 129 U.S. 315 (1889).

[1136] Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

[1137] Miller & Lux v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908).

[1138] *E.g.*, Southern Realty Co. v. Walker, 211 U.S. 603 (1909).

[1139] 276 U.S. 518 (1928).

[1140] 276 U.S. at 532 (joined by Justices Brandeis and Stone). Justice Holmes here presented his view that Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), had been wrongly decided, but he preferred not to overrule it, merely "not allow it to spread . . . into new fields." 276 U.S. at 535.

[1141] The section provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. With only insubstantial changes, the section now appears as 28 U.S.C. § 1652. For a concise review of the entire issue, *see* C. Wright, Handbook of the Law of Federal Courts ch. 9 (4th ed. 1983).

[1142] 41 U.S. (16 Pet.) 1 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

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thereof pertaining to real estate and other immovables, in contrast to questions of general commercial law as to which the answers were dependent not on "the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[1143] The course of decision over the period of almost one hundred years was toward an expansion of the areas in which federal judges were free to construct a federal common law and a concomitant contraction of the definition of "local" laws.[1144] Although dissatisfaction with *Swift v. Tyson* was almost always present, within and without the Court,[1145] it was the Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[1146] that brought

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[1143] 41 U.S. at 19. The Justice concluded this portion of the opinion: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Nun erit alia lex Romae, alia Athenis; alia munc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtenebit.*" Id. The thought that the same law should prevail in Rome as in Athens was used by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a modern use, *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); 380 F.2d 385, 398 (5th Cir. 1967) (dissenting opinion).

[1144] The expansions included Lane v. Vick, 44 U.S. (3 How.) 464 (1845) (wills); City of Chicago v. Robbins, 67 U.S. (2 Bl.) 418 (1862), and Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (torts); Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870) (real estate titles and rights of riparian owners); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (mineral conveyances); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contracts); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893). It was strongly contended that uniformity, the goal of Justice Story's formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 CORNELL L.Q. 499, 529 n.150 (1928). Moreover, the Court held that, although state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision, Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847), or if they had been rendered after the case had been tried in federal court, Burgess v. Seligman, 107 U.S. 20 (1883), thus promoting lack of uniformity. *See also* Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Pease v. Peck, 59 U.S. (18 How.) 595 (1856); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856).

[1145] Extensions of the scope of *Tyson* frequently were rendered by a divided Court over the strong protests of dissenters. *E.g.*, Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Lane v. Vick, 44 U.S. (3 How.) 463 (1845); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). In Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401–04 (1893), Justice Field dissented in an opinion in which he expressed the view that Supreme Court disregarding of state court decisions was unconstitutional, a view endorsed by Justice Holmes in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

[1146] 276 U.S. 518 (1928). B. & W. had contracted with a railroad to provide exclusive taxi service at its station. B. & Y. began operating taxis at the same station and B. & W. wanted to enjoin the operation, but it was a settled rule by judicial decision in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, B. & W. dissolved itself in Ken-

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disagreement to the strongest point and perhaps precipitated the overruling of *Swift v. Tyson* in *Erie Railroad Co. v. Tompkins*.[1147]

"It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the Federal Government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government."[1148] *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned; it reached a constitutional decision when a statutory interpretation was available though perhaps less desirable; and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.[1149]

Tompkins was injured by defendant's train while he was walking along the tracks. He was a citizen of Pennsylvania, and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that, because he was a trespasser, the defendant owned him only a duty not to injure him through wanton or willful misconduct;[1150] the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by "local" law within the meaning of *Swift v. Tyson*. Justice Brandeis for himself and four other Justices, however, chose to overrule the early case.

First, it was argued that *Tyson* had failed to bring about uniformity of decision and that its application discriminated against citi-

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tucky and reincorporated in Tennessee, solely in order to create diversity of citizenship and enable itself to sue in federal court. It was successful and the Supreme Court ruled that diversity was present and that the injunction should issue. In Mutual Life Ins. Co. v. Johnson, 293 U.S. 335 (1934), the Court, in an opinion by Justice Cardozo, appeared to retreat somewhat from its extensions of *Tyson*, holding that state law should be applied, through a "benign and prudent comity," in a case "balanced with doubt," a concept first used by Justice Bradley in Burgess v. Seligman, 107 U.S. 20 (1883).

[1147] 304 U.S. 64 (1938). Judge Friendly has written: "Having served as the Justice's [Brandeis'] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved." H. Friendly, Benchmarks 20 (1967).

[1148] C. Wright, Handbook of the Law of Federal Courts 355 (4th ed. 1983). *See* Judge Friendly's exposition, *In Praise of Erie—And of the New Federal Common Law*, in H. Friendly, Benchmarks 155 (1967).

[1149] 304 U.S. at 157–64, 171 n.71.

[1150] This result was obtained in retrial in federal court on the basis of Pennsylvania law. Tompkins v. Erie Railroad Co., 98 F.2d 49 (3d Cir. 1938), *cert. denied*, 305 U.S. 637 (1938).

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zens of a state by noncitizens. Justice Brandeis cited recent researches[1151] indicating that § 34 of the 1789 Act included court decisions in the phrase "laws of the several States." "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."[1152] For a number of reasons, it would not have been wise to have overruled *Tyson* on the basis of arguable new discoveries.[1153]

Second, the decision turned on the lack of power vested in Congress to prescribe rules for federal courts in state cases. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts."[1154] But having said

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[1151] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 72–73 (1938), citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 84–88 (1923). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 353 (4th ed. 1983).

[1152] 304 U.S. at 77–78 (footnote citations omitted).

[1153] Congress had re-enacted § 34 as § 721 of the Revised Statutes, citing Swift v. Tyson in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute was unconstitutional. 304 U.S. at 79–80. *See* H. FRIENDLY, BENCHMARKS 161–163 (1967). Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. "Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect."

"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. [Here, the Justice footnotes: 'For reasons that would take us too far afield to discuss, Erie Railroad Co. v. Tompkins, 304 U.S. 64, is no exception.'] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." Romero v. International Terminal Operating Co., 358 U.S. 354, 370–371 (1959).

[1154] 304 U.S. at 78. Justice Brandeis does not argue the constitutional issue and does not cite either provisions of the Constitution or precedent beyond the views of Justices Holmes and Field. Id. at 78–79. Justice Reed thought that Article III and the Necessary and Proper Clause might contain authority. Id. at 91–92 (Justice Reed concurring in the result). For a formulation of the constitutional argument in favor of the Brandeis position, *see* H. FRIENDLY, BENCHMARKS 167–171 (1967). *See also* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202, 208 (1956); Hanna v. Plumer, 380 U.S. 460, 471–472 (1965).

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this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." [1155]

Third, the rule of *Erie* replacing *Tyson* is that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." [1156]

Since 1938, the effect of *Erie* has first increased and then diminished, as the nature of the problems presented changed. Thus, the Court at first indicated that not only were the decisions of the highest court of a state binding on a federal diversity court, but also decisions of intermediate appellate courts [1157] and courts of first instance,[1158] even where the decisions bound no other state judge except as they were persuasive on their merits. It has now retreated from this position, concluding that federal judges are to give careful consideration to lower state court decisions and to old, perhaps outmoded decisions, but that they must find for themselves the state law if the state's highest court has not spoken definitively within a period that would raise no questions about the continued viability of the decision.[1159] In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision, and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the state's highest court in the meantime has changed the applicable law.[1160] In diversity cases that present conflicts of law problems, the Court has reiterated that the district court is to apply the law of the state in

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[1155] 304 U.S. at 79–80.

[1156] 304 U.S. at 78. *Erie* applies in equity as well as in law. Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

[1157] West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940).

[1158] Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

[1159] King v. Order of Commercial Travelers of America, 333 U.S. 153 (1948); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions since there were "no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . . , no legislative development that promises to undermine the judicial rule"). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

[1160] Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Huddleston v. Dwyer, 322 U.S. 232 (1944); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

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which it sits, so that in a case in State A in which the law of State B is applicable, perhaps because a contract was made there or a tort was committed there, the federal court is to apply State A's conception of State B's law.[1161]

The greatest difficulty in applying the *Erie* doctrine has been in cases in which issues of procedure were important.[1162] The process was initiated in 1945 when the Court held that a state statute of limitations, which would have barred suit in state court, would bar it in federal court, although as a matter of federal law the case still could have been brought in federal court.[1163] The Court regarded the substance-procedure distinction as immaterial. "[S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." [1164] The standard to be applied was compelled by the "intent" of *Erie*, which "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." [1165] The Court's application of this standard created substantial doubt that the Federal Rules of Civil Procedure had any validity in diversity cases.[1166]

[1161] Klaxon Co. v. Stentor Manufacturing Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

[1162] Interestingly enough, 1938 marked what seemed to be a switching of positions *vis-a-vis* federal and state courts of substantive law and procedural law. Under *Tyson*, federal courts in diversity actions were free to formulate a federal common law, while they were required by the Conformity Act, § 5, 17 Stat. 196 (1872), to conform their procedure to that of the state in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided. 302 U.S. 783.

[1163] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[1164] 326 U.S. at 108–09.

[1165] 326 U.S. at 109.

[1166] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding applicable in federal court); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state statute barring foreign corporation not qualified to do business in the state applies in federal court); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (state rule determinative when an action is begun for purposes of statute of limitations applicable in federal court although a Federal Rule of Civil Procedure states a different rule).

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But, in two later cases, the Court contracted the application of *Erie* in matters governed by the Federal Rules. Thus, in the earlier case, the Court said that "outcome" was no longer the sole determinant and countervailing considerations expressed in federal policy on the conduct of federal trials should be considered; a state rule making it a question for the judge rather than a jury of a particular defense in a tort action had to yield to a federal policy enunciated through the Seventh Amendment of favoring juries.[1167] Some confusion has been injected into consideration of which law to apply—state or federal—in the absence of a federal statute or a Federal Rule of Civil Procedure.[1168] In an action for damages, the federal courts were faced with the issue of the application either of a state statute, which gave the appellate division of the state courts the authority to determine if an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation, or of a federal judicially created practice of review of awards as so exorbitant that it shocked the conscience of the court. The Court determined that the state statute was both substantive and procedural, which would result in substantial variations between state and federal damage awards depending whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts,[1169] rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply.[1170] Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the Federal Government to determine how its courts are to be operated."[1171] Additional decisions will be required to determine which approach, if either, prevails. The latter ruling simplified the matter greatly. *Erie* is not to be the proper test when the question is the application of one of the Rules of Civil Procedure; if the rule is valid when measured against the Enabling Act and the Constitution, it is to be applied regardless of state law to the contrary.[1172]

[1167] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[1168] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.

[1169] *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[1170] *E.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[1171] 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4511, at 311 (2d ed. 1996).

[1172] Hanna v. Plumer, 380 U.S. 460 (1965).

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Although it seems clear that *Erie* applies in nondiversity cases in which the source of the right sued upon is state law,[1173] it is equally clear that *Erie* is not applicable always in diversity cases whether the nature of the issue be substantive or procedural. Thus, it may be that there is an overriding federal interest which compels national uniformity of rules, such as a case in which the issue is the appropriate rule for determining the liability of a bank which had guaranteed a forged federal check,[1174] in which the issue is the appropriate rule for determining whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his services[1175] and in which the issue is the appropriate rule for determining the validity of a defense raised by a federal officer sued for having libeled one in the course of his official duties.[1176] In such cases, when the issue is found to be controlled by federal law, common or otherwise, the result is binding on state courts as well as on federal.[1177] Despite, then, Justice Brandeis' assurance that there is no "federal general common law," there is a common law existing and developing in the federal courts, even in diversity cases, which will sometimes control decision.[1178]

[1173] Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956). The contrary view was implied in Levinson v. Deupree, 345 U.S. 648, 651 (1953), and by Justice Jackson in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 466–67, 471–72 (1942) (concurring opinion). *See* Wichita Royalty Co. v. City National Bank, 306 U.S. 103 (1939).

[1174] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* National Metropolitan Bank v. United States, 323 U.S. 454 (1945); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); United States v. Standard Rice Co., 323 U.S. 106 (1944); United States v. Acri, 348 U.S. 211 (1955); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956). *But see* United States v. Yazell, 382 U.S. 341 (1966). *But see* O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

[1175] United States v. Standard Oil Co., 332 U.S. 301 (1947). Federal law applies in maritime tort cases brought on the "law side" of the federal courts in diversity cases. Pope & Talbot v. Hawn, 346 U.S. 406 (1953).

[1176] Howard v. Lyons, 360 U.S. 593 (1959). Matters concerned with our foreign relations also are governed by federal law in diversity. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Federal common law also governs a government contractor defense in certain cases. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[1177] Free v. Bland, 369 U.S. 663 (1962); Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

[1178] The quoted Brandeis phrase is in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). On the same day *Erie* was decided, the Court, in an opinion by Justice Brandeis, held that the issue of apportionment of the waters of an interstate stream between two states "is a question of 'federal common law.'" Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). On the matter, *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

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Controversies Between Citizens of the Same State Claiming Land Under Grants of Different States

The genesis of this clause was in the report of the Committee of Detail which vested the power to resolve such land disputes in the Senate,[1179] but this proposal was defeated in the Convention,[1180] which then added this clause to the jurisdiction of the federal judiciary without reported debate.[1181] The motivation for this clause was the existence of boundary disputes affecting ten sates at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the states, this clause, never productive of many cases, became obsolete.[1182]

Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens, or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the law of nations, a foreign state is immune from suit in the federal courts without its consent,[1183] an immunity which extends to suits brought by states of the American Union.[1184] Conversely, the Eleventh Amendment has been construed to bar suits by foreign states against a state of the United States.[1185] Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a state against citizens or subjects of foreign states, by foreign states against American citizens, citizens of a state against the citizens or subjects of a foreign state, and by aliens against citizens of a state.[1186]

[1179] 2 M. Farrand, supra at 162, 171, 184.

[1180] Id. at 400–401.

[1181] Id. at 431.

[1182] *See* Pawlet v. Clark, 13 U.S. (9 Cr.) 292 (1815). *Cf.* City of Trenton v. New Jersey, 262 U.S. 182 (1923).

[1183] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).

[1184] Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[1185] 292 U.S. at 330.

[1186] But, in the absence of a federal question, there is no basis for jurisdiction between the subjects of a foreign state. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, Pub. L. 94–538, 90 Stat. 2891, amending various sections of title 28 U.S.C., comprehensively provided jurisdictional bases for suits by and against foreign states and appears as well to comprehend suits by an alien against a foreign state which would be beyond the constitutional grant. However, in the only case in which that matter has been an issue before it, the Court has construed the Act as creating a species of federal question jurisdiction. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

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Suits by Foreign States.—The privilege of a recognized foreign state to sue in the courts of another state upon the principle of comity is recognized by both international law and American constitutional law.[1187] To deny a sovereign this privilege "would manifest a want of comity and friendly feeling."[1188] Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign state.[1189] As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit.[1190] Once a foreign government avails itself of the privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.[1191] The rule that a foreign nation instituting a suit in a federal district court cannot invoke sovereign immunity as a defense to a counterclaim growing out of the same transaction has been extended to deny a claim of immunity as a defense to a counterclaim extrinsic to the subject matter of the suit but limited to the amount of the sovereign's claim.[1192] Moreover, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. A foreign state does not receive the benefit of the rule which exempts the United States and its member states from the operation of the statute of limitations, because

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[1187] *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1871).

[1188] 78 U.S. at 167. This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit or to continue one that has been brought.

[1189] Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938), citing Jones v. United States, 137 U.S. 202, 212 (1890); *Matter of Lehigh Valley R.R.*, 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state is, of course, a political question.

[1190] *Ex parte* Peru, 318 U.S. 578, 589 (1943), distinguishing Compania Espanola v. The Navemar, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself. Under the latter circumstances, however, a claim that a foreign vessel is a public ship and immune from suit must be substantiated to the satisfaction of the federal court.

[1191] Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938). Among other benefits which the Court cited as not extending to foreign states as litigant included exemption from costs and from giving discovery. Decisions were also cited to the effect that a sovereign plaintiff "should so far as the thing can be done, be put in the same position as a body corporate."

[1192] National Bank v. Republic of China, 348 U.S. 356, 361 (1955), citing 26 Dept. State Bull. 984 (1952), in which the Department "pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government."

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those considerations of public policy back of the rule are regarded as absent in the case of the foreign sovereign.[1193]

Indian Tribes.—Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States. This rule was applied in *Cherokee Nation v. Georgia*,[1194] where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

Narrow Construction of the Jurisdiction.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[1195] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[1196] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[1197] These rules, however, do not preclude a suit between citizens of the same state if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[1198]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all

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[1193] Guaranty Trust Co. v. United States, 304 U.S. 126, 135, 137 (1938), citing precedents to the effect that a sovereign plaintiff "should be put in the same position as a body corporate."

[1194] 30 U.S. (5 Pet.) 1, 16–20 (1831).

[1195] Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cr.) 303 (1809).

[1196] Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[1197] Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871). *See*, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[1198] Browne v. Strode, 9 U.S. (5 Cr.) 303 (1809).

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other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[1199] In *Chisholm v. Georgia*,[1200] the Court entertained an action of assumpsit against Georgia by a citizen of another state. Congress in § 3 of the Judiciary Act of 1789[1201] purported to invest the Court with original jurisdiction in suits between a state and citizens of another state, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which states were parties were now limited to states as party plaintiffs, to two or more states disputing, or to United States suits against states.[1202]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jurisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[1203]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[1204] Congress from 1789 on gave the inferior federal courts con-

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[1199] But, in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[1200] 2 U.S. (2 Dall.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

[1201] 1 Stat. 80.

[1202] On the Eleventh Amendment, *see* infra.

[1203] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[1204] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

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current jurisdiction in some classes of such cases.[1205] Sustained in the early years on circuit,[1206] this concurrent jurisdiction was finally approved by the Court itself.[1207] The Court has also relied on the first Congress's interpretation of the meaning of Article III in declining original jurisdiction of an action by a state to enforce a judgment for a pecuniary penalty awarded by one of its own courts.[1208] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[1209]

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it to give the Court power to issue a writ of mandamus on an original proceeding, declared that, as Congress could not restrict the original jurisdiction, neither could it enlarge it, and he pronounced the clause void.[1210] Although the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle it proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, such as *Missouri v. Holland*,[1211] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be in-

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[1205] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[1206] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.Pa. 1793).

[1207] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930).

[1208] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1209] 127 U.S. at 297. *See also* the dictum in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398–99 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431–32 (1793).

[1210] Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id. at 174. This exclusive interpretation has been since followed. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); *Ex parte* Barry, 43 U.S. (2 How.) 65 (1844); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 252 (1864); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 98 (1869). In the curious case of *Ex parte* Levitt, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I. § 6, cl. 2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of Marbury v. Madison.

[1211] 252 U.S. 416 (1920). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

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voked sparingly."[1212] Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[1213] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[1214] It is to be honored "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."[1215] But where claims are of sufficient "seriousness and dignity," in which resolution by the judiciary is of substantial concern, the Court will hear them.[1216]

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress, and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the ex-

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[1212] Utah v. United States, 394 U.S. 89, 95 (1968).

[1213] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. *E.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[1214] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

[1215] Illinois v. City of Milwaukee, 406 U.S. 91, 93–94 (1972). In this case, and in Washington v. General Motors Corp., 406 U.S. 109 (1972), and Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision, but which could be brought in the lower federal courts. Not all such cases, however, were barred. Vermont v. New York, 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," *cf.* Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. *E.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[1216] Wyoming v. Oklahoma, 502 U.S. 437, 451 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976).

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ercise of these congressional powers, and what the limitations may be, are matters that have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1217] Supreme Court holdings establish clearly the breadth of congressional power, and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

Appellate Jurisdiction.—In *Wiscart v. D'Auchy*,[1218] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[1219] A majority of the Court decided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[1220] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished."

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have

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[1217] A classic but now dated study is Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV, L. REV. 1362 (1953). *See* Hart & Wechsler (6h ed.), supra at 287–305.

[1218] 3 U.S. (3 Dall.) 321 (1796).

[1219] Judiciary Act of 1789, § 22, 1 Stat. 84.

[1220] Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id. at 326–27. *See also* Clarke v. Bazadone, 5 U.S. (1 Cr.) 212 (1803); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

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been passed on the subject."[1221] Later Justices viewed the matter differently from Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."[1222] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."[1223]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[1224] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken.[1225] Although the Court had already heard argument on the merits, it then dis-

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[1221] Durousseau v. United States, 10 U.S. (6 Cr.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 7 U.S. (3 Cr.) 159 (1805).

[1222] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

[1223] Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute).

[1224] 73 U.S. (6 Wall.) 318 (1868). That Congress's apprehensions might have had a basis in fact, *see* C. Fairman, History of the Supreme Court of the United States, Vol. VI, Pt. I: Reconstruction and Reunion 1864–88 493–495 (1971). *McCardle* is fully reviewed at pp. 433–514.

[1225] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806), with *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

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missed for want of jurisdiction.[1226] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[1227] Although *McCardle* grew out of the stresses of Reconstruction, the principle it applied has been applied in later cases.[1228]

Jurisdiction of the Inferior Federal Courts.—The Framers, as we have seen,[1229] divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and

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[1226] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id. at 513.

[1227] 74 U.S. at 514.

[1228] *See*, *e.g.*, Justice Frankfurter's remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." In *The Francis Wright*, 105 U.S. 381, 385–386 (1882), upholding Congress's power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." *See also* Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. *E.g.*, Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. Frankfurter & J. Landis, supra at 79, 109–120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. *See* Walker v. Taylor, 46 U.S. (5 How.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866), or intentionally, Railroad Co. v. Grant, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. *See also* Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901).

[1229] Supra, "One Supreme Court" and "Inferior Courts".

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to which nine classes of cases and controversies "shall extend."[1230] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[1231] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[1232] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisdiction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America*,[1233] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same state but in which the note had been assigned to a citizen of a second state so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[1234] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[1235] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Be-

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[1230] Article III, § 1, 2.

[1231] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816). For an effort to reframe Justice Story's position in modern analytical terms, *see* the writings of Professors Amar and Clinton, supra and infra.

[1232] Judiciary Act of 1789, 1 Stat. 73. *See* Warren, *New Light on the History of the Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). A modern study of the first Judiciary Act that demonstrates the congressional belief in discretion to structure jurisdiction is Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B. C. L. Rev. 1101 (1985).

[1233] 4 U.S. (4 Dall.) 8 (1799).

[1234] "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[1235] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

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sides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[1236] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions,[1237] and the early decisions of the Court continued to be sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects."[1238] In *Cary v. Curtis*,[1239] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[1240] Five years later, the validity of the assignee clause of the Judiciary Act of 1789[1241] was placed in issue in *Sheldon v. Sill*,[1242] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that, because the right of a citizen of any state to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected this contention and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the

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[1236] 4 U.S. at 10.

[1237] In *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

[1238] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812). Justice Johnson continued: "All other Courts [besides the Supreme Court] created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer." *See also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721–722 (1838).

[1239] 44 U.S. (3 How.) 236 (1845).

[1240] 44 U.S. at 244–45. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power. Id. at 264.

[1241] Supra.

[1242] 49 U.S. (8 How.) 441 (1850).

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enumerated cases and controversies in Article III. The case and the principle have been cited and reaffirmed numerous times,[1243] including in a case under the Voting Rights Act of 1965.[1244]

Congressional Control Over Writs and Processes.—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[1245] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[1246] Though the courts have variously interpreted these restrictions,[1247] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[1248] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be

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[1243] *E.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 233–234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 513–521 (1898); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251–252 (1868).

[1244] By the Voting Rights Act of 1965, Congress required covered states that wished to be relieved of coverage to bring actions to this effect in the District Court of the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *See also* Palmore v. United States, 411 U.S. 389, 400–02 (1973); Swain v. Pressley, 430 U.S. 372 (1977); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir.), *cert. denied*, 424 U.S. 948 (1976).

[1245] 1 Stat. 73. For a comprehensive discussion with itemization, *see* Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 Harv. L. Rev. 1010 (1924).

[1246] The Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes): Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). *See also* Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

[1247] *Compare* Snyder v. Marks, 109 U.S. 189 (1883), *with* Dodge v. Brady, 240 U.S. 122 (1916), with Allen v. Regents, 304 U.S. 439 (1938).

[1248] F. Frankfurter & I. Greene, The Labor Injunction (1930).

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prevented.[1249] The Court seemed to experience no difficulty in upholding the Act,[1250] and it has liberally applied it through the years.[1251]

Congress's power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[1252] and in the cases arising from it. Fearful that the price control program might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic constitutionality of the Act was sustained in *Lockerty v. Phillips*.[1253] In *Yakus v. United States*,[1254] the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[1255] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

The Theory Reconsidered

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything it desires by manipulation of jurisdiction, and, indeed, the cases reflect certain limitations. Setting to one side various formulations that lack textual and subsequent judicial support, such as mandatory vest-

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[1249] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115.

[1250] In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[1251] *E.g.*, New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957); Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[1252] 56 Stat. 23 (1942).

[1253] 319 U.S. 182 (1943).

[1254] 321 U.S. 414 (1944).

[1255] 321 U.S. at 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on *Yakus* and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in *Yakus* was before the Court in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. *See esp.* id. at 289 (Justice Powell concurring). *See also* Harrison v. PPG Industries, 446 U.S. 578 (1980), and id. at 594 (Justice Powell concurring).

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ing of jurisdiction,[1256] inherent judicial power,[1257] and a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may not impair through jurisdictional limitations,[1258] one can nonetheless see the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1259] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues and construing statutes so as not to deny jurisdiction.[1260]

[1256] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17, 547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word "all" before the subject-matter grants—federal question, admiralty, public ambassadors –mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction, such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990). Rebuttal articles include Meltzer, The History and Structure of Article III, id. at 1569; Redish, Text, Structure, and Common Sense in the Interpretation of Article III, id. at 1633; and a response by Amar, id. at 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan*, 86 Colum. L. Rev. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. *See* Casto, *The First Congress's Understanding of its Authority over the Federal Court's Jurisdiction*, 26 B.C. L. Rev. 1101 (1985).

[1257] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. *See also* Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

[1258] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960). *See also* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929 (1981–82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 Cong. Rec. 9093–9097 (1982) (Letter to Hon. Strom Thurmond).

[1259] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. *See* Hart & Wechsler (6th ed.), supra at 275–324.

[1260] Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited

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Ex parte McCardle[1261] marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.[1262]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[1263] A year later, in *Ex parte Yerger*,[1264] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus*.[1265]

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case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id. at 611–15 (concurring).

[1261] 74 U.S. (7 Wall) 506 (1869). For the definitive analysis of the case, *see* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973).

[1262] Article I, § 9, cl. 2.

[1263] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1869). A restrained reading of *McCardle* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 congressional statute giving to federal courts of appeal a "gate-keeping" function over the filing of second or successive *habeas* petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive *habeas* petitions. Pub. L. 104–132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in *McCardle* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but, just as in *Yerger*, the statute did not annul the Court's jurisdiction to hear *habeas* petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

[1264] 75 U.S. (8 Wall.) 85 (1869). *Yerger* is fully reviewed in C. Fairman, History of the Supreme Court of the United States: Vol. VI, Pt. I: Reconstruction and Reunion, 1864–88 (New York: 1971), 558–618.

[1265] *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C.Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case could command a majority view today." Justice Harlan, however, cited *McCardle* with apparent approval of its holding, id. at 567–68, while noting that Congress's "authority is not, of course, unlimited." Id. at 568. *McCardle* was cited approvingly in Bruner v. United States, 343 U.S. 112, 117 n.8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

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Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein*,[1266] in which the Court voided a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon.[1267] The statute declared that no pardon was to be admissible in evidence in support of any claim against the United States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments, and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to

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[1266] 80 U.S. (13 Wall.) 128 (1872). *See* C. Fairman, supra at 558–618. The seminal discussion of *Klein* may be found in Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wisc. L. Rev. 1189. While he granted that *Klein* is limited insofar as its bearing on jurisdictional limitation *per se* is concerned, he cited an ambiguous holding in Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872), as in fact a judicial invalidation of a jurisdictional limitation. Young, id. at 1222–23 n.179.

[1267] Congress by the Act of July 17, 1862, §§ 5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, § 2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

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the appellate power."[1268] The statute was void for two reasons; it "infring[ed] the constitutional power of the Executive,"[1269] and it "prescrib[ed] a rule for the decision of a cause in a particular way."[1270] While the precise import of *Klein*—with its broad language prohibiting Congress prescribing a "rule of decision" that unduly invades core judicial functions—has puzzled legal scholars,[1271] it appears that *Klein* broadly stands for the proposition that Congress may not usurp the judiciary's power to interpret and apply the law by directing a court "how pre-existing law applies to particular circumstances" before it.[1272] Few laws, however, have been struck down for improperly prescribing a "rule of decision" that a court must follow, and the Court has, in more recent years, declined to interpret *Klein* as inhibiting Congress from "amend[ing] applicable law."[1273] Instead, the Court has recognized that Congress may, without running afoul of *Klein*, direct courts to apply newly enacted legislation to pending civil cases, even when such an application would alter the outcome in the case.[1274] Moreover, the general permissibility under Article III of legislation affecting pending litigation extends to statutes that direct courts to apply a new legal standard even when the underlying facts of a case are undisputed, functionally leaving the court with nothing to decide. For example, in *Bank Markazi v. Peterson*,

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[1268] United States v. Klein, 80 U.S. (13 Wall.) 128, 145–46 (1872).

[1269] 80 U.S. at 147.

[1270] 80 U.S. at 146.

[1271] *See* Bank Markazi v. Peterson, No. 14–770, 578 U.S. ___, slip op. at 13 & n.18 (2016) (noting various secondary sources describing the *Klein* opinion as being "deeply puzzling," "delphic," and "baffling").

[1272] *See id.* at 12–13 & n.17. The Court in *Bank Markazi* noted that the precise constitutional concern in *Klein* was tied to the President's pardon power. *Id.* at 14–15. Specifically, the Court viewed *Klein* as a case in which the Congress, lacking the authority to impair *directly* the effect of a pardon, attempted to alter *indirectly* the legal effect of a pardon by directing a court to a particular outcome, and, in so doing, was compelling a court to a result that required the judiciary to act unconstitutionally. *See id.* at 15 & n.19 (noting the constitutional infirmity identified by *Klein* was that the challenged law "attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.").

[1273] *See, e.g.*, *Bank Markazi*, slip op. at 15 (holding that *Klein*'s prohibition "cannot" be taken "at face value" because Congress has the power to "make valid statutes retroactively applicable to pending cases") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015)); Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218 (1995) (noting that Klein's "prohibition does not take hold when Congress 'amend[s] applicable law'") (quoting Robertson v. Seattle Audubon Soc., 503 U.S. 429, 441 (1992)); *Robertson*, 503 U.S. at 437–38, 441.

[1274] *See Bank Markazi*, slip op. at 16. While retroactive legislation, standing alone, may not violate *Klein*'s prohibition, other constitutional provisions—including Article I's prohibitions on ex post facto laws and bills of attainder and the Fifth Amendment's Due Process and Takings Clauses—may otherwise restrict Congress's ability to legislate retroactively. *See id.* (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994)).

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the Court upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 that made a designated set of assets available for recovery to satisfy a discrete and finite set of default judgments, notwithstanding the fact that the change in the underlying law made the result of the pending case all but a "forgone conclusion."[1275] In addition, the *Bank Markazi* Court, recognizing Congress's authority to legislate on "one or a very small number of specific subjects," rejected the argument that particularized congressional legislation that alters the substantive law governing a specific case—standing alone—impinges on the judicial power in violation of Article III.[1276] The Court held as such, even though the legislation in question identified a case by caption and docket number and did not apply to similar enforcement actions involving any other assets.[1277]Accordingly, *Klein*'s prohibition on congressionally prescribed "rule[s] of decision" appears to be limited to instances where Congress "fails to supply any new legal standard effectuating the lawmakers' reasonable policy judgment" and instead merely compels a court to make particular findings or results under the old law.[1278]

Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell v. Benson*.[1279] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance, and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cogni-

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[1275] *See id.* at 16; *see also Robertson*, 503 U.S. at 434–39 (upholding a statute permitting timber harvesting, altering the outcome of pending litigation over the permissibility of such harvesting).

[1276] *Bank Markazi*, slip op. at 21.

[1277] *Id.* The Court's holding in *Bank Markazi* may have been influenced by the case touching on foreign affairs, "a domain in which the controlling role of the political branches is both necessary and proper." *Id.* at 22. In concluding its opinion in *Bank Markazi*, the Court, citing to long-established historical practices in the realm of foreign affairs, "stress[ed]" that congressional regulation of claims over foreign-state property generally does not "inva[de] upon the Article III judicial power." *Id.* at 22–23.

[1278] *See Bank Markazi*, slip op. at 18–19. For example, the *Bank Markazi* Court noted that a statute that directs that in a hypothetical case—"Smith v. Jones"—that "Smith wins," would violate the principle of *Klein*. Nonetheless, Congress can alter the underlying *substantive* law affecting such a case, allowing Congress to accomplish *indirectly* what the rule of Klein *directly* prohibits. *See id.* at 12–13 n.17.

[1279] 285 U.S. 22 (1932). *See also* Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).

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zance.[1280] What this might mean was elaborated in *Crowell v. Benson*,[1281] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the Due Process Clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[1282]

It is not at all clear that, in this respect, *Crowell v. Benson* remains good law. It has never been overruled, and it has been cited by several Justices approvingly,[1283] but the Court has never applied the principle to control another case.[1284]

Express Constitutional Restrictions on Congress.—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers

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[1280] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[1281] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[1282] 285 U.S. at 56, 60, 64.

[1283] *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), and id. at 100–03, 109–11 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id. at 82, n.34; 110 n.12. For other discussions, *see* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578–79 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682–84 (1980), and id. at 707–12 (Justice Marshall dissenting).

[1284] *Compare Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 792 (1968); Cordillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. Estep v. United States, 327 U.S. 114, 142 (1946); City of Yonkers v. United States, 320 U.S. 685 (1944).

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are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."[1285] The Supreme Court has had no occasion to deal with this principle in the context of Congress's power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act[1286] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. The United States Court of Appeals for the Second Circuit sustained the Act.[1287] The court noted that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter were invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[1288] The Court, however, found that the Portal-to-Portal Act "did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals . . . any rights . . . which rested upon private contracts they had made. Nor is the Portal-to-Portal Act a violation of Article III of the Constitution or an encroachment upon the separate power of the judiciary."[1289]

Conclusion.—There thus remains a measure of doubt that Congress's power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the ap-

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[1285] Williams v. Rhodes, 393 U.S. 23, 29 (1968). The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress's power over jurisdiction, "What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution." United States v. Bitty, 208 U.S. 393, 399–400 (1908).

[1286] 52 Stat. 1060, 29 U.S.C. § 201.

[1287] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948). *See also* Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948). For later dicta, *see* Johnson v. Robison, 415 U.S. 361, 366–67 (1974); Weinberger v. Salfi, 422 U.S. 749, 761–62 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201–02, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); *but see* id. at 611–15 (Justice Scalia dissenting). Note the relevance of United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[1288] 169 F.2d at 257.

[1289] 169 F.2d at 261–62.

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pellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution or from the cases.

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union. . . ." Naturally, in such a system, "contests respecting power must arise." [1290] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and state court refusal to comply with the judgments of federal tribunals; in part by statutes, with respect to the federal law generally enjoining federal court interference with pending state court proceedings; and in part by self-imposed rules of comity and restraint, such as the abstention doctrine, all applied to avoid unseemly conflicts, which, however, have at times occurred.

Subject to congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except suits between states, those to which the United States is a party, those to which a foreign state is a party, and those within the traditional admiralty jurisdiction.[1291] Even within this last category, however, state courts, though

[1290] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204–05 (1824).

[1291] *See* 28 U.S.C. §§ 1251, 1331 *et seq*. Indeed, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See* Gulf Offshore Co.

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unable to prejudice the harmonious operation and uniformity of general maritime law,[1292] have concurrent jurisdiction over cases that occur within the maritime jurisdiction when such litigation assumes the form of a suit at common law.[1293] Review of state court decisions by the United States Supreme Court is intended to protect the federal interest and promote uniformity of law and decision relating to the federal interest.[1294] The first category of conflict surfaces here. The second broader category arises from the fact that state interests, actions, and wishes, all of which may at times be effectuated through state courts, are variously subject to restraint by federal courts. Although the possibility always existed,[1295] it became much more significant and likely when, in the wake of the Civil War, Congress bestowed general federal question jurisdiction on the federal courts,[1296] enacted a series of civil rights statutes and conferred jurisdiction on the federal courts to enforce them,[1297] and most important proposed and saw to the ratification of the three constitutional amendments, especially the Fourteenth, which made an ever-increasing number of state actions subject to federal scrutiny.[1298]

The Autonomy of State Courts

Noncompliance With and Disobedience of Supreme Court Orders by State Courts.—The United States Supreme Court when deciding cases on review from the state courts usually remands the

v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). Federal courts have exclusive jurisdiction of the federal antitrust laws, even though Congress has not spoken expressly or impliedly. *See* General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 287 (1922). Justice Scalia has argued that, inasmuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, Tafflin v. Levitt, 493 U.S. at 469, but as can be seen that is not now the rule.

[1292] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[1293] Through the "saving to suitors" clause, 28 U.S.C. § 1333(1). *See* Madruga v. Superior Court, 346 U.S. 556, 560–61 (1954).

[1294] *See* "Organization of Courts, Tenure, and Compensation of Judges" and "Marbury v. Madison," supra. *See also* 28 U.S.C. § 1257.

[1295] *E.g.*, by a suit against a state by a citizen of another state directly in the Supreme Court, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which was overturned by the Eleventh Amendment; by suits in diversity or removal from state courts where diversity existed, 1 Stat. 78, 79; by suits by aliens on treaties, 1 Stat. 77, and, subsequently, by removal from state courts of certain actions. 3 Stat. 198. And for some unknown reason, Congress passed in 1793 a statute prohibiting federal court injunctions against state court proceedings. *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 120–32 (1941).

[1296] Act of March 3, 1875, 18 Stat. 470.

[1297] Civil Rights Act of 1871, § 1, 17 Stat. 13. The authorization for equitable relief is now 42 U.S.C. § 1983, while jurisdiction is granted by 28 U.S.C. § 1343.

[1298] *See* H. Wechsler, The Nationalization of Civil Liberties and Civil Rights (1969).

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case to the state court when it reverses for "proceedings not inconsistent" with the Court's opinion. This disposition leaves open the possibility that unresolved issues of state law will be decided adversely to the party prevailing in the Supreme Court or that the state court will so interpret the facts or the Court's opinion to the detriment of the party prevailing in the Supreme Court.[1299] When it is alleged that the state court has deviated from the Supreme Court's mandate, the party losing below may appeal again[1300] or she may presumably apply for mandamus to compel compliance.[1301] Statutorily, the Court may attempt to overcome state recalcitrance by a variety of specific forms of judgment.[1302] If, however, the state courts simply defy the mandate of the Court, difficult problems face the Court, extending to the possibility of contempt citations.[1303]

The most spectacular disobedience of federal authority arose out of the conflict between the Cherokees and the State of Georgia, which

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[1299] Hart & Wechsler (6th ed.), supra at 431–531. Notable examples include Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). For studies, *see* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term 1931 to October Term 1940*, 55 Harv. L. Rev. 1357 (1942); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 Harv. L. Rev. 1251 (1954); Schneider, *State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence*, 7 Valp. U. L. Rev. 191 (1973).

[1300] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). *See* 2 W. Crosskey, Politics and the Constitution in the History of the United States 785–817 (1953); 1 C. Warren, The Supreme Court in United States History 442–453 (1926). For recent examples, *see* NAACP v. Alabama, 360 U.S. 240, 245 (1959); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964), after remand, 277 Ala. 89, 167 So.2d 171 (1964); Stanton v. Stanton, 429 U.S. 501 (1977); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1301] It does not appear that mandamus has ever actually issued. *See In re* Blake, 175 U.S. 114 (1899); *Ex parte* Texas, 315 U.S. 8 (1942); Fisher v. Hurst, 333 U.S. 147 (1948); Lavender v. Clark, 329 U.S. 674 (1946); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1302] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 437 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239 (1824); Williams v. Bruffy, 102 U.S. 248 (1880) (entry of judgment); Tyler v. Maguire, 84 U.S. (17 Wall.) 253 (1873) (award of execution); Stanley v. Schwalby, 162 U.S. 255 (1896); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885) (remand with direction to enter a specific judgment). *See* 28 U.S.C. §§ 1651(a), 2106.

[1303] *See* 18 U.S.C. § 401. In United States v. Shipp, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court's denial of a petition for a writ of *habeas corpus*. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the *Shipp* practice. *In re* Herndon, 394 U.S. 399 (1969). *See* In re Herndon, 325 F. Supp. 779 (M.D. Ala. 1971).

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was seeking to remove them and seize their lands with the active support of President Jackson.[1304] In the first instance, after the Court had issued a writ of error to the Georgia Supreme Court to review the murder conviction of a Cherokee, Corn Tassel, and after the writ was served, Corn Tassel was executed on the day set for the hearing, contrary to the federal law that a writ of error superseded sentence until the appeal was decided.[1305] Two years later, Georgia again defied the Court, when, in *Worcester v. Georgia*,[1306] it set aside the conviction of two missionaries for residing among the Indians without a license. Despite the issuance of a special mandate to a local court to discharge the missionaries, they were not released, and the state's governor loudly proclaimed resistance. Consequently, the two remained in jail until they agreed to abandon further efforts for their discharge by federal authority and to leave the state, whereupon the governor pardoned them.

Use of State Courts in Enforcement of Federal Law.—Although the states' rights proponents in the Convention and in the First Congress wished to leave to the state courts the enforcement of federal law and rights rather than to create inferior federal courts,[1307] it was not long before they or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts,[1308] and early Congresses imposed positive duties on state courts to enforce federal laws.[1309] Reaction set in out of hostility to the Embargo Acts, the Fugitive Slave Law, and other measures,[1310] and, in *Prigg v. Pennsylvania*,[1311] involving the Fugitive Slave Law, the Court indicated that the states could not be com-

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[1304] 1 C. Warren, supra at 729–79.

[1305] Id. at 732–36.

[1306] 31 U.S. (6 Pet.) 515 (1832).

[1307] *See* "Organization of Courts, Tenure, and Compensation of Judges," supra.

[1308] Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78; *see also* id. at § 25, 1 Stat. 85.

[1309] *E.g.*, Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine & Spirits Act, 1 Stat. 376 (1794); Fugitive Slave Act, 1 Stat. 302 (1794); Naturalization Act of 1795, 1 Stat. 414; Alien Enemies Act of 1798, 1 Stat. 577. State courts in 1799 were vested with jurisdiction to try criminal offenses against the postal laws. 1 Stat. 733, 28. The Act of March 3, 1815, 3 Stat. 244, vested state courts with jurisdiction of complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures. *See* Warren, *Federal Criminal Laws and State Courts*, 38 Harv. L. Rev. 545, 577–581 (1925).

[1310] Embargo Acts, 2 Stat. 453, 473, 499, 506, 528, 550, 605, 707 (1808–1812); 3 Stat. 88 (1813); Fugitive Slave Act, 1 Stat. 302 (1793).

[1311] 41 U.S. (16 Pet.) 539, 615 (1842). *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 69 (1820) (Justice Story dissenting); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259 (1835) (Justice McLean dissenting). However, the Court held that states could exercise concurrent jurisdiction if they wished. Claflin v. Houseman, 93 U.S. 130 (1876), and cases cited.

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pelled to enforce federal law. After a long period, however, Congress resumed its former practice,[1312] which the Court sustained,[1313] and it went even further in the Federal Employers' Liability Act by not only giving state courts concurrent jurisdiction but also by prohibiting the removal of cases begun in state courts to the federal courts.[1314]

When Connecticut courts refused to enforce an FELA claim on the ground that to do so was contrary to the public policy of the state, the Court held on the basis of the Supremacy Clause that, when Congress enacts a law and declares a national policy, that policy is as much Connecticut's and every other state's as it is of the collective United States.[1315] The Court's suggestion that the act could be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion,"[1316] leaving the impression that state practice might in some instances preclude enforcement in state courts, was given body when the Court upheld New York's refusal to adjudicate an FELA claim that fell in a class of cases in which claims under state law would not be entertained.[1317] "[T]here is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."[1318] However, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."[1319]

The fact that a state statute divests its courts of jurisdiction not only over a disfavored federal claim, but also over an identical state claim, does not ensure that the "state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action."[1320] "Although

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[1312] *E.g.*, Act of June 8, 1872, 17 Stat. 323.

[1313] Claflin v. Houseman, 93 U.S. 130 (1876).

[1314] 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51–60.

[1315] *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

[1316] 223 U.S. at 59.

[1317] Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[1318] 279 U.S. at 388. For what constitutes a valid excuse, *compare* Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950), *with* McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934). It appears that generally state procedure must yield to federal when it would make a difference in outcome. *Compare* Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949), *and* Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952), with Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

[1319] Howlett v. Rose, 496 U.S. 356, 371 (1990). *See also* Felder v. Casey, 487 U.S. 131 (1988).

[1320] Haywood v. Drown, 556 U.S. ___, No. 07–10374, slip op. at 8–9 (2009) (striking down New York statute that gave the state's supreme courts—its trial courts of general jurisdiction—jurisdiction over suits brought under 42 U.S.C. § 1983, except

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the absence of discrimination [in its treatment of federal and state law] is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear." [1321]

In *Testa v. Katt*,[1322] the Court unanimously held that state courts, at least with regard to claims and cases analogous to claims and cases enforceable in those courts under state law, are required to enforce "penal" laws of the United States; the statute at issue in the case provided "that a buyer of goods at above the prescribed ceiling price may sue the seller 'in any court of competent jurisdiction.'" [1323] Respecting Rhode Island's claim that one sovereign cannot enforce the penal laws of another, Justice Black observed that the assumption underlying this claim flew "in the face of the fact that the States of the Union constitute a nation" and the fact of the existence of the Supremacy Clause.[1324]

State Interference with Federal Jurisdiction.—It seems settled, though not without dissent, that state courts have no power to enjoin proceedings [1325] or effectuation of judgments [1326] of the federal courts, with the exception of cases in which a state court has custody of property in proceedings *in rem* or *quasi in rem*, where

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in the case of suits seeking money damages from corrections officers, whether brought under federal or state law).

[1321] 556 U.S. ___, No. 07–10374, slip op. at 9 (New York statute found, "contrary to Congress's judgment [in 42 U.S.C. § 1983,] that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages").

[1322] 330 U.S. 386 (1947).

[1323] 330 U.S. at 387.

[1324] 330 U.S. at 389. *See*, for a discussion as well as an extension of *Testa*, FERC v. Mississippi, 456 U.S. 742 (1982). Cases since *Testa* requiring state court enforcement of federal rights have generally concerned federal remedial laws. *E.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). The Court has approved state court adjudication under 42 U.S.C. § 1983, Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980), but, curiously, in Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (emphasis by Court), it noted that it has "never considered . . . the question whether a State *must* entertain a claim under 1983." *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 n.7 (1987) (continuing to reserve question). But, with Felder v. Casey, 487 U.S. 131 (1988), and Howlett by Howlett v. Rose, 496 U.S. 356 (1990), it seems dubious that state courts could refuse. Enforcement is not limited to federal statutory law; federal common law must similarly be enforced. Free v. Bland, 369 U.S. 663 (1962).

[1325] Donovan v. City of Dallas, 377 U.S. 408 (1964), and cases cited. Justices Harlan, Clark, and Stewart dissented, arguing that a state should have power to enjoin vexatious, duplicative litigation which would have the effect of thwarting a state-court judgment already entered. *See also* Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 56 (1941) (Justice Frankfurter dissenting). In Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868), the general rule was attributed to the complete independence of state and federal courts in their spheres of action, but federal courts, of course may under certain circumstances enjoin actions in state courts.

[1326] McKim v. Voorhies, 11 U.S. (7 Cr.) 279 (1812); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

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the state court has exclusive jurisdiction to proceed and may enjoin parties from further action in federal court.[1327]

Conflicts of Jurisdiction: Rules of Accommodation

Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.

Comity.—"[T]he notion of 'comity,'" Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism'. . . ."[1328] Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency,"[1329] which persuades but does not command.

Abstention.—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the contro-

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[1327] Princess Lida v. Thompson, 305 U.S. 456 (1939). Nor do state courts have any power to release by *habeas corpus* persons in custody pursuant to federal authority. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

[1328] Younger v. Harris, 401 U.S. 37, 44 (1971). *Compare* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), *with* id. at 119–25 (Justice Brennan concurring, joined by three other Justices).

[1329] Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 458, 488 (1900). Recent decisions emphasize comity as the primary reason for restraint in federal court actions tending to interfere with state courts. *E.g.*, O'Shea v. Littleton, 414 U.S. 488, 499–504 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 599–603 (1975); Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Moore v. Sims, 442 U.S. 415, 430 (1979). The Court has also cited comity as a reason to restrict access to federal *habeas corpus*. Francis v. Henderson, 425 U.S. 536, 541 and n.31 (1976); Wainwright v. Sykes, 433 U.S. 72, 83, 88, 90 (1977); Engle v. Isaac, 456 U.S. 107, 128–29 (1982). *See also* Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (comity limits federal court interference with state tax systems); Levin v. Commerce Energy, Inc., 560 U.S. ___, No. 09–223, slip op. (2010) (comity has particular force in cases challenging constitutionality of state taxation of commercial activities). *And see* Missouri v. Jenkins, 495 U.S. 33 (1990).

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versy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue.[1330] Abstention is not proper, however, where the relevant state law is settled,[1331] or where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law.[1332] Federal jurisdiction is not ousted by abstention; rather it is postponed.[1333] Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts are as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would

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[1330] C. Wright, Handbook of the Law of Federal Courts 13 (4th ed. 1983). The basic doctrine was formulated by Justice Frankfurter for the Court in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Other strands of the doctrine are that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with a state's administration of its own affairs, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Martin v. Creasy, 360 U.S. 219 (1959); Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (carefully reviewing the scope of the doctrine), especially where state law is unsettled. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). *See also* Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960). Also, although pendency of an action in state court will not ordinarily cause a federal court to abstain, there are "exceptional" circumstances in which it should. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). But, in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), an exercise in *Burford* abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

[1331] City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Zwickler v. Koota, 389 U.S. 241, 249–51 (1967). *See* Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534–35 (1965)).

[1332] Harman v. Forssenius, 380 U.S. 528, 534–35 (1965); Babbitt v. United Farm Workers Nat'l., 442 U.S. 289, 305–12 (1979). Abstention is not proper simply to afford a state court the opportunity to hold that a state law violates the federal Constitution. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271 n.4 (1977); City of Houston v. Hill, 482 U.S. 451 (1987) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute"). But if the statute is clear and there is a reasonable possibility that the state court would find it in violation of a distinct or specialized state constitutional provision, abstention may be proper, Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970), although not if the state and federal constitutional provisions are alike. Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976).

[1333] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973); Harrison v. NAACP, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. Harris County Comm'rs v. Moore, 420 U.S. 77, 88 n.14 (1975).

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not be expended in decision of difficult constitutional issues which might not require decision.[1334]

During the 1960s, the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of them civil rights and civil liberties cases.[1335] Time-consuming delays[1336] and piecemeal resolution of important questions[1337] were cited as a too-costly consequence of the doctrine. Actions brought under the civil rights statutes seem not to have been wholly subject to the doctrine,[1338] and for awhile cases involving First Amendment expression guarantees seemed to be sheltered as well, but this is no longer the rule.[1339] Abstention developed robustly with *Younger v. Harris*,[1340] and its progeny.

Exhaustion of State Remedies.—A complainant will ordinarily be required, as a matter of comity, to exhaust all available state legislative and administrative remedies before seeking relief in federal court.[1341] To do so may make unnecessary federal-court adjudication. The complainant will ordinarily not be required, however, to exhaust his state judicial remedies, inasmuch as it is a litigant's choice to proceed in either state or federal courts when the alterna-

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[1334] *E.g.*, Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Harrison v. NAACP, 360 U.S. 167 (1959).

[1335] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Davis v. Mann, 377 U.S. 678 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); Harman v. Forssenius, 380 U.S. 528 (1965); Zwickler v. Koota, 389 U.S. 241 (1967); Wisconsin v. Constanineau, 400 U.S. 433 (1971).

[1336] England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 426 (1964) (Justice Douglas concurring). *See* C. Wright, Handbook of the Law of Federal Courts 305 (4th ed. 1983).

[1337] Baggett v. Bullitt, 377 U.S. 360, 378–379 (1964). Both consequences may be alleviated substantially by state adoption of procedures by which federal courts may certify to the state's highest court questions of unsettled state law which would be dispositive of the federal court action. The Supreme Court has actively encouraged resort to certification where it exists. Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960); Lehman Brothers v. Schein, 416 U.S. 386 (1974); Bellotti v. Baird, 428 U.S. 132, 151 (1976).

[1338] *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1339] *Compare* Baggett v. Bullitt, 377 U.S. 360 (1964), *and* Dombrowski v. Pfister, 380 U.S. 479 (1965), *with* Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971). *See* Babbitt v. United Farm Workers, 442 U.S. 289, 305–312 (1979).

[1340] 401 U.S. 37 (1971). There is room to argue whether the *Younger* line of cases represents the abstention doctrine at all, but the Court continues to refer to it in those terms. *E.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. ___, No. 12–815, slip op. (2013).

[1341] The rule was formulated in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), and Bacon v. Rutland R.R., 232 U.S. 134 (1914).

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tives exist and a question for judicial adjudication is present.[1342] But when a litigant is suing for protection of federally guaranteed civil rights, he need not exhaust any kind of state remedy.[1343]

Anti-Injunction Statute.—For reasons unknown,[1344] Congress in 1793 enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings.[1345] Over time, a long list of exceptions to the statutory bar was created by judicial decision,[1346] but in *Toucey v. New York Life Ins. Co.*,[1347] the Court in a lengthy opinion by Justice Frankfurter announced a very liberal interpretation of the anti-injunction statute so as to do away with practically all the exceptions that had been created. Congress's response was to redraft the statute and to indicate that it was restoring the pre-*Toucey* interpretation.[1348] Considerable disagreement exists over the application of the statute, however, especially with regard to the exceptions it permits. The present tendency appears to be to read the law expansively and the exceptions restrictively in the interest of preventing conflict with state courts.[1349] Nonetheless, some exceptions exist, either expressly or implicitly in statutory language,[1350] or through Court interpretation.[1351] The Court's

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[1342] City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934); Lane v. Wilson, 307 U.S. 268 (1939). *But see* Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951). Exhaustion of state court remedies is required in *habeas corpus* cases and usually in suits to restrain state court proceedings.

[1343] Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). Where there are pending administrative proceedings that fall within the *Younger* rule, a litigant must exhaust. Younger v. Harris, 401 U.S. 37 (1971), as explicated in Ohio Civil Rights Comm'n v. Dayton Christian School, Inc., 477 U.S. 619, 627 n.2 (1986). Under title VII of the Civil Rights Act of 1964, barring employment discrimination on racial and other specified grounds, the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. 42 U.S.C. § 2000e–5(c). *See* Love v. Pullman Co., 404 U.S. 522 (1972). The Civil Rights of Institutionalized Persons Act contains "a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983." *Patsy*, 457 U.S. at 508.

[1344] Toucey v. New York Life Ins. Co., 314 U.S. 118, 130–32 (1941).

[1345] "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." Ch. XXII, § 5, 1 Stat. 335 (1793), now, as amended, 28 U.S.C. § 2283.

[1346] Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 Mich. L. Rev. 1145 (1932).

[1347] 314 U.S. 118 (1941).

[1348] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Reviser's Note is appended to the statute, stating intent.

[1349] Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). *See* M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power ch. 10 (1980).

[1350] The greatest difficulty is with the "expressly authorized by Act of Congress" exception. No other Act of Congress expressly refers to § 2283 and the Court has indicated that no such reference is necessary to create a statutory exception. Amal-

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general policy of application, however, seems to a considerable degree to effectuate what is now at least the major rationale of the statute, deference to state court adjudication of issues presented to them for decision.[1352]

Res Judicata.—Both the Constitution and a contemporaneously enacted statute require federal courts to give "full faith and credit" to state court judgments, to give, that is, preclusive effect to state court judgments when those judgments would be given preclusive effect by the courts of that state.[1353] The present Court views the interpretation of "full faith and credit" in the overall context of deference to state courts running throughout this section. "Thus, *res judicata* and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."[1354] 42 U.S.C. § 1983 is not an exception to the mandate of the *res judicata* statute.[1355] An exception to § 1738 "will not be recognized unless a later statute con-

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gamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955). *Compare* Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954). Rather, "in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 237 (1972). Applying this test, the Court in *Mitchum* held that a 42 U.S.C. § 1983 suit is an exception to § 2283 and that persons suing under this authority may, if they satisfy the requirements of comity, obtain an injunction against state court proceedings. The exception is, of course, highly constrained by the comity principle. On the difficulty of applying the test, *see* Vendo Co. v. Lektco-Vend Corp., 433 U.S. 623 (1977) (fragmented Court on whether Clayton Act authorization of private suits for injunctive relief is an "expressly authorized" exception to § 2283).

On the interpretation of the § 2283 exception for injunctions to protect or effectuate a federal-court judgment, *see* Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988).

[1351] Thus, the Act bars federal court restraint of pending state court proceedings but not restraint of the institution of such proceedings. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). Restraint is not barred if sought by the United States or an officer or agency of the United States. Leiter Minerals v. United States, 352 U.S. 220 (1957); NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). Restraint is not barred if the state court proceeding is not judicial but rather administrative. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Roudebush v. Hartke, 405 U.S. 15 (1972). *Compare* Hill v. Martin, 296 U.S. 393, 403 (1935), *with* Lynch v. Household Finance Corp., 405 U.S. 538, 552–56 (1972).

[1352] The statute is to be applied "to prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1940); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285–86 (1970).

[1353] Article IV, § 1, of the Constitution; 28 U.S.C. § 1738.

[1354] Allen v. McCurry, 449 U.S. 90, 95–96 (1980).

[1355] 449 U.S. at 96–105. In England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court held that, when parties are compelled to go to state court under *Pullman* abstention, either party may reserve the federal issue and thus be enabled to return to federal court without being barred by *res judicata*.

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tains an express or implied partial repeal."[1356] Thus, a claimant who pursued his employment discrimination remedies through state administrative procedures, as the federal law requires her to do (within limits), and then appealed an adverse state agency decision to state court will be precluded from bringing her federal claim to federal court, since the federal court is obligated to give the state court decision "full faith and credit."[1357]

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[1358] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."[1359]

Three-Judge Court Act.—When the Court in *Ex parte Young*[1360] held that federal courts were not precluded by the Eleventh Amendment from restraining state officers from enforcing state laws determined to be in violation of the federal Constitution, serious efforts were made in Congress to take away the authority thus asserted, but the result instead was legislation providing that suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officers were to be heard by a panel of three federal judges, rather than by a single district judge, with appeal direct to the Supreme Court.[1361] The provision was designed to assuage state feeling by vesting such determinations in a court more prestigious than a single-judge district court, to assure a more authoritative determination, and to prevent the assertion of individual predilections in sensitive and emotional areas.[1362] Because, however, of the heavy burden that convening a three-judge court placed on the judiciary and that the direct appeals placed on the

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[1356] Kramer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982).

[1357] 456 U.S. 468–76. There were four dissents. Id. at 486 (Justices Blackmun, Brennan, and Marshall), 508 (Stevens).

[1358] The doctrine derives its name from Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[1359] Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (*Rooker-Feldman* has no application when federal court proceedings have been initiated prior to state court proceedings; preclusion law governs in that situation).

[1360] 209 U.S. 123 (1908).

[1361] 36 Stat. 557 (1910). The statute was amended in 1925 to apply to requests for permanent injunctions, 43 Stat. 936, and again in 1937 to apply to constitutional attacks on federal statutes. 50 Stat. 752.

[1362] Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965); *Ex parte* Collins, 277 U.S. 565, 567 (1928).

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Supreme Court, the provisions for such courts, save in cases "when otherwise required by an Act of Congress"[1363] or in cases involving state legislative or congressional districting, were repealed by Congress in 1976.[1364]

Conflicts of Jurisdiction: Federal Court Interference with State Courts

One challenging the constitutionality, under the United States Constitution, of state actions, statutory or otherwise, could, of course, bring suit in state court; indeed, in the time before conferral of federal-question jurisdiction on lower federal courts plaintiffs had to bring actions in state courts, and on some occasions since, this has been done.[1365] But the usual course is to sue in federal court for either an injunction or a declaratory judgment or both. In an era in which landmark decisions of the Supreme Court and of inferior federal courts have been handed down voiding racial segregation requirements, legislative apportionment and congressional districting, abortion regulations, and many other state laws and policies, it is difficult to imagine a situation in which it might be impossible to obtain such rulings because no one required as a defendant could be sued. Yet, the adoption of the Eleventh Amendment in 1798 resulted in the immunity of the state,[1366] and the immunity of state officers if the action upon which they were being sued was state action,[1367] from suit without the state's consent. *Ex parte Young*[1368] is a seminal case in American constitutional law because it created a fiction

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[1363] These now are primarily limited to suits under the Voting Rights Act, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c), and to certain suits by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000a–5(b), 2000e–6(b).

[1364] Pub. L. 94–381, 90 Stat. 1119, 28 U.S.C. § 2284. In actions still required to be heard by three-judge courts, direct appeals are still available to the Supreme Court. 28 U.S.C. § 1253.

[1365] For example, one of the cases decided in Brown v. Board of Education, 347 U.S. 483 (1954), came from the Supreme Court of Delaware. In Scott v. Germano, 381 U.S. 407 (1965), the Court set aside an order of the district court refusing to defer to the state court which was hearing an apportionment suit and said: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged." *See also* Scranton v. Drew, 379 U.S. 40 (1964).

[1366] By its terms, the Eleventh Amendment bars only suits against a state by citizens of other states, but, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court deemed it to embody principles of sovereign immunity that applied to unconsented suits by its own citizens.

[1367] *In re* Ayers, 123 U.S. 443 (1887).

[1368] 209 U.S. 123 (1908).

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by which the validity of state statutes and other actions could be challenged by suits against state officers as individuals.[1369]

Conflict between federal and state courts is inevitable when the federal courts are open to persons complaining about unconstitutional or unlawful state action which could as well be brought in the state courts and perhaps is so brought by other persons, but the various rules of restraint flowing from the concept of comity reduce federal interference here some considerable degree. It is rather in three fairly well defined areas that institutional conflict is most pronounced.

Federal Restraint of State Courts by Injunctions.—Even where the federal anti-injunction law is inapplicable, or where the question of application is not reached,[1370] those seeking to enjoin state court proceedings must overcome substantial prudential barriers, among them the abstention doctrine[1371] and more important than that the equity doctrine that suits in equity "shall not be sustained in . . . the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."[1372] The application of this latter principle has been most pronounced in the reluctance of federal courts to interfere with a state's good faith enforcement of its criminal law. Here, the Court has required of a litigant seeking to bar threatened state prosecution not only a showing of irreparable injury that is both great and immediate, but also an inability to defend his constitutional rights in the state proceeding. Certain types of injury, such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, are insufficient to be considered irreparable in this sense. Even if a state criminal statute *is* unconstitutional, a person charged under it usually has an adequate remedy at law by raising his constitutional defense in the state trial.[1373] The policy has never been stated

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[1369] The fiction is that while the official is a state actor for purposes of suit against him, the claim that his action is unconstitutional removes the imprimatur of the state that would shield him under the Eleventh Amendment. 209 U.S. at 159–60.

[1370] 28 U.S.C. § 2283 may be inapplicable because no state court proceeding is pending or because the action is brought under 42 U.S.C. § 1983. Its application may never be reached because a court may decide that equitable principles do not justify injunctive relief. Younger v. Harris, 401 U.S. 37, 54 (1971).

[1371] *See* "Abstention," supra.

[1372] The quoted phrase setting out the general principle is from the Judiciary Act of 1789, § 16, 1 Stat. 82.

[1373] The older cases are Fenner v. Boykin, 271 U.S. 240 (1926); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Watson v. Buck, 313 U.S. 387 (1941); Williams v. Miller, 317 U.S. 599 (1942); Douglas v. City of Jeannette, 319 U.S. 157 (1943). There is a stricter rule against federal restraint of the use of evidence in state criminal trials. Stefanelli v. Minard, 342 U.S. 117 (1951); Pugach v. Dollinger, 365 U.S. 458 (1961). The Court reaffirmed the rule in Perez v. Ledesma, 401 U.S. 82 (1971). State officers may not be enjoined

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as an absolute, in recognition of the fact that a federal court injunction could properly issue in exceptional and limited circumstances, such as the existence of factors making it impossible for a litigant to protect his federal constitutional rights through a defense of the state criminal charges or the bringing of multiple criminal charges.[1374]

In *Dombrowski v. Pfister*,[1375] the Court appeared to change the policy somewhat. The case on its face contained allegations and offers of proof that may have been sufficient alone to establish the "irreparable injury" justifying federal injunctive relief.[1376] But the formulation of standards by Justice Brennan for the majority placed great emphasis upon the fact that the state criminal statute in issue regulated expression. Any criminal prosecution under a statute regulating expression might of itself inhibit the exercise of First Amendment rights, he said, and prosecution under an overbroad statute,[1377] such as the one in this case, might critically impair exercise of those rights. The mere threat of prosecution under such an overbroad statute "may deter . . . almost as potently as the actual application of sanctions. . . ."[1378]

In such cases, courts could no longer embrace "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights," because either the mere threat of prosecution or the long wait between prosecution and final vindication could result in a "chilling effect upon the exercise of First Amendment rights."[1379] The principle apparently established by the Court was two-phased: a federal court should not abstain when there is a facially unconstitutional statute infringing upon speech and ap-

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from testifying or using evidence gathered in violation of federal constitutional restrictions, Cleary v. Bolger, 371 U.S. 392 (1963), but the rule is unclear with regard to federal officers and state trials. *Compare* Rea v. United States, 350 U.S. 214 (1956), *with* Wilson v. Schnettler, 365 U.S. 381 (1961).

[1374] *E.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 163–164 (1943); Stefanelli v. Minard, 342 U.S. 117, 122 (1951). *See also* Terrace v. Thompson, 263 U.S. 197, 214 (1923), Future criminal proceedings were sometimes enjoined. *E.g.*, Hague v. CIO, 307 U.S. 496 (1939).

[1375] 380 U.S. 479 (1965). Grand jury indictments had been returned after the district court had dissolved a preliminary injunction, erroneously in the Supreme Court's view, so that it took the view that no state proceedings were pending as of the appropriate time. For a detailed analysis of the case, *see* Fiss, *Dombrowski*, 86 YALE L. J. 1103 (1977).

[1376] "[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 380 U.S. at 485–86.

[1377] That is, a statute that reaches both protected and unprotected expression and conduct.

[1378] 380 U.S. at 486.

[1379] 380 U.S. at 486, 487.

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plication of that statute discourages protected activities, and the court should further enjoin the state proceedings when there is prosecution or threat of prosecution under an overbroad statute regulating expression if the prosecution or threat of prosecution chills the exercise of freedom of expression.[1380] These formulations were reaffirmed in *Zwickler v. Koota*,[1381] in which a declaratory judgment was sought with regard to a statute prohibiting anonymous election literature. The Court deemed abstention improper,[1382] and further held that adjudication for purposes of declaratory judgment is not hemmed in by considerations attendant upon injunctive relief.[1383]

The aftermath of *Dombrowski* and *Zwickler* was a considerable expansion of federal-court adjudication of constitutional attack through requests for injunctive and declaratory relief, which gradually spread out from First Amendment areas to other constitutionally protected activities.[1384] However, these developments were highly controversial and, after three arguments on the issue, the Court in a series of 1971 cases receded from its position and circumscribed the discretion of the lower federal courts to a considerable and ever-broadening degree.[1385] The important difference between the 1971 cases and the *Dombrowski-Zwickler* line was that, in the latter there were no prosecutions pending, whereas in the 1971 cases there were. Nevertheless, the care with which Justice Black for the majority in the 1971 cases undertook to distinguish *Dombrowski* signified a limitation of its doctrine.

Justice Black reviewed and reaffirmed the traditional rule of reluctance to interfere with state court proceedings except in extraordinary circumstances. The holding in *Dombrowski*, as distinguished from some of its language, did not change the general rule, because extraordinary circumstances had existed. Thus, Justice Black, with considerable support from the other Justices,[1386] went on to affirm that, where a criminal proceeding is already pending in a

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[1380] *See* Cameron v. Johnson, 381 U.S. 741 (1965); Cameron v. Johnson, 390 U.S. 611 (1968).

[1381] 389 U.S. 241 (1967). The state criminal conviction had been reversed by a state court on state law grounds and no new charge had been instituted.

[1382] It was clear that the statute could not be construed by a state court to render unnecessary a federal constitutional decision. 389 U.S. at 248–52.

[1383] 389 U.S. at 254.

[1384] Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 Tex. L. Rev. 535 (1970).

[1385] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971). Justice Black wrote the majority opinion in the first four of these cases; the other two were per curiam opinions.

[1386] Only Justice Douglas dissented. 401 U.S. at 58. Justices Brennan, White, and Marshall generally concurred in a restrained fashion. Id. at 56, 75, 93.

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state court, if it is a single prosecution about which there is no allegation that it was brought in bad faith or that it was one of a series of repeated prosecutions that would be brought, and if the defendant may put in issue his federal-constitutional defense at the trial, then federal injunctive relief is improper, even if it is alleged that the statute on which the prosecution was based regulated expression and was overbroad.

Many statutes regulating expression were valid and some overbroad statutes could be validly applied, so findings of facial unconstitutionality abstracted from concrete factual situations was not a sound judicial method. "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." [1387]

The reason for the principle, said Justice Black, flows from "Our Federalism," which requires federal courts to defer to state courts when there are proceedings pending in them.[1388]

Moreover, in a companion case, the Court held that, when prosecutions are pending in state court, the propriety of injunctive and declaratory relief should ordinarily be judged by the same standards.[1389] A declaratory judgment is as likely to interfere with state proceedings as an injunction, whether the federal decision be treated as *res judicata* or viewed as a strong precedent guiding the state court. Additionally, "the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings." [1390]

When, however, there is no pending state prosecution, the Court is clear that "Our Federalism" is not offended if a plaintiff in a federal court is able to demonstrate a genuine threat of enforcement

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[1387] 401 U.S. at 54. On bad faith enforcement, *see* id. at 56 (Justices Stewart and Harlan concurring); 97 (Justices Brennan, White, and Marshall concurring in part and dissenting in part). For an example, *see* Universal Amusement Co. v. Vance, 559 F.2d 1286, 1293–1301 (5th Cir. 1977), *aff'd per curiam sub nom.* Dexter v. Butler, 587 F.2d 176 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 929 (1979).

[1388] 401 U.S. at 44.

[1389] Samuels v. Mackell, 401 U.S. 66 (1971). The holding was in line with Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[1390] Samuels v. Mackell, 401 U.S. 66, 72 (1971).

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of a disputed criminal statute, whether the statute is attacked on its face or as applied, and becomes entitled to a federal declaratory judgment.[1391] And, in fact, when no state prosecution is pending, a federal plaintiff need not demonstrate the existence of the *Younger* factors to justify the issuance of a preliminary or permanent injunction against prosecution under a disputed state statute.[1392]

Beyond criminal prosecutions, the Court extended *Younger*'s general directive to bar interference with pending state civil cases that are akin to criminal prosecutions.[1393] *Younger* abstention was also found appropriate when a judgment debtor in a state civil case sought to enjoin a state court order to enforce the judgment.[1394] The Court further applied *Younger*'s principles to bar federal court interference with state administrative proceedings of a judicial nature, in which important state interests were at stake.[1395]

Nonetheless, the Court has emphasized that "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."[1396] In *Sprint Communications, Inc. v. Jacobs*,[1397] the Court made clear that federal forbearance under Younger was limited to three discrete types of state proceedings: (1) ongoing state criminal prosecutions; (2) particular state civil proceedings that are akin to criminal prosecutions; and (3) civil proceedings involving orders uniquely in furtherance of the state courts' ability to per-

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[1391] Steffel v. Thompson, 415 U.S. 452 (1974).

[1392] Doran v. Salem Inn, 422 U.S. 922 (1975) (preliminary injunction may issue to preserve *status quo* while court considers whether to grant declaratory relief); Wooley v. Maynard, 430 U.S. 705 (1977) (when declaratory relief is given, permanent injunction may be issued if necessary to protect constitutional rights). However, it may not be easy to discern when state proceedings will be deemed to have been instituted prior to the federal proceeding. *E.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue. Ltd., 420 U.S. 592 (1975); *see also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

[1393] Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state action to close adult theater under the state's nuisance statute and to seize and sell personal property used in the theater's operations).

[1394] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (holding that federal abstention was warranted in a federal court action to block a state court order issued under the state's "lien and bond" authority). It was "the State's [particular] interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'" that merited abstention, and not merely a general state interest in protecting ongoing civil proceedings from federal interference. *Id.* at 14 n.12 (quoting *Juidice*, 430 U.S. at 336 n.12).

[1395] Oh. Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986). The "judicial in nature" requirement is more fully explicated in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989).

[1396] *See New Orleans Pub. Serv., Inc.*, 491 U.S. at 368.

[1397] 571 U.S. ___, No. 12–815, slip op. (2013).

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form their judicial functions.[1398] In so doing, the *Sprint Communications* Court clarified that the types of cases previously held to merit abstention under the Younger line defined Younger's scope and did not merely exemplify it.[1399]

Habeas Corpus: Scope of the Writ.—At the English common law, *habeas corpus* was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. That common law meaning was applied in the federal courts.[1400] Expansion began after the Civil War through more liberal court interpretation of "jurisdiction." Thus, one who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence.[1401] Then, the Court held that the constitutionality of the statute upon which a charge was based could be examined on *habeas*, because an unconstitutional statute was said to deprive the trial court of its jurisdiction.[1402] Other cases expanded the want-of-jurisdiction rationale.[1403] But the modern status of the writ of *habeas corpus* may be said to have been started in its development in *Frank v. Mangum*,[1404] in which the Court reviewed on *habeas* a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process.

Further, in order to determine if there had been a denial of due process, a *habeas* court should examine the totality of the process,

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[1398] *Id.* at 2.

[1399] *Id.* at 8.

[1400] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (Chief Justice Marshall); *cf. Ex parte* Parks, 93 U.S. 18 (1876). *But see* Fay v. Noia, 372 U.S. 391, 404–415 (1963). The expansive language used when Congress in 1867 extended the *habeas* power of federal courts to state prisoners "restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States . . . ," 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

[1401] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

[1402] *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Royall, 117 U.S. 241 (1886); Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1403] *Ex parte* Wilson, 114 U.S. 417 (1885); *In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887); *but see Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Bigelow, 113 U.S. 328 (1885). It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. F. Frankfurter & J. Landis, supra. Once such review was granted, the Court began to restrict the use of the writ. *E.g.*, Glasgow v. Moyer, 225 U.S. 420 (1912); *In re* Lincoln, 202 U.S. 178 (1906); *In re* Morgan, 203 U.S. 96 (1906).

[1404] 237 U.S. 309 (1915).

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including the appellate proceedings. Because Frank's claim of mob domination was reviewed fully and rejected by the state appellate court, he had been afforded an adequate corrective process for any denial of rights, and his custody did not violate the Constitution. Then, eight years later, in *Moore v. Dempsey*,[1405] involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

Moreover, the Court shortly abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[1406] The landmark case was *Brown v. Allen*,[1407] in which the Court laid down several principles of statutory construction of the *habeas* statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal *habeas*. Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal *habeas* court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a "vital flaw" in the state proceedings, or when the state court record is incomplete or otherwise inadequate.

Almost plenary federal *habeas* review of state court convictions was authorized and rationalized in the Court's famous "1963 tril-

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[1405] 261 U.S. 86 (1923).

[1406] Walker v. Johnston, 312 U.S. 275 (1941). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnston, 312 U.S. 275 (1941). The way one reads the history of the developments is inevitably a product of the philosophy one brings to the subject. In addition to the recitations cited in other notes, *compare* Wright v. West, 505 U.S. 277, 285–87 & n.3 (1992) (Justice Thomas for a plurality of the Court), *with* id. at 297–301 (Justice O'Connor concurring).

[1407] 344 U.S. 443 (1953). *Brown* is commonly thought to rest on the assumption that federal constitutional rights cannot be adequately protected only by direct Supreme Court review of state court judgments but that independent review, on *habeas*, must rest with federal judges. It is, of course, true that *Brown* coincided with the extension of most of the Bill of Rights to the states by way of incorporation and expansive interpretation of federal constitutional rights; previously, there was not a substantial corpus of federal rights to protect through *habeas*. *See* Wright v. West, 505 U.S. 277, 297–99 (1992) (Justice O'Connor concurring). In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan, for the Court, and Justice Harlan, in dissent, engaged in a lengthy, informed historical debate about the legitimacy of *Brown* and its premises. *Compare* id. at 401–24, *with* id. at 450–61. *See* the material gathered and cited in Hart & Wechsler (6th ed.), supra at 1220–1248.

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ogy."[1408] First, the Court dealt with the established principle that a federal *habeas* court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when district courts must hold a hearing and find facts.[1409] "Where the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."[1410] To "particularize" this general test, the Court went on to hold that an evidentiary hearing must take place when (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.[1411]

[1408] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These cases dealt, respectively, with the treatment to be accorded a *habeas* petition in the three principal categories in which they come to the federal court: when a state court has rejected petitioner's claims on the merits, when a state court has refused to hear petitioner's claims on the merits because she has failed properly or timely to present them, or when the petition is a second or later petition raising either old or new, or mixed, claims. Of course, as will be demonstrated *infra*, these cases have now been largely drained of their force.

[1409] Townsend v. Sain, 372 U.S. 293, 310–12 (1963). If the district judge concluded that the *habeas* applicant was afforded a full and fair hearing by the state court resulting in reliable findings, the Court said, he may, and ordinarily should, defer to the state factfinding. Id. at 318. Under the 1966 statutory revision, a *habeas* court must generally presume correct a state court's written findings of fact from a hearing to which the petitioner was a party. A state finding cannot be set aside merely on a preponderance of the evidence and the federal court granting the writ must include in its opinion the reason it found the state findings not fairly supported by the record or the existence of one or more listed factors justifying disregard of the factfinding. Pub. L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254(d). *See* Sumner v. Mata, 449 U.S. 539 (1981); Sumner v. Mata, 455 U.S. 591 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025 (1984); Parker v. Dugger, 498 U.S. 308 (1991); Burden v. Zant, 498 U.S. 433 (1991). The presumption of correctness does not apply to questions of law or to mixed questions of law and fact. Miller v. Fenton, 474 U.S. 104, 110–16 (1985). However, in Wright v. West, 505 U.S. 277 (1992), the Justices argued inconclusively whether deferential review of questions of law or especially of law and fact should be adopted.

[1410] Townsend v. Sain, 372 U.S. 293, 312 (1963). The Court was unanimous on the statement, but it divided 5 to 4 on application.

[1411] 372 U.S. at 313–18. Congress in 1966 codified the factors in somewhat different form but essentially codified *Townsend*. Pub. L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254. The Court believes that Congress neither codified *Townsend* nor precluded the Court from altering the *Townsend* standards. Keeney v. Tamayo-Reyes, 504 U.S.

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Second, *Sanders v. United States*[1412] dealt with two interrelated questions: the effects to be given successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or grounds not theretofore raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"[1413] the Court set out generous standards for consideration of successive claims. As to previously asserted grounds, the Court held that controlling weight may be given to a prior denial of relief if (1) the same ground presented was determined adversely to the applicant before, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application, so that the *habeas* court might but was not obligated to deny relief without considering the claim on the merits.[1414] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," the court must consider the merits of the new claim.[1415]

Third, the most controversial of the 1963 cases, *Fay v. Noia*,[1416] dealt with the important issue of state defaults, of, that is, what the effect on *habeas* is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure

1, 10, n.5 (1992). *Compare* id. at 20–21 (Justice O'Connor dissenting). *Keeney* formally overruled part of *Townsend*. Id. at 5.

[1412] 373 U.S. 1 (1963). *Sanders* was a § 2255 case, a federal prisoner petitioning for postconviction relief. The Court applied the same liberal rules with respect to federal prisoners as it did for state. *See* Kaufman v. United States, 394 U.S. 217 (1969). As such, the case has also been eroded by subsequent cases. *E.g.*, Davis v. United States, 411 U.S. 233 (1973); United States v. Frady, 456 U.S. 152 (1982).

[1413] 373 U.S. at 8. The statement accorded with the established view that principles of *res judicata* were not applicable in *habeas*. *E.g.*, Price v. Johnston, 334 U.S. 266 (1948); Wong Doo v. United States, 265 U.S. 239 (1924); Salinger v. Loisel, 265 U.S. 224 (1924). Congress in 1948 had appeared to adopt some limited version of *res judicata* for federal prisoners but not for state prisoners, Act of June 25, 1948, 62 Stat. 965, 967, 28 U.S.C. §§ 2244, 2255, but the Court in *Sanders* held the same standards applicable and denied the statute changed existing caselaw. 373 U.S. at 11–14. *But see* id. at 27–28 (Justice Harlan dissenting).

[1414] 373 U.S. at 15. In codifying the *Sanders* standards in 1966, Pub. L. 89–711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the "ends of justice" language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[1415] 373 U.S. at 17–19.

[1416] 372 U.S. 391 (1963). *Fay* was largely obliterated over the years, beginning with Davis v. United States, 411 U.S. 233 (1973), a federal-prisoner post-conviction relief case, and Wainwright v. Sykes, 433 U.S. 72 (1977), but it was not formally overruled until Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).

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a claim which he subsequently wants to raise on *habeas*. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the state's "independent and adequate state ground" bars direct federal review of the claim.[1417] Whether a similar result prevailed upon *habeas* divided the Court in *Brown v. Allen*,[1418] in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on *habeas* because of his state procedural default. The result was changed in *Fay v. Noia*, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court's appellate review, but that it had no place in *habeas*. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[1419]

Still, the Court recognized that the states had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a *habeas* petitioner relief if it found that he had deliberately bypassed state procedure; the discretion could be exercised only if the court found that the prisoner had intentionally waived his right to pursue his state remedy.[1420]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had because of some procedural default been denied the opportunity to have their claims reviewed, or who had been at least once heard on federal *habeas*, to have the chance to present their grounds for relief to a federal *habeas* judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. A major effect, however, was to exacerbate the feelings of state judges and state law enforcement officials and to stimulate many efforts in Congress

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[1417] *E.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Herb v. Pitcairn, 324 U.S. 117 (1945). In the *habeas* context, the procedural-bar rules are ultimately a function of the requirement that petitioners first exhaust state avenues of relief before coming to federal court.

[1418] 344 U.S. 443 (1953).

[1419] Fay v. Noia, 372 U.S. 391, 424–34 (1963).

[1420] 372 U.S. at 438–40.

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to enact restrictive *habeas* amendments.[1421] Although the efforts were unsuccessful, complaints were received more sympathetically in a newly constituted Supreme Court and more restrictive rulings ensued.

The discretion afforded the Court was sounded by Justice Rehnquist, who, after reviewing the case law on the 1867 statute, remarked that the history "illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." [1422] The emphasis from early on has been upon the equitable nature of the *habeas* remedy and the judiciary's responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, the Court time and again underscores that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them the discretion to exercise the power.[1423]

Change has occurred in several respects in regard to access to and the scope of the writ. It is sufficient to say that the more recent rulings have eviscerated the content of the 1963 trilogy and that *Brown v. Allen* itself is threatened with extinction.

First, the Court in search and seizure cases has returned to the standard of *Frank v. Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review

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[1421] In 1961, state prisoner *habeas* filings totaled 1,020, in 1965, 4,845, in 1970, a high (to date) of 9,063, in 1975, 7,843 in 1980, 8,534 in 1985, 9,045 in 1986. On relief afforded, no reliable figures are available, but estimates indicate that at most 4 percent of the filings result in either release or retrial. C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure (1988 & supps.), § 4261, at 284–91.

[1422] Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The present Court's emphasis in *habeas* cases is, of course, quite different from that of the Court in the 1963 trilogy. Now, the Court favors decisions that promote finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. Keeney v. Tamayo-Reyes, 504 U.S. 1, 8–10 (1992). Overall, federalism concerns are critical. *See* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism." First sentence of opinion). The seminal opinion on which subsequent cases have drawn is Justice Powell's concurrence in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973). He suggested that *habeas* courts should entertain only those claims that go to the integrity of the fact-finding process, thus raising questions of the value of a guilty verdict, or, more radically, that only those prisoners able to make a credible showing of "factual innocence" could be heard on *habeas*. Id. at 256–58, 274–75. As will be evident *infra*, some form of innocence standard now is pervasive in much of the Court's *habeas* jurisprudence.

[1423] 433 U.S. at 83; Stone v. Powell, 428 U.S. 465, 495 n.37 (1976); Francis v. Henderson, 425 U.S. 536, 538 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The dichotomy between power and discretion goes all the way back to the case imposing the rule of exhaustion of state remedies. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

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and that he cannot raise those claims again in a *habeas* petition.[1424] Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not since been extended to other constitutional grounds,[1425] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions.[1426]

Second, the Court has formulated a "new rule" exception to *habeas* cognizance. That is, subject to two exceptions,[1427] a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal *habeas* relief if the case announces or applies a "new rule."[1428] A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[1429] If a rule "was susceptible to debate among reasonable minds," it could not have been dictated by precedent, and therefore it must be classified as a "new rule."[1430]

Third, the Court has largely maintained the standards of *Townsend v. Sain*, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hear-

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[1424] Stone v. Powell, 428 U.S. 465 (1976). The decision is based as much on the Court's dissatisfaction with the exclusionary rule as with its desire to curb *habeas*. Holding that the purpose of the exclusionary rule is to deter unconstitutional searches and seizures rather than to redress individual injuries, the Court reasoned that no deterrent purpose was advanced by applying the rule on *habeas*, except to encourage state courts to give claimants a full and fair hearing. Id. at 493–95.

[1425] *Stone* does not apply to a Sixth Amendment claim of ineffective assistance of counsel in litigating a search and seizure claim. Kimmelman v. Morrison, 477 U.S. 365, 382–383 (1986). *See also* Rose v. Mitchell, 443 U.S. 545 (1979) (racial discrimination in selection of grand jury foreman); Jackson v. Virginia, 443 U.S. 307 (1979) (insufficient evidence to satisfy reasonable doubt standard).

[1426] Issues of admissibility of confessions (*Miranda* violations) and eyewitness identifications are obvious candidates. *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 205 (1989) (Justice O'Connor concurring); Brewer v. Williams, 430 U.S. 387, 413–14 (1977) (Justice Powell concurring), and id. at 415 (Chief Justice Burger dissenting); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (reserving *Miranda*).

[1427] The first exception permits the retroactive application on *habeas* of a new rule if the rule places a class of private conduct beyond the power of the state to proscribe or addresses a substantive categorical guarantee accorded by the Constitution. The rule must, to say it differently, either decriminalize a class of conduct or prohibit the imposition of a particular punishment on a particular class of persons. The second exception would permit the application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494–95 (1990) (citing cases); Sawyer v. Smith, 497 U.S. 227, 241–45 (1990).

[1428] Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); Penry v. Lynaugh, 492 U.S. 302, 313–19 (1989).

[1429] Butler v. McKellar, 494 U.S. 407, 412 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 314 (1989), which was quoting Teague v. Lane, 489 U.S. 288, 314 (1989). This sentence was quoted again in Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

[1430] 494 U.S. at 415. *See also* Stringer v. Black, 503 U.S. 222, 228–29 (1992). This latter case found that two decisions relied on by petitioner merely drew on existing precedent and so did not establish a new rule. *See also* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

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ing. However, one *Townsend* factor, not expressly set out in the statute, has been overturned in order to bring the case law into line with other decisions. *Townsend* had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that, unless he had "deliberately bypass[ed]" that procedural outlet, he was still entitled to the hearing.[1431] The Court overruled that point and substituted a much stricter "cause-and-prejudice" standard.[1432]

Fourth, the Court has significantly stiffened the standards governing when a federal *habeas* court should entertain a second or successive petition filed by a state prisoner—a question with which *Sanders v. United States* dealt.[1433] A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and "the ends of justice" would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in *Kuhlmann v. Wilson* [1434] argued that the "ends of justice" standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating "actual innocence" of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[1435]

Even if the subsequent petition alleges new and different grounds, a *habeas* court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes "an abuse of the writ." [1436] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of "inexcusable neglect" or of deliberate relinquishment. In

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[1431] Townsend v. Sain, 372 U.S. 293, 313, 317 (1963), imported the "deliberate bypass" standard from Fay v. Noia, 372 U.S. 391, 438 (1963).

[1432] Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). This standard is imported from the cases abandoning Fay v. Noia and is discussed *infra*.

[1433] 373 U.S. 1, 15–18 (1963). The standards are embodied in 28 U.S.C. § 2244(b).

[1434] 477 U.S. 436 (1986).

[1435] Sawyer v. Whitley, 505 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. Id. at 339.

[1436] The standard is in 28 U.S.C. § 2244(b), along with the standard that, if a petitioner "deliberately withheld" a claim, the petition can be dismissed. *See also* 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).

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McClesky v. Zant,[1437] the Court construed the "abuse of the writ" language to require a showing of both "cause and prejudice" before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a "fundamental miscarriage of justice" will occur, which means she must make a "colorable showing of factual innocence."[1438]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[1439] *Fay*, it will be recalled, dealt with so-called procedural-bar circumstances; that is, if a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the state then refuses to reach the merits of his claim and rules against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal *habeas*? The answer in *Fay* was that the federal court always had power to review the claim but that it had discretion to deny relief to a *habeas* claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a "deliberate bypass" of state procedure.

That is no longer the law. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules."[1440] The "miscarriage-of-justice" element is probably limited to cases in which actual inno-

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[1437] 499 U.S. 467 (1991).

[1438] 499 U.S. at 489–97. The "actual innocence" element runs through the cases under all the headings.

[1439] Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).

[1440] Coleman v. Thompson, 501 U.S. 722, 750 (1991). The standard has been developed in a long line of cases. Davis v. United States, 411 U.S. 233 (1973) (under federal rules); Francis v. Henderson, 425 U.S. 536 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Harris v. Reed, 489 U.S. 255 (1989). *Coleman* arose because the defendant's attorney had filed his appeal in state court three days late. Wainwright v. Sykes involved the failure of defendant to object to the admission of inculpatory statements at the time of trial. Engle v. Isaac involved a failure to object at trial to jury instructions.

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cence or actual impairment of a guilty verdict can be shown.[1441] The concept of "cause" excusing failure to observe a state rule is extremely narrow; "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[1442] As for the "prejudice" factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[1443]

The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera v. Collins*,[1444] the Court appeared, though ambiguously, to take the position that, although it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on *habeas*. Petitioners are entitled in federal *habeas* courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of a person claiming actual innocence would not, by this reasoning, violate the Constitution.[1445] In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for mak-

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[1441] *E.g.*, Smith v. Murray, 477 U.S. 527, 538–39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In Bousley v. Brooks, 523 U.S. 614 (1998), a federal postconviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[1442] Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not "cause" unless it rises to the level of a Sixth Amendment violation. *See also* Coleman v. Thompson, 501 U.S. 722, 752–57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state court proceeding is "cause" excusing the petitioner's failure to raise it then, Reed v. Ross, 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient "cause." Engle v. Isaac, 456 U.S. 107 (1982).

[1443] United States v. Frady, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error "so infected the entire trial that the resulting conviction violates due process").

[1444] 506 U.S. 390 (1993).

[1445] 506 U.S. at 398–417.

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ing this showing.[1446] Then, in *In re Troy Anthony Davis*,[1447] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition. Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, noted that the fact that seven of the state's key witnesses had recanted their trial testimony, and that several people had implicated the state's principal witness as the shooter, made the case "exceptional." [1448]

In *Schlup v. Delo*,[1449] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of "cause and prejudice," a claimant filing a successive or abusive petition must, as an initial matter, make a showing of "actual innocence" so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." [1450] The Court adopted a second standard, under which the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." To meet this burden, a claimant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." [1451]

[1446] 506 U.S. at 417–419. Justices Scalia and Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427–28 (concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on *habeas*. Id. at 419 (Justices O'Connor and Kennedy concurring), 429 (Justice White concurring). In House v. Bell, 547 U.S. 518, 554–55 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *See* Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

[1447] 557 U.S. ___, No. 08–1443 (2009).

[1448] Justice Scalia, joined by Justice Thomas, dissented, writing, "This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." He also wrote that the defendant's "claim is a sure loser" and that the Supreme Court was sending the District Court "on a fool's errand."

[1449] 513 U.S. 298 (1995).

[1450] 513 U.S. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitley, 505 U.S. 333 (1992).

[1451] 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).

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In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[1452] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts "gate keepers" in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in *Felker v. Turpin*.[1453] One important restriction in AEDPA bars a federal *habeas* court from granting a writ to any person in custody under a judgment of a state court "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*."[1454] The Court has made the significance of this restriction plain: Instead of assessing whether federal law was correctly applied *de novo*, as would be the course under direct review of a federal district court decision, the proper approach for federal *habeas* relief under AEDPA is the more deferential one of determining whether the Court has established clear precedent on the issue contested and, if so, whether the state's application of the precedent was reasonable, *i.e.*, no fairminded jurist could find that the state acted in accord with the Court's established precedent.[1455]

For the future, barring changes in Court membership, other curtailing of *habeas* jurisdiction can be expected. Perhaps the Court will impose some form of showing of innocence as a predicate to obtaining a hearing. More far-reaching would be an overturning of *Brown v. Allen* itself and the renunciation of any oversight, save for the extremely limited direct review of state court convictions in the Supreme Court. The Court continues to emphasize broad federalism concerns, rather than simply comity and respect for state courts.

Removal.—In the Judiciary Act of 1789, Congress provided that civil actions commenced in the state courts which could have been brought in the original jurisdiction of the inferior federal courts could

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[1452] Pub. L. 104–132, Title I, 110 Stat. 1217–21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure.

[1453] 518 U.S. 651 (1996).

[1454] The amended 28 U.S.C. § 2254(d) (emphasis added). The provision was applied in Bell v. Cone, 535 U.S. 685 (2002). *See also* Renico v. Lett, 559 U.S. ___, No. 09–338, slip op. 9–12 (2010). For analysis of its constitutionality, *see* the various opinions in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999).

[1455] Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 10–14 (2011) (overturning Ninth Circuit's grant of relief, which was based on ineffective assistance of counsel); *accord* Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011) (same) and Cullen v. Pinholster, No. 09–1088, slip op. (2011) (same).

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be removed by the defendant from the state court to the federal court.[1456] Generally, as Congress expanded the original jurisdiction of the inferior federal courts, it similarly expanded removal jurisdiction.[1457] Although there is potentiality for intra-court conflict here, of course, in the implied mistrust of state courts' willingness or ability to protect federal interests, it is rather with regard to the limited areas of removal that do not correspond to federal court original jurisdiction that the greatest amount of conflict is likely to arise.

If a federal officer is sued or prosecuted in a state court for acts done under color of law[1458] or if a federal employee is sued for a wrongful or negligent act that the Attorney General certifies was done while she was acting within the scope of her employment,[1459] the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."[1460] In the years after enactment of this statute, however, the court narrowly construed the removal privilege granted,[1461] and recent decisions for the most part confirm this

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[1456] § 12, 1 Stat. 79. The removal provision contained the same jurisdictional amount requirement as the original jurisdictional statute. It applied in the main to aliens and defendants not residents of the state in which suit was brought.

[1457] Thus the Act of March 3, 1875, § 2, 18 Stat. 470, conferring federal question jurisdiction on the inferior federal courts, provided for removal of such actions. The constitutionality of congressional authorization for removal is well-established. Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871); Tennessee v. Davis, 100 U.S. 257 (1880); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). *See* City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966).

[1458] *See* 28 U.S.C. § 1442. This statute had its origins in the Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts), and the Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), both of which grew out of disputes arising when certain states attempted to nullify federal laws, and the Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers for acts done during the existence of the Civil War under color of federal authority). In Mesa v. California, 489 U.S. 121 (1989), the Court held that the statute authorized federal officer removal only when the defendant avers a federal defense. *See* Willingham v. Morgan, 395 U.S. 402 (1969).

[1459] 28 U.S.C. § 2679(d), enacted after Westfall v. Erwin, 484 U.S. 292 (1988).

[1460] 28 U.S.C. § 1443(1). Subsection (2) provides for the removal of state court actions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." This subsection "is available only to federal officers and to persons assisting such officers in the performance of their official duties." City of Greenwood v. Peacock, 384 U.S. 808, 815 (1966).

[1461] Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Bush v. Kentucky, 107 U.S. 110

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restrictive interpretation,[1462] so that instances of successful resort to the statute are fairly rare.

Thus, the Court's position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be "in the courts of such State," the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants.[1463] Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant's rights would be denied.[1464] Furthermore, the removal statute's reference to "any law providing for . . . equal rights" covered only laws "providing for specific civil rights stated in terms of racial equality."[1465] Thus, apparently federal constitutional pro-

(1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Louisiana, 163 U.S. 101 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Kentucky v. Powers, 201 U.S. 1 (1906).

[1462] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966). There was a hiatus of cases reviewing removal from 1906 to 1966 because from 1887 to 1964 there was no provision for an appeal of an order of a federal court remanding a removed case to the state courts. § 901 of the Civil Rights Act of 1964, 78 Stat. 266, 28 U.S.C. § 1447(d).

[1463] Georgia v. Rachel, 384 U.S. 780, 803 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that "in the courts of such State" modified only "cannot enforce," so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. Id. at 844–55.

[1464] Georgia v. Rachel, 384 U.S. 780, 797–802 (1966). Thus, in Strauder v. West Virginia, 100 U.S. 303 (1880), African-Americans were excluded by statute from service on grand and petit juries, and it was held that a black defendant's criminal indictment should have been removed because federal law secured nondiscriminatory jury service and it could be predicted that he would be denied his rights before a discriminatorily selected state jury. In Virginia v. Rives, 100 U.S. 313 (1880), there was no state statute, but there was exclusion of Negroes from juries pursuant to custom and removal was denied. In Neal v. Delaware, 103 U.S. 370 (1880), the state provision authorizing discrimination in jury selection had been held invalid under federal law by a state court, and a similar situation existed in Bush v. Kentucky, 107 U.S. 110 (1882). Removal was denied in both cases. The dissenters in City of Greenwood v. Peacock, 384 U.S. 808, 848–52 (1966), argued that federal courts should consider facially valid statutes which might be applied unconstitutionally and state court enforcement of custom as well in evaluating whether a removal petitioner could enforce his federal rights in state court.

[1465] Georgia v. Rachel, 384 U.S. 780, 788–94 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 824–27 (1966), *See also* id. at 847–48 (Justice Douglas dissenting).

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visions and many general federal laws do not qualify as a basis for such removal.[1466]

Clause 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[1467]

IN GENERAL

See analysis under the Sixth Amendment.

SECTION 3. Clause 1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court.

TREASON

The Treason Clause is a product of the awareness of the Framers of the "numerous and dangerous excrescences" which had disfigured the English law of treason and was therefore intended to put it beyond the power of Congress to "extend the crime and punishment of treason."[1468] The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society were not to be escalated by the stronger into capital charges of treason, as so often had happened in England.[1469]

[1466] City of Greenwood v. Peacock, 384 U.S. at 824–27. *See also* Johnson v. Mississippi, 421 U.S. 213 (1975).

[1467] *See* the Sixth Amendment.

[1468] 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION 469 (1836) (James Wilson). Wilson was apparently the author of the clause in the Committee of Detail and had some first hand knowledge of the abuse of treason charges. J. HURST, THE LAW OF TREASON IN THE UNITED STATES: SELECTED ESSAYS 90–91, 129–136 (1971).

[1469] 2 M. Farrand, supra at 345–50; 2 J. Elliot, supra at 469, 487 (James Wilson); 3 id. at 102–103, 447, 451, 466; 4 id. at 209, 219, 220; THE FEDERALIST No. 43 (J. Cooke ed. 1961), 290 (Madison); id. at No. 84, 576–577 (Hamilton); THE WORKS OF JAMES WILSON 663–69 (R. McCloskey ed. 1967). The matter is comprehensively studied in J. Hurst, supra at chs. 3, 4.

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Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,[1470] but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King,"[1471] under which most of the English law of "constructive treason" had been developed.[1472] Beyond limiting the power of Congress to define treason,[1473] the clause also prescribes limitations upon Congress's ability to make proof of the offense easy to establish[1474] and its ability to define punishment.[1475]

Levying War

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, which involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*,[1476] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that

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[1470] 25 Edward III, Stat. 5, ch. 2, *See* J. Hurst, supra at ch 2.

[1471] Id. at 15, 31–37, 41–49, 51–55.

[1472] Id. "[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the Treason Clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king's death had been the principal instrument by which 'treason' had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king's death to the mere speaking or writing of views restrictive of the royal authority." Id. at 152–53.

[1473] The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the Treason Clause. *E.g.*, *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 126 (1807); Wimmer v. United States, 264 Fed. 11, 12–13 (6th Cir. 1920), *cert. denied*, 253 U.S. 494 (1920).

[1474] By the requirement of two witnesses to the same overt act or a confession in open court.

[1475] Cl. 2, infra, "Corruption of the Blood and Forfeiture".

[1476] 8 U.S. (4 Cr.) 75 (1807).

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the actual enlistment of men to serve against the government does not amount to levying war." Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war." [1477]

On the basis of these considerations and because no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Marshall continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war." [1478]

The Burr Trial.—Not long afterward, the Chief Justice went to Richmond to preside over the trial of Aaron Burr. His ruling [1479] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.[1480]

[1477] 8 U.S. at 126.

[1478] 8 U.S. at 127.

[1479] United States v. Burr, 8 U.S. (4 Cr.) 469, Appx. (1807).

[1480] There have been lower court cases in which convictions were obtained. As a result of the Whiskey Rebellion, convictions of treason were obtained on the basis of the ruling that forcible resistance to the enforcement of the revenue laws was a constructive levying of war. United States v. Vigol, 29 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); United States v. Mitchell, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the *Case of Fries*, 9 Fed. Cas. 826, 924 (Nos. 5126, 5127) (C.C.D. Pa. 1799, 1800). The defendant was again pardoned after conviction. About a half century later participation in forcible resistance to the Fugitive Slave Law was held not to be a constructive levying of war. United States v. Hanway, 26 Fed. Cas. 105

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Aid and Comfort to the Enemy

The Cramer Case.—Since *Bollman*, the few treason cases that have reached the Supreme Court were outgrowths of World War II and have charged adherence to enemies of the United States and the giving of aid and comfort. In the first of these, *Cramer v. United States*,[1481] the issue was whether the "overt act" had to be "openly manifest treason" or if it was enough if, when supported by the proper evidence, it showed the required treasonable intention.[1482] The Court, in a five-to-four opinion by Justice Jackson, in effect took the former view holding that "the two-witness principle" interdicted "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness,"[1483] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses,"[1484] Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

The Haupt Case.—The Supreme Court sustained a conviction of treason, for the first time in its history, in 1947 in *Haupt v. United States*.[1485] Here it was held that although the overt acts relied upon to support the charge of treason—defendant's harboring and shel-

(No. 15299) (C.C.E.D. Pa. 1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the foundation of the Confederacy was treason against the United States. Sprott v. United States, 87 U.S. (20 Wall.) 459 (1875). *See also* Hanauer v. Doane, 79 U.S. (12 Wall.) 342 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869); Young v. United States, 97 U.S. 39 (1878). These four cases bring in the concept of adhering to the enemy and giving him aid and comfort, but these are not criminal cases and deal with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases are not, therefore, an interpretation of the Constitution.

[1481] 325 U.S. 1 (1945).

[1482] 89 Law. Ed. 1443–1444 (Argument of Counsel).

[1483] 325 U.S. at 35.

[1484] 325 U.S. at 34–35. Earlier, Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." A citizen, it was said, may take actions "which do aid and comfort the enemy . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." Id. at 29. Justice Jackson states erroneously that the requirement of two witnesses to the same overt act was an original invention of the Convention of 1787. Actually it comes from the British Treason Trials Act of 1695. 7 Wm. III, c.3.

[1485] 330 U.S. 631 (1947).

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tering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of this mission and his instructions, they were more than casually useful; they were aids in steps essential to his design for treason. If proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear." [1486]

The Court held that conversation and occurrences long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court, where a legal basis for the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative. This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas, who saw in *Haupt* a vindication of his position in *Cramer*. His concurring opinion contains what may be called a restatement of the law of treason and merits quotation at length:

"As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character."

"The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*."

"The *Cramer* case departed from those rules when it held that 'The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testi-

[1486] 330 U.S. at 635–36.

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mony of a single witness.' 325 U.S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into a incriminating one."[1487]

The Kawakita Case.—*Kawakita v. United States*[1488] was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: "At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese, showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport." The question whether, on this record, Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[1489]

Doubtful State of the Law of Treason Today

The vacillation of Chief Justice Marshall between the *Bollman*[1490] and *Burr*[1491] cases and the vacillation of the Court in the

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[1487] 330 U.S. at 645–46. Justice Douglas cites no cases for these propositions. Justice Murphy in a solitary dissent stated: "But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be." Id. at 649.

[1488] 343 U.S. 717 (1952).

[1489] 343 U.S. at 732. For citations in the subject of dual nationality, *see* id. at 723 n.2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consistently demonstrating his allegiance to Japan. "As a matter of law, he expatriated himself as well as that can be done." Id. at 746.

[1490] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

[1491] United States v. Burr, 8 U.S. (4 Cr.) 469 (1807).

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Cramer[1492] and *Haupt*[1493] cases leave the law of treason in a somewhat doubtful condition. The difficulties created by *Burr* have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label,[1494] within a formula provided by Chief Justice Marshall himself in *Bollman*. The passage reads: "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution . . . must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation."[1495]

Clause 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

CORRUPTION OF THE BLOOD AND FORFEITURE

The Confiscation Act of 1862 "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels"[1496] raised issues under Article III, § 3, cl. 2. Because of the constitutional doubts of the President, the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent

[1492] Cramer v. United States, 325 U.S. 1 (1945).

[1493] Haupt v. United States, 330 U.S. 631 (1947).

[1494] *Cf.* United States v. Rosenberg, 195 F.2d 583 (2d. Cir. 1952), *cert denied*, 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.

[1495] *Ex parte* Bollman, 8 U.S. (4 Cr.) 126, 127 (1807). Justice Frankfurter appended to his opinion in Cramer v. United States, 325 U.S. 1, 25 n.38 (1945), a list taken from the government's brief of all the cases prior to *Cramer* in which construction of the Treason Clause was involved. The same list, updated, appears in J. Hurst, *supra* at 260–67. Professor Hurst was responsible for the historical research underlying the government's brief in *Cramer*.

[1496] 12 Stat. 589. This act incidentally did not designate rebellion as treason.

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as his heirs without deriving any title from the United States. In applying this act, passed pursuant to the war power and not the power to punish treason,[1497] the Court in one case[1498] quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him."[1499]

[1497] Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[1498] Wallach v. Van Riswick, 92 U.S. 202, 213 (1876).

[1499] *Lord de la Warre's Case*, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the government was concerned but did not divide the interest acquired by third persons from the government during the lifetime of the offender. Illinois Cent. R.R. v. Bosworth, 133 U.S. 92, 101 (1890); Knote v. United States, 95 U.S. 149 (1877); Wallach v. Van Riswick, 92 U.S. 202, 203 (1876); *Armstrong's Foundry*, 73 U.S. (6 Wall.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154–155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier, in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary." However, *see* In re Shinohara, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In this case, an enemy alien resident in United States territory (Guam) was found guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. DeJager v. Attorney General of Natal (1907), A.C., 96 L.T.R. 857. *See also* 18 U.S.C. § 2381.