FOURTEENTH AMENDMENT
EQUAL PROTECTION AND OTHER RIGHTS

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Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the states. The Civil War had been fought over issues of states' rights, particularly the right to control the institution of slavery.[1] In the wake of the war, the Congress submitted, and the states ratified the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of these three "Reconstruction Amendments."

Amdt14.2 State Action Doctrine

The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties.[1] As the Court has noted, "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[2] Although state action requirements also apply to other provisions of the Constitution[3] and to federal governmental actions,[4] the doctrine is most often associated with the application of the Equal Protection Clause to the states.[5]

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment.[6] In addition, acts by

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

[1] The Amendment provides that "[n]o State" and "nor shall any State" engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. *See, e.g.*, Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq. These statutes, however, are generally based on Congress's power to regulate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[2] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 109 U.S. 3, 11 (1883).

[3] The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress's enforcement powers under Section 5 of the Amendment. For discussion of the latter, *see* Amdt14.S5.1 Overview of Enforcement Clause to Amdt14.S5.4 Modern Doctrine on Enforcement Clause. Several other constitutional rights are similarly limited—the Fifteenth Amendment (racial discrimination in voting), the Nineteenth Amendment (sex discrimination in voting), and the Twenty-Sixth Amendment (voting rights for eighteen-year-olds)—although the Thirteenth Amendment, banning slavery and involuntary servitude, is not.

[4] The scope and reach of the "state action" doctrine is the same whether a state or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[5] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the Due Process Clause. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[6] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African Americans "sitting-in" at a lunch counter

other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action."[7] But the difficulty for the Court has been when the conduct complained of is not so clearly the action of a state. For instance, is it state action when a minor state official's act was not authorized or perhaps was even forbidden by state law? What if a private party engages in discrimination while in a special relationship with governmental authority? "The vital requirement is State responsibility," Justice Felix Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights.[8]

The state action doctrine is not just a textual interpretation of the Fourteenth Amendment, but may also serve the purposes of federalism. Thus, following the Civil War, when the Court sought to reassert states' rights, it imposed a rather rigid state action standard, limiting the circumstances under which discrimination suits could be pursued. During the civil rights movement of the 1950s and 1960s, however, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.[9] "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order."[10]

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases as well as many subsequent cases arose in the context of statutorily mandated separation of the races, and therefore the finding of state action occasioned no controversy.[11] In the South, the aftermath of the case more often involved disputes over which remedies were needed to achieve a unitary system than it did the requirements of state action.[12] But if racial segregation is not the result

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over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

[7] *Ex parte* Virginia, 100 U.S. 339, 346 (1880). "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Id.* at 346–47

[8] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring) (concerning the Fifteenth Amendment).

[9] The history of the state action doctrine makes clear that the Court has considerable discretion and that the weighing of the opposing values and interests will lead to substantially different applications of the tests. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[10] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

[11] Brown v. Board of Education, 347 U.S. 483 (1954).

[12] *See* Brown's Aftermath, *supra*.

of state action in some aspect, then its existence is not subject to constitutional remedy.[13] Distinguishing between the two situations has occasioned much controversy.

For instance, in a case arising from a Denver, Colorado school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that de jure racial segregation caused by "intentionally segregative school board actions" is to be treated as if it had been mandated by statute, and is to be distinguished from de facto segregation arising from actions not associated with the state.[14] In addition, when it is proved that a meaningful portion of a school system is segregated as a result of official action, the responsible agency must then bear the burden of proving that other school segregation within the system is adventitious and not the result of official action.[15] Moreover, the Court has also apparently adopted a rule that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can devolve upon the agency so that subsequent facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[16]

Different results follow, however, when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation."[17] The de jure/de facto distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the state. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded black citizens from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge's action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.[18] The fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in *Yick Wo v. Hopkins*,[19] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance that was

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[13] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[14] "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." Keyes v. Denver School District, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979).

[15] It is not the responsibility of complainants to show that each school in a system is de jure segregated to be entitled to a system-wide desegregation plan. 413 U.S. at 208–13. The continuing validity of the *Keyes* shifting-of-the-burden principle, after *Washington v. Davis*, 426 U.S. 229 (1976), and *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406 (1977), was asserted in *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 540–42 (1979).

[16] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–40 (1979).

[17] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[18] *Ex parte* Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the state to act "under color of" state law; mere participation in an act with state officers suffices. United States v. Price, 383 U.S. 787 (1966).

[19] 118 U.S. 356 (1886).

fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action unattributable to the state for purposes of the Fourteenth Amendment."Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[20] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom"[21] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[22] the action is state action. In addition, when a state clothes a private party with official authority, that private party may not engage in conduct forbidden the state.[23]

Beyond this are cases where a private individual discriminates, and the question is whether a state has encouraged the effort or has impermissibly aided it.[24] Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*.[25] There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by White sellers to Black buyers. The covenants standing alone, Chief Justice Fred Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, this situation is to be distinguished from where "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[26] Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."[27]

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[20] United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Screws v. United States, 325 U.S. 91, 109 (1945) (citation omitted); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). *See also* United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Louis Brandeis noted in *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that, for purposes of being amenable to suit in federal court, however, the immunity of the states does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. *Ex parte* Young, 209 U.S. 123 (1908). *Cf.* Screws v. United States, 325 U.S. at 147–48. .

[21] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[22] Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters, but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of Black and White protesters for trespass because they refused to leave a segregated lunch counter was voided.

[23] Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also* Williams v. United States, 341 U.S. 97 (1951).

[24] Examples already alluded to include *Lombard v. Louisiana*, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, *Peterson v. City of Greenville*, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and *Robinson v. Florida*, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

[25] 334 U.S. 1 (1948).

[26] 334 U.S. at 13–14.

[27] "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." 334 U.S. at 19. In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court outlawed judicial

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the state, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the state in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered.[28] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[29]

It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans v. Abney*,[30] a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park could be used only by "white people," ruled that the city could not operate the park in a segregated fashion. Instead of striking the segregation requirement from the will, however, the court instead ordered return of the property to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself, and distinguished *Shelley* on the basis that African Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.[31]

The case of *Reitman v. Mulkey*[32] was similar to *Shelley* in both its controversy and the uncertainty of its rationale. In *Reitman*, the Court struck down an amendment to the California Constitution that prohibited the state and its subdivisions and agencies from forbidding racial discrimination in private housing. The Court, finding the provision to deny equal protection of the laws, appeared to ground its decision on either of two lines of reasoning. First was that the provision constituted state action to impermissibly encourage private racial discrimination. Second was that the provision made discriminatory racial practices immune from the ordinary legislative process, and thus impermissibly burdened minorities in the achievement of legitimate aims.[33] In a subsequent case, *Hunter v. Erickson*,[34] the latter

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enforcement of restrictive covenants in the District of Columbia as violating civil rights legislation and public policy. Barrows v. Jackson, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[28] Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), rehearing granted, judgment vacated and certiorari dismissed, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with id.* at 326 (Black, Harlan, and White, J.J., dissenting).

[29] In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights, and the Court imposed varying limitations on such rules. *See id.* at 265 (finding state action). Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. *Id.* at 916 n.51.

[30] 396 U.S. 435 (1970). The matter had previously been before the Court in *Evans v. Newton*, 382 U.S. 296 (1966).

[31] 396 U.S. at 445. Note the use of the same rationale in another context in *Palmer v. Thompson*, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, see Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957), discussed *infra*.

[32] 387 U.S. 369 (1967). The decision was 5-4, Justices John Marshall Harlan, Hugo Black, Tom Clark, and Potter Stewart dissenting. *Id.* at 387.

[33] *See, e.g.*, 387 U.S. at 377 (language suggesting both lines of reasoning). *But see* City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

[34] 393 U.S. 385 (1969).

rationale was used in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective.[35]

Two later decisions involving state referenda on busing for integration confirm that the condemning factor of *Mulkey* and *Hunter* was the imposition of barriers to racial amelioration legislation.[36] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[37] It is thus not impermissible merely to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play.[38] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[39] State action has been found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the state and the state prescribed a general election ballot made up of party nominees chosen in the primaries.[40] Although the City of Philadelphia was acting as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the City was held to be engaged in forbidden state action in discriminating against black applicants in admission.[41] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such

[35] In contrast, other ordinances would become effective when passed, except that petitions could be submitted to revoke those ordinances by referendum. 393 U.S. at 389–90 (1969). In *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate de facto segregation. The federal court held the law void, relying on *Mulkey* to conclude that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the de facto segregation problem.

[36] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A 5-4 majority in *Seattle* found the fault to be a racially based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-1 majority in *Crawford* found that repeal of a measure to bus to undo de facto segregation, without imposing any barrier to other remedial devices, was permissible.

[37] Crawford, 458 U.S. at 539, quoted in *Seattle*, 458 U.S. at 483. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977).

[38] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

[39] 365 U.S. at 722.

[40] Smith v. Allwright, 321 U.S. 649, 664 (1944).

[41] Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 *cert. denied*, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[42]

In a significant case in which the Court explored a lengthy list of contacts between the state and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African Americans from its restaurant. The Court emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee, and that the financial success of the restaurant benefited the governmental agency. The "degree of state participation and involvement in discriminatory action," therefore, was sufficient to condemn it.[43]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960s presented all these questions and more but did not resolve them.[44] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[45] in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from excluding Black patrons. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'"[46] Moreover, although the state had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."[47] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" that the Court had found in *Burton*.[48]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[49] Or, to quote Judge Henry Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action,

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[42] Evans v. Newton, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. *Id.* at 312, 315. For the subsequent ruling in this case, see Evans v. Abney, 396 U.S. 435 (1970).

[43] Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

[44] *See, e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[45] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. *Id.* at 177–79.

[46] 407 U.S. at 173.

[47] 407 U.S. at 176–77.

[48] 407 U.S. at 174–75.

[49] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the Due Process Clause).

must be the subject of the complaint."[50] Therefore, the Court found no such nexus between the state and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the state had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[51] operated to make the utility's action the state's action.[52] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ."[53] And the actions are to be attributable to the state apparently only if the state compelled the actions and not if the state merely established the process through statute or regulation under which the private party acted.

Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain his charges out of the proceeds, his actions are not governmental action and need not follow the dictates of the Due Process Clause.[54] Or, where a state workers' compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.[55] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[56]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public function."[57] For instance, in *Marsh v. Alabama*,[58] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town, but

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[50] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over the National College Athletic Association's activities, the application of association rules leading to a state university's suspending its basketball coach could not be ascribed to the state.). *But see* Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001) (where statewide public school scholastic association is "overwhelmingly" composed of public school officials for that state, this "entwinement" is sufficient to ascribe actions of association to state).

[51] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Thurgood Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." *Id.* at 369. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[52] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351–58 (1974). On the due process limitations on the conduct of public utilities, see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[53] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

[54] 436 U.S. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[55] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

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

[57] This rationale is one of those that emerges from various opinions in *Terry v. Adams*, 345 U.S. 461 (1953) (holding that a political association limited to White voters that held internal elections to designate which of its member would run in the Texas Democratic primaries was acting as part of the state-established electoral system).

[58] 326 U.S. 501 (1946).

the Court reversed. It is not entirely clear from the Court's opinion what it was that made the privately owned town one to which the Constitution applied. In essence, it appears to have been that the town "had all the characteristics of any other American town" and that it was "like" a state. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[59] A subsequent attempt to extend *Marsh* to privately owned shopping centers was at first successful, but was soon turned back, resulting in a sharp curtailment of the "public function" doctrine.[60]

Attempts to apply this theory to other kinds of private conduct, such as operation of private utilities,[61] use of permissive state laws to secure property claimed to belong to creditors,[62] maintaining schools for "problem" children referred by public institutions,[63] provision of workers' compensation coverage by private insurance companies,[64] and operation of nursing homes in which patient care is almost all funded by public resources,[65] proved unavailing. The question is not "whether a private group is serving a 'public function.'. . . That a private entity performs a function which serves the public does not make its acts state action."[66] The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'"[67]

Public function did play an important part, however, in the Court's finding state action in the exercise of peremptory challenges in jury selection by non-governmental parties. Using tests developed in an earlier case involving garnishment and attachment,[68] the Court found state action in the racially discriminatory use of such challenges during voir dire in a civil case.[69] The Court first asked "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and then "whether the private party charged with the deprivation could be described in all fairness as a state actor." In answering the second question, the Court considered three factors: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[70] There was no question that the exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the "overt" and "significant" assistance of the court.

In addition, jury selection was found to be a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so

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[59] 326 U.S. at 506.

[60] *See* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *limited in* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on *all* the attributes of a municipality. *Id.* at 516–17.

[61] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[62] Flagg Bros. v. Brooks, 436 U.S. 149, 157–59 (1978).

[63] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[64] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[65] Blum v. Yaretsky, 457 U.S. 991, 1011–12 (1982).

[66] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[67] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

[68] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).

[69] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[70] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[71] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."[72] Dissenting Justice Sandra Day O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."[73]

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action,[74] even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case[75] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," because it involves selection of persons to wield governmental power.[76]

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subject to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[77] However the question might have been answered under prior Court holdings, it is evident that the more recent cases would not generally support a finding of state action in these cases. In *Rendell-Baker v. Kohn*,[78] a private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90% and 99% of its operating budget from public funds. In

[71] 500 U.S. at 624, 625.

[72] 500 U.S. at 628.

[73] 500 U.S. at 639, 643.

[74] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

[75] Polk County v. Dodson, 454 U.S. 512 (1981).

[76] 505 U.S. at 54. Justice Sandra Day O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 65–66. Justice Antonin Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." *Id.* at 69–70. Chief Justice William Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Clarence Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.

[77] On funding, *see* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974). *But cf.* Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). On tax benefits, *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd. sub nom.* Coit v. Green, 404 U.S. 997 (1971);McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). *But cf.* New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1976); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

[78] 457 U.S. 830 (1982).

Blum v. Yaretsky,[79] a nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the state included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the state was involved, either through coercion or encouragement.[80] "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."[81]

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being "no affirmative right to governmental aid," the Court announced in *DeShaney v. Winnebago County Social Services Department*[82] that "as a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, although the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[83] and for failure to ensure reasonable safety for involuntarily committed mental patients,[84] no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and "did not occur while [the child] was in the State's custody."[85] Although the state may have incurred liability in tort through the negligence of its social workers, "[not] every tort committed by a state actor [is] a constitutional violation."[86] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father."[87]

Judicial inquiry into the existence of "state action" may lead to different results depending on what remedy is sought to be enforced. While cases may be brought against a private actor to compel him to halt his discriminatory action, one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Enforcing the latter remedy might well avoid constitutional issues that an order directed to

[79] 457 U.S. 991 (1982).

[80] The rules developed by the Court for general business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). To the latter point, see Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[81] 457 U.S. at 1011.

[82] 489 U.S. 189, 197 (1989).

[83] Estelle v. Gamble, 429 U.S. 97 (1976).

[84] Youngberg v. Romeo, 457 U.S. 307 (1982).

[85] 489 U.S. at 201.

[86] 489 U.S. at 202.

[87] 489 U.S. at 203.

the private party would raise.[88] In either case, however, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy. In a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood v. Harrison*,[89] the Court struck down the provision of free textbooks by a state to racially segregated private schools (which were set up to avoid desegregated public schools), even though the textbook program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'. . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations."[90] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses "involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds."[91] The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[92]

It should be noted, however, that, without mentioning these cases, the Court has interposed a potentially significant barrier to use of the principle set out in them. In a 1976 decision, which it has since expanded, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must show that revocation of the benefit would cause the institutions to cease the complained-of conduct.[93]

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[88] For example, if a Court finds a relationship between the state and a discriminating private group (which may have rights of association protected by the First Amendment), a remedy directed against the relationship might succeed, where a direction to such group to eliminate such discrimination might not. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).

[89] 413 U.S. 455 (1973).

[90] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

[91] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[92] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." 417 U.S. at 573–74. *See also* Blum v. Yaretsky, 457 U.S. 991 (1982) (plaintiffs unsuccessfully sued public officials, objecting not to regulatory decision made by the officials as to Medicaid payments, but to decisions made by the nursing home in discharging and transferring patients).

[93] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See id.* at 46, 63–64 (Brennan, J., concurring and dissenting).

SECTION 1—RIGHTS

Amdt14.S1.1 Citizenship

Amdt14.S1.1.1 Historical Background on Citizenship Clause

Fourteenth Amendment, Section 1:

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

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a state or nation were citizens thereof. In the *Dred Scott* case,[1] however, Chief Justice Roger Taney, writing for the Court, ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) White persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, [and who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein.[2] Freed slaves fell into neither of these categories.

The Court further held that, although a state could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Even a free man descended from a former slave residing as a free man in one of the states at the date of ratification of the Constitution was held ineligible for citizenship.[3] Congress subsequently repudiated this concept of citizenship, first in section 1[4] of the Civil Rights Act of 1866[5] and then in Section 1 of the Fourteenth Amendment. In doing so, Congress set aside the *Dred Scott* holding, and restored the traditional precepts of citizenship by birth.[6]

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[1] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? (1967). *See also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); M. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY (2007); Symposium, *150th Anniversary of the Dred Scott Decision*, 82 CHI.-KENT L. REV. 1–455 (2007).

[2] 60 U.S. (19 How.) at 406, 418.

[3] 60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).

[4] The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." *Id.* at 2890. The legislative history is discussed at some length in *Afroyim v. Rusk,* 387 U.S. 253, 282–86 (1967) (Harlan, J., dissenting).

[5] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27.

[6] United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

Amdt14.S1.1.2 Citizenship Clause Doctrine

Fourteenth Amendment, Section 1:

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

Based on the first sentence of Section 1,[1] the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship.[2] The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation,[3] or children of members of Indian tribes subject to tribal laws.[4] In addition, the citizenship of children born on vessels in United States territorial waters or on the high seas has generally been held by the lower courts to be determined by the citizenship of the parents.[5] Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[6]

Amdt14.S1.1.3 Loss of Citizenship

Fourteenth Amendment, Section 1:

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

In *Afroyim v. Rusk*,[1] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the Government of the United States the power to

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[1] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[2] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[3] 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).

[4] 169 U.S. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[5] United States v. Gordon, 25 F. Cas. 1364 (No. 15231) (C.C.S.D.N.Y. 1861) ; *In re* Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

[6] Insurance Co. v. New Orleans, 13 F. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the Privileges and Immunities Clause of state citizenship set out in Article IV, § 2. *See also* Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n,, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[1] 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in *Mackenzie v. Hare,* 239 U.S. 299 (1915), the subject first received extended judicial treatment in *Perez v. Brownell,* 356 U.S. 44 (1958), in which the Court, by a 5-4 decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Felix

expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit."[2] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of Section 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[3] Between these two decisions is a tension that should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

Amdt14.S1.2 Privileges or Immunities

Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases

Fourteenth Amendment, Section 1:

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

Unique among constitutional provisions, the clause prohibiting state abridgement of the "privileges or immunities" of United States citizens was rendered a "practical nullity" by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,[1] the Court evaluated a Louisiana statute that conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the privileges or immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each state at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws "abridging" these privileges.

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

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Frankfurter reasoned that Congress's power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. *Id.* at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion of ArtI.S8.C4.1.6.1 Expatriation (Termination of Citizenship) Generally to ArtI.S8.C4.1.6.5 Judicial Limits on Congress's Expatriation Power under Article I. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[2] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967).

[3] Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a 5-4 decision, with Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[1] 83 U.S. (16 Wall.) 36, 71, 77–78 (1873).

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

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butchers' national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one that "belong to the citizens of the States as such." Despite the broad language of this Clause, the Court held that the privileges and immunities of state citizenship had been "left to the State governments for security and protection" and had not been placed by the clause "under the special care of the Federal government." The only privileges that the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[2] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the Privileges or Immunities Clause to a superfluous reiteration of a prohibition already operative against the states.

Amdt14.S1.2.2 Modern Doctrine on Privileges or Immunities Clause

Fourteenth Amendment, Section 1:

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

Although the Court in the *Slaughter-House Cases* expressed a reluctance to enumerate those privileges and immunities of United States citizens that are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those that it identified were the right of access to the seat of government and to the seaports, subtreasuries, land officers, and courts of justice in the several states, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of habeas corpus, the right to use the navigable waters of the United States, and rights secured by treaty.[1] In *Twining v. New Jersey*,[2] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from state to state,[3] the right to petition Congress for a

[2] 83 U.S. at 78, 79.

[1] 83 U.S. at 79–80.

[2] 211 U.S. 78, 97 (1908).

[3] Citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It was observed in *United States v. Wheeler,* 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 491–92 (1849) (Taney, C.J., dissenting). Four concurring Justices in *Edwards v. California,* 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the Privileges or Immunities Clause. More recently, the Court declined to

redress of grievances,[4] the right to vote for national officers,[5] the right to enter public lands,[6] the right to be protected against violence while in the lawful custody of a United States marshal,[7] and the right to inform the United States authorities of violation of its laws.[8] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[9]

In modern times, the Court has continued the minor role accorded to the Clause, only occasionally manifesting a disposition to enlarge the restraint that it imposes upon state action.[10] In *Hague v. CIO*,[11] two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and, in *Edwards v. California*,[12] four Justices were prepared to rely on the Clause.[13] In many other respects, however, claims based on this Clause have been rejected.[14]

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ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969). Three Justices ascribed the source to this clause in *Oregon v. Mitchell,* 400 U.S. 112, 285–87 (1970) (Stewart and Blackmun, J.J., and Burger, C.J., concurring in part and dissenting in part).

[4] Citing United States v. Cruikshank, 92 U.S. 542 (1876).

[5] Citing *Ex parte* Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900). Note Justice William O. Douglas's reliance on this clause in *Oregon v. Mitchell,* 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

[6] Citing United States v. Waddell, 112 U.S. 76 (1884).

[7] Citing Logan v. United States, 144 U.S. 263 (1892).

[8] Citing *In re* Quarles and Butler, 158 U.S. 532 (1895).

[9] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[10] Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, *see* Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the Privileges or Immunities Clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." In *Harvey*, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by lending money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the state.

[11] 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. *Id.* at 532). Justices Harlan Stone and Stanley Reed preferred to base the decision on the Due Process Clause. *Id.* at 518.

[12] 314 U.S. 160, 177–83 (1941).

[13] *See also* Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); *id.* at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).

[14] *E.g.*, Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the state); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the state); Missouri Pac. Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); *In re* Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another state and secured by mortgage of land in the debtor's state); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); *In re* Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a state to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters);

Amdt14.S1.2.2
Modern Doctrine on Privileges or Immunities Clause

In *Oyama v. California*,[15] the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law that resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as White citizens enjoyed.[16]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[17] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the state of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.[18] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[19] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[20]

Amdt14.S1.3 Due Process Generally

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association—other than benevolent orders, and the like—with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a state to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the state are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least fifty of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the forty-nine most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a state in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

[15] 332 U.S. 633, 640 (1948).

[16] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[17] *See* Amdt14.S1.8.13.1 Overview of Fundamental Rights to Amdt14.S1.8.13.2 Interstate Travel as a Fundamental Right.

[18] Saenz v. Roe, 526 U.S. 489 (1999).

[19] 526 U.S. at 525 (Thomas, J., dissenting).

[20] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the Fourteenth Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment's Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."[1] The Supreme Court has applied the Clause in two main contexts. First, the Court has construed the Clause to provide protections that are similar to those of the Fifth Amendment's Due Process Clause except that, while the Fifth Amendment applies to federal government actions, the Fourteenth Amendment binds the states.[2] The Fourteenth Amendment's Due Process Clause guarantees "procedural due process," meaning that government actors must follow certain procedures before they may deprive a person of a protected life, liberty, or property interest.[3] The Court has also construed the Clause to protect "substantive due process," holding that there are certain fundamental rights that the government may not infringe even if it provides procedural protections.[4]

Second, the Court has construed the Fourteenth Amendment's Due Process Clause to render many provisions of the Bill of Rights applicable to the states.[5] As originally ratified, the Bill of Rights restricted the actions of the federal government but did not limit the actions of state governments. However, following ratification of the Reconstruction Amendment, the Court has interpreted the Fourteenth Amendment's Due Process Clause to impose on the states many of the Bill of Rights' limitations, a doctrine sometimes called "incorporation" against the states through the Due Process Clause. Litigants bringing constitutional challenges to state government action often invoke the doctrines of procedural or substantive due process or argue that state action violates the Bill of Rights, as incorporated against the states. The Due Process Clause of the Fourteenth Amendment has thus formed the basis for many high-profile Supreme Court cases.[6]

The Fourteenth Amendment prohibits states from depriving "any person" of life, liberty, or property without due process of law. The Supreme Court has held that this protection extends to all natural persons (i.e., human beings), regardless of race, color, or citizenship.[7] The Court has also considered multiple cases about whether the word "person" includes "artificial persons," meaning entities such as corporations. As early as the 1870s, the Court appeared to accept that the Clause protects corporations, at least in some circumstances. In the 1877 *Granger Cases*, the Court upheld various state laws without questioning whether a corporation could raise due process claims.[8] In a roughly contemporaneous case arising under the Fifth Amendment, the Court explicitly declared that the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law."[9] Subsequent decisions of the Court have held that a corporation may not be

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[1] U.S. Const. amend. XIV.

[2] For discussion of the Fifth Amendment's Due Process Clause, see Amdt5.5.1 Overview of Due Process.

[3] *See* Amdt14.S1.5.1 Overview of Procedural Due Process to Amdt14.S1.5.8.2 Protective Commitment and Due Process.

[4] *See* Amdt14.S1.6.1 Overview of Substantive Due Process to Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process.

[5] *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[6] Among numerous other examples, *see, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Gideon v. Wainwright, 372 U.S. 335 (1963); Griswold v. Connecticut, 381 U.S. 479 (1965); McDonald v. Chicago, 561 U.S. 742 (2010).

[7] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[8] Munn v. Illinois, 94 U.S. 113 (1877).

[9] Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).

deprived of its property without due process of law.[10] By contrast, in multiple cases involving the liberty interest, the Court has held that the Fourteenth Amendment protects the liberty of natural, not artificial, persons.[11] Nevertheless, the Court has at times allowed corporations to raise claims not based on the property interest. For instance, in a 1936 case, a newspaper corporation successfully argued that a state law deprived it of liberty of the press.[12]

A separate question concerns the ability of government officials to invoke the Due Process Clause to protect the interests of their office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, does not enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[13] Moreover, municipal corporations lack standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the state.[14] However, the Court has acknowledged that state officers have an interest in resisting "an endeavor to prevent the enforcement of statutes in relation to which they have official duties," even if the officials have not sustained any "private damage."[15] State officials may therefore ask federal courts "to review decisions of state courts declaring state statutes, which [they] seek to enforce, to be repugnant to" the Fourteenth Amendment.[16]

Amdt14.S1.4 Incorporation of Bill of Rights

Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[10] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[11] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[12] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See id.* at 778 n.14. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court held that the First Amendment prohibits banning political speech based on the speaker's corporate identity. While *Citizens United* involved federal regulation, it overruled a prior case that had upheld a related state regulation, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

[13] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[14] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against a state).

[15] Coleman v. Miller, 307 U.S. 433, 442, 445 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[16] *Coleman*, 307 U.S. at 442–43. The converse is not true, however, and the interest of a state official in vindicating the Constitution provides no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). See also Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Bill of Rights, comprising the first ten amendments to the Constitution, protects certain rights belonging to individuals and states against infringement by the federal government. While some provisions of the Constitution expressly prohibit the states from taking certain actions,[1] the Bill of Rights does not explicitly bind the states,[2] and the Supreme Court in early cases declined to apply the Bill of Rights to the states directly.[3] However, following the ratification of the Fourteenth Amendment, the Supreme Court has interpreted the Fourteenth Amendment's Due Process Clause to impose on the states many of the Bill of Rights' limitations, a doctrine sometimes called "incorporation" against the states through the Due Process Clause.

In the early years of the Republic, both Congress and the Supreme Court appear to have believed that the Bill of Rights restricted only the federal government, not the states. When Congress was considering the constitutional amendments that later became the Bill of Rights, the Senate rejected an amendment that would have applied to the states, which read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State."[4] Beginning with Chief Justice John Marshall's opinion in the 1833 case *Barron v. Baltimore*, a number of nineteenth century Supreme Court decisions rejected arguments that the first eight amendments to the Constitution should limit the states' ability to restrict protected rights.[5]

Following the ratification of the Fourteenth Amendment in 1868, the Court changed course and held that the Due Process Clause of the Fourteenth Amendment prohibits the states from depriving their citizens of certain privileges and protections contained in the Bill of Rights.[6] Subsequent decisions of the Court have held that many provisions of the Bill of Rights bind the states; however, there are some Bill of Rights provisions that the Court has not applied to the states.[7]

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[1] *See, e.g.*, U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

[2] The First Amendment provides that "Congress shall make no law" contrary to its protections. U.S. Const. amend. I. Other Bill of Rights Amendments provide that certain rights "shall not be infringed," U.S. Const. amend. II, or "shall not be violated," U.S. Const. amend. IV, or otherwise require or prohibit certain government actions without specifying the relevant government entity, *e.g.*, U.S. Const. amends. III, V, VI, VII, VIII.

[3] *See, e.g.*, Barron v. Baltimore 32 U.S. (7 Pet.) 243 (1833).

[4] 1 Annals of Congress 755 (August 17, 1789). James Madison declared the rejected amendment to be "the most valuable of the whole list." *Id.*

[5] 32 U.S. (7 Pet.) 243 (1833). *See also* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869). The Ninth and Tenth Amendments do not enumerate separate substantive rights for protection. *See* Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights; Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People.

[6] *See* Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights.

[7] *See* Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights.

Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights

Fourteenth Amendment, Section 1:

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

Following the ratification of the Fourteenth Amendment, litigants challenging state laws and policies pursued several different strategies to raise constitutional challenges under the Fourteenth Amendment. In early litigation, plaintiffs unsuccessfully invoked the Fourteenth Amendment's Privileges or Immunities Clause to challenge state regulations.[1] Litigants in other cases argued that the Due Process Clause of the Fourteenth Amendment guarantees certain fundamental and essential rights, but did not specifically argue that the Amendment incorporated the Bill of Rights to restrict state government action.[2]

Beginning in the 1880s, some litigants contended that, although the Bill of Rights as originally ratified did not limit the states, to the extent the Bill of Rights secured and recognized fundamental rights, those rights were rights, privileges, or immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment. In the 1887 decision *Spies v. Illinois*, the Court resolved one such case on other grounds.[3] In a series of subsequent cases, the Court confronted the argument and rejected it.[4] The elder Justice John Marshall Harlan and other Justices dissented in some of these cases, arguing that the Fourteenth Amendment in effect incorporated the Bill of Rights such that its guarantees also restrain the states.[5]

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[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases.

[2] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886).

[3] Spies v. Illinois, 123 U.S. 131 (1887).

[4] *In re* Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892); Palko v. Connecticut, 302 U.S. 319, 323 (1937), ("We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule."). *See* Felix Frankfurter, *Memorandum on 'Incorporation,' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965).

[5] Dissenting in *O'Neil v. Vermont*, 144 U.S. 323, 370 (1892), Justice Harlan argued that "since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Stephen Field took the same position, writing: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." *Id.* at 363. Justice Harlan reasserted this view in *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (dissenting opinion), and in *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (dissenting opinion). According to Justice William Douglas, ten Justices who served between the ratification of the Fourteenth Amendment and the 1960s believed that the Amendment incorporated the Bill of Rights, but those Justices never constituted a majority of the Court. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). Justice Arthur Goldberg was not included on Justice Douglas's list, but also expressed this view. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

In 1947, in *Adamson v. California*, a minority of four Justices would have held that the Fourteenth Amendment "was intended to, and did make the [Fifth Amendment] prohibition against compelled testimony applicable to trials in state courts."[6] Justice Hugo Black, joined by three others, stated that his research into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[7] Justice Black's analysis prompted scholarly debate over whether those who drafted and ratified the Fourteenth Amendment intended for the Amendment to apply the Bill of Rights to the states.[8] Against that background, beginning at the end of the nineteenth century, the Court issued a series of decisions that imposed restrictions on state governments that were either similar to or directly derived from restrictions the Bill of Rights imposes on the federal government.

Early due process cases did not hold that the Fourteenth Amendment incorporated the Bill of Rights against the states directly but instead held that the Bill of Rights and the Fourteenth Amendment's Due Process Clause each separately enshrined certain fundamental rights. Thus, in an 1897 case, the Court held that the Fourteenth Amendment's Due Process Clause forbade the taking of private property without just compensation but did not mention the Just Compensation Clause of the Fifth Amendment.[9] In 1908, in *Twining v. New Jersey*, the Court observed,

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law.[10]

In the 1925 case *Gitlow v. New York*, the Court said in dictum: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[11] In two opinions from the 1930s, Justice Benjamin Cardozo summarized the doctrine of this period by observing that the Fourteenth Amendment's Due Process Clause might proscribe a certain state action, not because the proscription was spelled out in one of the first eight amendments, but because certain proscriptions were "implicit in the concept of ordered 'liberty,'"[12] such that state government action that violates them "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[13] As late as 1958, Justice Harlan opined that a state practice violated the

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[6] 332 U.S. 46, 68 (1947) (Black, J., dissenting).

[7] *Id.* at 74.

[8] *Compare* I. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949) *with* Graham,*Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 Wisc. L. Rev. 479, 610; Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954); J. tenBroek, Equal Under Law (1965 enlarged ed.).

[9] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[10] 211 U.S. 78, 99 (1908). *See also* Powell v. Alabama, 287 U.S. 45, 67–68 (1932) (quoting *Twining* and stating that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character").

[11] 268 U.S. 652, 666 (1925).

[12] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[13] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Justice Frankfurter embraced this approach to the Fourteenth Amendment's Due Process Clause, *e.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California,

Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[14]

In contrast to the foregoing approach of holding that the Bill of Rights and the Due Process Clause separately protect some of the same rights, the doctrine of incorporation holds that the Due Process Clause renders provisions of the Bill of Rights directly applicable to the states. The practice of looking to the Bill of Rights to identify rights protected by the Fourteenth Amendment emerged in Supreme Court cases in the first half of the twentieth century.[15] Some Justices advocated for a doctrine of total incorporation, which would have held that the Fourteenth Amendment's Due Process Clause applied the Bill of Rights to the states in its entirety.[16] Others preferred the doctrine of selective incorporation, which would apply certain fundamental provisions of the Bill of Rights to the states on a case-by-case basis.[17] A majority of the Court never embraced total incorporation. Over time, the doctrine of selective incorporation gained prominence, coming to dominate Fourteenth Amendment due process jurisprudence by the 1960s. Thus, in the 1964 case *Malloy v. Hogan*, Justice William Brennan wrote:

> We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.[18]

Similarly, in a 1963 case, Justice Thomas Clark wrote that "this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment."[19]

Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

332 U.S. 46, 59 (1947) (concurring opinion), as did Justice Harlan, *e.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of these principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, 342 U.S. 165 (1952).

[14] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[15] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (discussing "the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment"); *cf. Gitlow*, 268 U.S. at 666.

[16] *See, e.g.*, Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting); O'Neil v. Vermont, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting).

[17] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 326 (1937); *Adamson*, 332 U.S. at 57 (1947) (Frankfurter, J., concurring).

[18] 378 U.S. 1, 10 (1964) (citations omitted).

[19] Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963). Similar formulations for the Speech and Press Clauses appeared early. *E.g.*, *Barnette*, 319 U.S. at 639; Schneider v. Irvington, 308 U.S. 147, 160 (1939). In *Griffin v. California*, 380 U.S. 609, 615 (1965), Justice Douglas stated that "the Fifth Amendment, in its direct application to the Federal Government, and, in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Modern Supreme Court doctrine embraces the doctrine of selective incorporation of the Bill of Rights against the states, meaning that the Court has held on a case-by-case basis that many of the provisions of the Bill of Rights limit state government action. Numerous Supreme Court decisions hold that particular provisions of the Bill of Rights have been applied to the states through the Fourteenth Amendment's Due Process Clause.[1] Primarily through the doctrine of selective incorporation, the Court has held that most provisions of the Bill of Rights apply to the states.[2]

The Court has applied to the states the First Amendment's[3] guarantee of free exercise of religion,[4] the prohibition on government establishment of religion,[5] the rights of freedom of speech,[6] freedom of the press,[7] and freedom of assembly,[8] and the right to petition the government.[9] The Court has also incorporated against the states the Second Amendment right to keep and bear arms[10] and the Fourth Amendment right to be free from unreasonable searches and seizures.[11] Numerous Supreme Court cases have applied provisions of the Fifth[12]

[1] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Klopfer v. North Carolina, 386 U.S. 213 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968); Ashe v. Swenson, 397 U.S. 436 (1970); Baldwin v. New York, 399 U.S. 66 (1970).

[2] In some cases, particularly earlier cases, the Court held that certain rights applied against the states because the rights at issue were fundamental and not merely because they were named in the Bill of Rights and incorporated by the Fourteenth Amendment. *E.g.*, Powell v. Alabama, 287 U.S. 45, 67–68 (1932). For additional discussion of this distinction, see Amdt14.S1.4.2 Early Doctrine on Incorporation of the Bill of Rights. Whichever formulation was originally used, the Court now generally uses the language of incorporation. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[3] *See* Amdt1.1 Overview of First Amendment, Fundamental Freedoms.

[4] Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

[5] Everson v. Bd. of Educ., 330 U.S. 1, 3, 7, 8 (1947); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[6] Gitlow v. New York, 268 U.S. 652, 666 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

[7] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701 (1931).

[8] DeJonge v. Oregon, 299 U.S. 353 (1937).

[9] DeJonge v. Oregon, 299 U.S. at 364, 365; Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941).

[10] McDonald v. Chicago, 561 U.S. 742 (2010); *see also* Amdt2.1 Overview of Second Amendment, Right to Bear Arms.

[11] Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Amdt4.2 Historical Background on Fourth Amendment to Amdt4.7.4 Good Faith Exception to Exclusionary Rule.

[12] Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Griffin v. California, 380 U.S. 609 (1965) (same); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897) (just compensation); *see also* Amdt5.2.1 Historical Background on Grand Jury Clause to Amdt5.9.10 Enforcing Right to Just Compensation.

and Sixth Amendments[13] to restrict state government action. In addition, the Court has applied to the states the Eighth Amendment's[14] restrictions on excessive bail,[15] excessive fines,[16] and cruel and unusual punishments.[17]

By contrast, the Court has declined to apply to the states the Fifth Amendment's right to a grand jury indictment[18] and the Seventh Amendment's guarantee of a jury trial in civil cases in which the amount in controversy exceeds twenty dollars.[19] The Court has had no occasion to decide whether the states must comply with the Third Amendment's limitations on quartering troops in homes.[20] The Ninth and Tenth Amendments do not expressly enumerate separate substantive rights for protection,[21] though the Court has cited the Ninth Amendment in litigation against a state.[22]

In deciding whether the Fourteenth Amendment incorporated a specific right against the states, the Court asks whether the right at issue is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[23] A majority of the Court has consistently held that, if a provision of the Bill of Rights is incorporated against the states, the provision imposes the same substantive limitations on the states and the federal government.[24] The Court has thus "rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[25]

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[13] Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (public trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Irvin v. Dowd, 366 U.S. 717 (1961) (impartial jury); Turner v. Louisiana, 379 U.S. 466 (1965) (same); *In re* Oliver, 333 U.S. 257 (1948) (notice of charges); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Douglas v. Alabama, 380 U.S. 415 (1965) (same); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (same); *see also* Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions.

[14] *See* Amdt8.1 Overview of Eighth Amendment, Cruel and Unusual Punishment.

[15] McDonald v. City of Chicago, 561 U.S. 742, 764 n.12 (2010); Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

[16] Timbs v. Indiana, No. 17-1091, slip op. at 2 (2019).

[17] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

[18] Hurtado v. California, 110 U.S. 516 (1884); *see also* Amdt5.2.1 Historical Background on Grand Jury Clause to Amdt5.2.3 Military Exception to Grand Jury Clause.

[19] *Cf.* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring). See Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916); *see also* Amdt7.2.1 Historical Background of Jury Trials in Civil Cases to Amdt7.3.2 Appeals from State Courts to the Supreme Court.

[20] *See* Amdt3.1 Overview of Third Amendment, Quartering Soldiers.

[21] *See* Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights; Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People.

[22] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[23] Timbs v. Indiana, No. 17-1091, slip op. at 7 (2019) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

[24] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); Ker v. California, 374 U.S. 23 (1963); Griffin v. California, 380 U.S. 609 (1965); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (specifically the First Amendment Speech and Press Clauses); Crist v. Bretz, 437 U.S. 28 (1978); Burch v. Louisiana, 441 U.S. 130 (1979).

[25] Williams v. Florida, 399 U.S. 78, 106–107 (1970) (Black, J., concurring in part and dissenting in part), quoting *Malloy*, 378 U.S. at 10–11 (1964). Some Justices have argued for the application of a dual-standard test of due process for the Federal Government and the states. Justice Harlan first took this position in *Roth v. United States*, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also* Ker v. California, 374 U.S. 23, 45–46 (1963) (Harlan, J., concurring); Williams v. Florida, 399 U.S. 78, 143–45 (1970) (Stewart, J. concurring in part and dissenting in part); Duncan v. Louisiana, 391 U.S. 145, 173–83 (1968) (Harlan, J., dissenting); Bloom v. Illinois, 391 U.S. 194, 211 (1968) (Fortas, J., concurring); Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Powell, J., concurring); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (Powell, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 290 (1976) (Rehnquist, J., concurring in part and dissenting in part); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting). Those

Amdt14.S1.5 Procedural Due Process

Amdt14.S1.5.1 Overview of Procedural Due Process

Fourteenth Amendment:

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

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Broadly speaking, procedural due process requires state actors to provide certain procedural protections before they deprive a person of any protected life, liberty, or property interest.[3] Unless one of those protected interests is at stake, the Due Process Clause does not apply.[4]

When considering whether a protected interest is at stake, the Supreme Court traditionally looked to the common understanding of the terms "life," "liberty," and "property," as embodied in the common law. The Court has always accepted that the liberty interest includes the interest in freedom from physical restraint[5] and the property interest attaches to the ownership of personal and real property.[6] In the 1960s and 1970s, the Court adopted more expansive views of the liberty and property interests, holding that the Due Process Clause protects some non-traditional interests such as conditional property rights and liberty and property rights created by statute.[7] In modern cases involving alleged property interests, the Court has often decided whether a property interest exists by considering whether a law or government policy created an "entitlement"—a reasonable expectation that a government-provided benefit would continue.[8] Modern cases have found protected liberty

Justices rejected incorporation and also argued that, if the same limitations were to apply, the standards previously developed for the Federal Government would have to be diluted in order to give the states more leeway in the operation of their criminal justice systems.

[1] U.S. Const. amend. XIV.

[2] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements to Amdt5.6.3 Military Proceedings and Procedural Due Process.

[3] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[4] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.").

[5] *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897).

[6] *E.g.*, McMillen v. Anderson, 95 U.S. 37, 40 (1877) ("The revenue laws of a State may be in harmony with the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law.").

[7] *E.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring); Fuentes v. Shevin, 407 U.S. 67 (1972); Wolff v. McDonnell, 418 U.S. 539 (1974).

[8] *E.g.*, *Roth*, 408 U.S. at 577.

interests in the exercise of constitutional rights[9] and where state laws create an expectation related to individual liberty.[10] The scope of the life interest has not been the subject of significant litigation.[11]

When a protected interest is at stake, due process generally requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.[12] However, the specific procedures needed to satisfy due process vary depending on the circumstances.[13] One key consideration in determining what procedures are required is whether the government conduct at issue is a part of a criminal or civil proceeding.[14] The Court has held that the "appropriate framework" for due process analysis of criminal procedures is a narrow inquiry into whether a procedure is offensive to the concept of fundamental fairness.[15] In the civil context, by contrast, the Court applies a balancing test that evaluates the government's chosen procedure in light of the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake.[16]

Historical practice is often relevant in due process cases, as the Court analyzes the requirements of due process in part by examining the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of the Republic.[17] This means that the Court may be more likely to uphold legal procedures with a long historical pedigree. However, it does not necessarily follow that a procedure that was accepted in British law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the Court has cautioned, the procedures of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[18] Thus, the Constitution does not obligate the states to use any particular practice and procedure that existed at common law. Rather, as long

[9] *E.g.*, *id.* at 572.

[10] *E.g.*, Vitek v. Jones, 445 U.S. 480, 483 (1980); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[11] Some due process cases involving questions of life and death are brought based on a claimed liberty interest. *See, e.g.*, Cruzan v. Director, Missouri Dept. of Health Supreme Court of the United States, 497 U.S. 261 (1990) (liberty interest in refusing medical treatment); Washington v. Glucksberg, 521 U.S. 702 (1997) (no liberty interest in assisted suicide).

[12] Thus, where a litigant had the benefit of a "full and fair trial" in the state courts, and "her rights are measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition," she is not deprived of property without due process of law, even if she can be regarded as deprived of property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

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

[14] *See* Medina v. California, 505 U.S. 437, 443 (1992).

[15] *Id.*

[16] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Nelson v. Colorado, No. 15-1256, slip op. at 1, 5 (Apr. 19, 2017) (holding that the *Mathews* test controls when evaluating state procedures governing the continuing deprivation of property after a criminal conviction has been reversed or vacated, with no prospect of reprosecution).

[17] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899); *see also* Hurtado v. California, 110 U.S. 516, 529 (1884) ("A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.").

[18] *Twining*, 211 U.S. at 101.

as the states comply with due process requirements, they may learn from and build on the country's past experiences to make changes they deem to be necessary.[19]

The government often provides due process in the form of civil or criminal judicial proceedings but, in some contexts, the government may deprive a person of a protected interest without instituting judicial proceedings.[20] For instance, administrative and executive proceedings are not judicial in nature, yet they may satisfy the requirements of the Due Process Clause.[21] The Due Process Clause does not require de novo judicial review of agency proceedings, and in some circumstances may not require judicial review of agency decisions at all.[22]

While the Constitution requires separation between the three Branches of the Federal Government, states enjoy greater flexibility, and it is up to a state to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.[23] Thus, the Due Process Clause does not prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[24]

Amdt14.S1.5.2 Liberty Deprivations and Due Process

Fourteenth Amendment, Section 1:

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

The traditional conception of "liberty" refers to freedom from physical restraint or confinement. Freedom from confinement is one aspect of the liberty interest that the Due Process Clause protects, but the Supreme Court has also construed the liberty interest to include other common law and statutory rights.[1]

A number of cases involving claimed liberty interests relate to prisoners' rights. In those cases, the Court has often, but not always, been reluctant to find that a protected liberty

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[19] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[20] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[21] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, but that does not impair their validity. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[22] *See, e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veterans' benefits).

[23] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[24] For instance, state statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York *ex rel.* Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the Due Process Clause and present no federal question. By contrast, constitutional separation-of-powers principles and the limitations on the federal judiciary laid out in Article III prohibit similar arrangements at the federal level. *See* ArtIII.S1.5.3 Imposing Non-Adjudicatory Functions on Courts.

[1] *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897) ("The 'liberty' mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.").

interest exists unless the claim is based on a statutory right. For example, in *Meachum v. Fano*, the Court held that a state prisoner was not entitled to a fact-finding hearing when he was transferred to a different prison in which the conditions were substantially less favorable to him, because his initial valid conviction satisfied the due process requirement for depriving him of liberty and no state law guaranteed him the right to remain in the prison to which he was initially assigned.[2] As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any set of facts, and no hearing was required. By contrast, in *Vitek v. Jones*, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a designated physician or psychologist finding that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in [the transferor] facility."[3] Because the transfer was conditioned upon a "cause," the Court held that fair procedures must be used to establish the facts necessary to show cause. The *Vitek* Court also held that the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease, which the Due Process Clause protected.[4] Similarly, in cases involving revocation of parole or probation, the Court has recognized a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.[5]

By contrast, in cases involving possible grants of parole, commutation of a sentence, or other proceedings that might expedite a prisoner's release, the Court has held that, in the absence of some form of positive entitlement, a prisoner may be turned down without observance of procedures.[6] Summarizing its prior holdings, the Court concluded in a 1989 case that two requirements must be present before a liberty interest is created in the prison context: a statute or regulation must contain "substantive predicates" limiting the exercise of official discretion, and there must be explicit "mandatory language" requiring a particular outcome if the substantive predicates are found.[7] In subsequent cases, the Court limited the application of this test to circumstances where a state's restraint on a prisoner's freedom creates an "atypical and significant hardship."[8]

Outside the criminal context, the Court has expanded the concept of "liberty" beyond freedom from physical restraint to include various other protected interests, some statutorily created and some not.[9] Thus, in *Ingraham v. Wright*, the Court unanimously agreed that school children had a liberty interest in freedom from wrongful or excessive corporal punishment,

[2] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[3] 445 U.S. 480, 483 (1980).

[4] *Id.* at 491–93.

[5] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[6] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positively granted privileges of prisoners).

[7] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain substantive predicates but lack mandatory language).

[8] Sandin v. Conner, 515 U.S. 472, 484 (1995) (thirty-day solitary confinement not atypical in relation to the ordinary incidents of prison life); Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an atypical and significant hardship).

[9] These procedural liberty interests are distinct from substantive liberty interests, which may not be infringed through any process absent a sufficient governmental interest. *See* Amdt14.S1.6.1 Overview of Substantive Due Process.

whether or not such interest was protected by statute.[10] The Court explained that the liberty interest protected by the Due Process Clause "included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[11]

In some cases, the Court also appeared to expand the notion of liberty to include the right to be free from official stigmatization, finding that the threat of such stigmatization could in and of itself require due process.[12] Thus, in the 1971 case *Wisconsin v. Constantineau*, the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers" without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served.[13] Without discussing the source of the entitlement, the Court noted that the governmental action at issue impugned the individual's "reputation, honor, or integrity."[14]

By contrast, in the 1976 case *Paul v. Davis*, the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in the loss of a statutory entitlement.[15] In *Davis*, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. The Court rejected the constitutional challenge, holding that state law "does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of [that] interest by means of damage actions."[16] Thus, it appears that unless the government's official defamation has a specific negative effect on an entitlement, such as the denial of the right to obtain alcohol that occurred in *Constantineau*, there is no protected liberty interest that would require due process.

Amdt14.S1.5.3 Property Deprivations and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[10] 430 U.S. 651 (1977).

[11] *Id.* at 673. Cases involving the family-related liberties discussed under substantive due process, as well as associational and privacy rights, may also involve liberty interests that require procedural due process protections. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). *See also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).

[12] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975).

[13] 400 U.S. 433 (1971).

[14] *Id.* at 437. *But see* Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) (posting of accurate information regarding sex offenders on state internet website does not violate due process as the site does not purport to label the offenders as presently dangerous).

[15] 424 U.S. 693 (1976).

[16] *Id.* at 701–10. The Court distinguished *Constantineau* as being a "reputation-plus" case. That is, it not only stigmatized an individual but also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." *Id.* at 708. *See also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a later case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Like the liberty interest,[1] the concept of property rights has expanded beyond its common law roots, reflecting the Supreme Court's recognition that certain interests that fall short of traditional property rights are nonetheless important parts of people's economic well-being. For instance, in a case where household goods were sold under an installment contract and the seller retained title, the Court deemed the possessory interest of the buyer sufficiently important to require procedural due process before repossession could occur.[2] In another case, the Court held that the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was a sufficient property interest to require some form of determination that the garnisher was likely to prevail.[3] The Court has also ruled that the continued possession of a driver's license, which may be essential to one's livelihood, is a protected property interest.[4]

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment, and contracts.[5] Another relevant factor was the decline of the distinction between rights and privileges. Justice Oliver Wendell Holmes summarized the distinction in dismissing a suit by a policeman who had been fired from his job for political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[6] Under that theory, a finding that a litigant had no "vested property interest" in government employment,[7] or that some form of public assistance was "only" a privilege rather than a right,[8] meant that no procedural due process was required before depriving a person of that interest.[9] The reasoning was that, if the government was under no obligation to provide some benefit, it could choose to provide that benefit subject to whatever conditions or procedures it deemed appropriate.

There was some tension between the position that the government was free to attach conditions to benefits and another line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. That line of thought, referred to as the "unconstitutional conditions" doctrine, held that, "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[10]

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[1] *See* Amdt14.S1.5.2 Liberty Deprivations and Due Process.

[2] Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

[3] Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

[4] Bell v. Burson, 402 U.S. 535 (1971) (holding that a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability). *Compare* Dixon v. Love, 431 U.S. 105 (1977), *with* Mackey v. Montrym, 443 U.S. 1 (1979). *But see* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[5] *See* Laurence Tribe, American Constitutional Law 685 (2d. ed) (1988).

[6] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E.2d 517, 522 (1892).

[7] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 314 U.S. 918 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952).

[8] Flemming v. Nestor, 363 U.S. 603 (1960).

[9] Barsky v. Board of Regents, 347 U.S. 442 (1954).

[10] Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when Court largely abandoned the right-privilege distinction.[11] By 1972, the Court declared that it had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[12]

Concurrently with the decline of the "right-privilege" distinction, the Court embraced a mode of analysis known as the "entitlement" doctrine, under which the Court erected procedural protections against erroneous deprivation of benefits the government had granted on a discretionary basis.[13] Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights, and "natural rights." Under a new "positivist" approach, the Court might find a protected property or liberty interest based on any positive statute or governmental practice that gave rise to a legitimate expectation. This positivist doctrine can be seen in the 1970 case *Goldberg v. Kelly*, where the Court held that the government must provide an evidentiary hearing before terminating welfare benefits because such termination may deprive an eligible recipient of the means of livelihood.[14] In reaching that conclusion, the Court found that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[15] Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, the Court found that the recipient had a property interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of statutory rights to the claimant led some lower courts to apply the Due Process Clause by weighing the interests involved and the harm done to a person deprived of a benefit. However, the Court held that this approach was inappropriate. It explained, "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[16] To have a property interest in the constitutional sense, the Court held, it was not enough for a person to have an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit.[17] The Court further explained that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[18]

Consequently, in *Board of Regents v. Roth*, the Court held that a public university's refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the university's contract, regulations, or policies that

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[11] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). A number of early cases involved the imposition of conditions on admitting corporations into a state. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981)) (reviewing the cases). Some more recent cases have continued to apply the right-privilege distinction. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[12] Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

[13] The limitations were procedural and not substantive, meaning that Congress or a state legislature could still simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[14] 397 U.S. 254 (1970).

[15] *Id.* at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

[16] Bd. of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[17] *Id.* at 577.

[18] *Id.*

"created any legitimate claim" to reemployment.[19] By contrast, in *Perry v. Sindermann*, a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.[20] The Court deemed "existing rules or understandings" to have the characteristics of tenure, and thus to provide a legitimate expectation independent of any contract provision.[21]

The Court has also found "legitimate entitlements" in situations besides employment. In *Goss v. Lopez*, an Ohio statute provided for free education to all residents between five and twenty-one years of age and required school attendance; thus, the Court held that the state had obligated itself to provide students some due process hearing rights prior to suspending them.[22] The Court explained, "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[23] The Court is highly deferential, however, to school dismissal decisions based on academic grounds.[24]

The more an interest differs from the traditional understanding of "property," the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*, the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order an estranged wife obtained against her husband, despite having probable cause to believe the order had been violated.[25] While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[26] The Court also questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[27]

In *Arnett v. Kennedy*, a majority of the Court rebuffed an attempt to limit the expansion of due process with respect to entitlements.[28] The case involved a federal law that provided that

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[19] *Id.* at 576–78.

[20] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[21] *Id.* at 601.

[22] 419 U.S. 565 (1975). *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *See also* Bd. of Curators v. Horowitz, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[23] *Id.* at 574. *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care).

[24] Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, it held that right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225.

[25] 545 U.S. 748 (2005).

[26] *Id.* at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. The Court stated that such indeterminacy is not the "hallmark of a duty that is mandatory." *Id.* at 763.

[27] *Id.* at 764–65.

[28] 416 U.S. 134 (1974).

employees could not be discharged except for cause. A minority of three Justices acknowledged that due process rights could be created through statutory grants of entitlements, but observed that the statute at issue specifically withheld the procedural protections the employee sought. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,"[29] the employee would have to "take the bitter with the sweet."[30] Thus, the minority would have held that Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required. The other six Justices, although disagreeing among themselves in other respects, rejected that reasoning. "This view misconceives the origin of the right to procedural due process," Justice Lewis Powell wrote. "That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[31]

By contrast, in *Bishop v. Wood*, the Court accepted a district court's finding that a policeman held his position at will, despite language setting forth conditions for discharge.[32] Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice *Arnett* position, and the dissenters accused the majority of having repudiated the majority position of the six Justices in *Arnett*.

Subsequently, however, the Court held that, because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action."[33] The Court applied this analysis in *Logan v. Zimmerman Brush Co.*, in which a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint.[34] The commission inadvertently scheduled the hearing after the expiration of the 120 days, and the state courts held the requirement to be jurisdictional, requiring dismissal of the complaint. The Supreme Court noted that various older cases had clearly established that causes of action were property, and, in any event, the claim at issue was an entitlement grounded in state law and thus could only be removed "for cause." That property interest existed independently of the 120-day period and could not be taken away by agency action or inaction.[35]

Amdt14.S1.5.4 Civil Cases

Amdt14.S1.5.4.1 Overview of Procedural Due Process in Civil Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[29] *Id.* at 155 (Rehnquist and Stewart, JJ., and Burger, C.J.).

[30] *Id.* at 154.

[31] *Id.* at 167 (Powell, J., and Blackmun, J., concurring). *See id.* at 177 (White, J., concurring and dissenting); *id.* at 203 (Douglas, J., dissenting); *id.* at 206 (Marshall, Douglas, and Brennan, JJ., dissenting).

[32] 426 U.S. 341 (1976).

[33] Vitek v. Jones, 445 U.S. 480, 491 (1980). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[34] 455 U.S. 422 (1982).

[35] *Id.* at 428–33. A different majority of the Court also found a denial of equal protection. *Id.* at 438.

Amdt14.S1.5.4.1
Overview of Procedural Due Process in Civil Cases

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

If a state seeks to deprive a person of a protected life, liberty, or property interest, the Fourteenth Amendment's Due Process Clause requires that the state first provide certain procedural protections.[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Fifth Amendment due process case law is therefore relevant to the interpretation of the Fourteenth Amendment.[3]

The Court first addressed due process in the 1855 Fifth Amendment case *Murray's Lessee v. Hoboken Land and Improvement Co.*[4] In *Murray's Lessee*, the Court held that it would determine (independently from Congress) whether the government had provided due process by evaluating whether the statutory process conflicted with the Constitution and, if not, whether it comported with "those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[5] In the 1884 Fourteenth Amendment case *Hurtado v. California*, the Court held that a process could be judged based on whether it had attained "the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law."[6] To hold that only historical, traditional procedures can constitute due process, the Court said, would render the law "incapable of progress or improvement."[7] The Supreme Court articulated the modern test for what process is required before the government may invade a protected interest in the 1976 case *Mathews v. Eldridge*.[8]

As a general matter, the Supreme Court has held that the constitutional requirement of procedural due process allows for variances in procedure "appropriate to the nature of the case."[9] Nonetheless, the Court's decisions have identified key goals and requirements of procedural due process that apply in many circumstances. The Court has explained that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[10] Thus, the required

[1] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[2] *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974); *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements to Amdt5.6.3 Military Proceedings and Procedural Due Process.

[3] For additional discussion of pre-modern cases construing the Fifth Amendment's Due Process Clause, see Amdt5.5.2 Historical Background on Due Process; *see also* Amdt5.6.1 Overview of Due Process Procedural Requirements.

[4] 59 U.S. (18 How.) 272 (1855).

[5] *Id.* at 277. The Court took a similar approach to Fourteenth Amendment due process interpretation in *Davidson v. City of New Orleans*, 96 U.S. 97 (1878), and *Munn v. Illinois*, 94 U.S. 113 (1877).

[6] 110 U.S. 516, 528 (1884).

[7] *Id.* at 529.

[8] 424 U.S. 319, 335 (1976); *see also* Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge.

[9] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[10] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews*, 424 U.S. at 344.

elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.[11]

The core requirements of procedural due process are notice[12] and a hearing[13] before an impartial tribunal,[14] though specific requirements in each case vary based on the particular interests at stake.[15] Due process may also require other procedural protections such as an opportunity for confrontation and cross-examination, discovery, a decision based on the record, or the opportunity to be represented by counsel.[16] As long as the states provide adequate procedural protections, they possess significant discretion to structure courts and regulate state judicial proceedings,[17] set statutes of limitations,[18] and specify burdens of proof or evidentiary presumptions.[19] Except as otherwise noted, the following essays focus on procedural due process requirements in civil and administrative proceedings. Later essays discuss procedural due process requirements in criminal cases.[20]

Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge

Fourteenth Amendment, Section 1:

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

The requirements of due process depend on the nature of the interest at stake and the weight of that interest balanced against the opposing government interests.[1] The Supreme

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[11] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 529 U.S. 460 (2000) (amendment of judgment to impose attorney's fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

[12] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process.

[13] *See* Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

[14] *See* Amdt14.S1.5.4.5 Impartial Decision Maker.

[15] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Due process does not require notice and a hearing for all possible deprivations of protected interests. *See, e.g.*, Amdt14.S1.5.7.1 State Taxes and Due Process Generally.

[16] *See* Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process.

[17] *See* Amdt14.S1.5.4.7 Power of States to Regulate Procedures.

[18] *See* Amdt14.S1.5.4.8 Statutes of Limitations and Procedural Due Process.

[19] *See* Amdt14.S1.5.4.9 Burdens of Proof and Presumptions.

[20] *See* Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases; Amdt14.S1.5.6.1 Overview of Criminal Cases and Post-Trial Due Process.

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

Court articulated the current standard for determining what process is required before the government may impair a protected interest in the 1976 case *Mathews v. Eldridge*.[2] The *Mathews* Court explained:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[3]

Application of this standard is highly fact-dependent, as *Mathews* itself demonstrated. *Mathews* concerned termination of Social Security benefits. The *Mathews* Court compared the process required in the case before it with what was required in an earlier case involving termination of welfare benefits, *Goldberg v. Kelly*.[4] The termination of welfare benefits in *Goldberg*, which affected "persons on the very margin of subsistence" and could have resulted in the challenger's loss of food and shelter, had required a pre-deprivation hearing. By contrast, the Court held, the termination of Social Security benefits in *Mathews* required less protection because disability benefits are not based on financial need and a terminated recipient could apply for welfare if needed.[5] Moreover, while the Court had found a significant risk of erroneous deprivation in *Goldberg*, it found that the determination of ineligibility for Social Security benefits more often turns on routine and uncomplicated evaluations of data, reducing the likelihood of error. Finally, the Court noted that the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, the Court concluded that due process was satisfied by a post-termination hearing with full retroactive restoration of benefits if the claimant prevails.[6]

While more recent cases often cite *Mathews* for the test the Court announced in that case, other roughly contemporaneous cases also show changes in the Court's approach to procedural due process in the 1970s. For instance, in cases involving debtors and installment buyers, the Court shifted its approach around the time of the *Mathews* decision, generally requiring less process before money or property could be seized. Earlier cases had focused upon the interests of the holders of the property in not being unjustly deprived of goods and funds in their possession and had thus leaned toward requiring pre-deprivation hearings. By contrast, newer cases look to the interests of creditors as well. In one 1974 case, the Court explained: "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[7]

To illustrate, the 1969 case *Sniadach v. Family Finance Corp.* mandated pre-deprivation hearings before wages could be garnished.[8] The Court appears to have limited *Sniadach* to instances when wages, and perhaps certain other basic necessities, are at issue and the

[2] 424 U.S. 319 (1976).

[3] *Id.* at 335.

[4] 397 U.S. 254 (1970).

[5] *Mathews*, 424 U.S. at 340–41.

[6] *Id.* at 339–49.

[7] Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).

[8] 395 U.S. 337 (1969).

consequences of deprivation would be severe.[9] The 1972 case *Fuentes v. Shevin* struck down a replevin statute that authorized the seizure of household goods purchased on an installment contract upon the filing of an ex parte application and the posting of bond.[10] The Court has also limited that case, holding that an appropriately structured ex parte judicial determination before seizure is sufficient to satisfy due process.[11] Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[12]

The Court has applied *Mathews* in a broad range of contexts. Applying the standard in the context of government employment, the Court considered the interest of an employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination and concluded that due process requires some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, including an award of back pay if the employee is successful.[13] Where an adverse employment action does not rise to the level of termination of employment, the governmental interest is significant, and reasonable grounds for such action have been established separately, the Court has held that a prompt hearing held after the adverse action may be sufficient.[14]

In *Brock v. Roadway Express, Inc.*, a plurality of the Court applied a similar analysis to governmental regulation of private employment, determining that an agency may order an employer to reinstate a whistleblower employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges and to have an opportunity for informal rebuttal.[15] The principal difference from the *Mathews* test was that the Court acknowledged two conflicting private interests to weigh in

[9] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Powell, J., concurring). The majority opinion draws no such express distinction, instead emphasizing that *Sniadach-Fuentes* do require observance of some due process procedural guarantees. *See id.* at 605–06. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of the Court by Justice Byron White emphasizing the wages aspect of the earlier case).

[10] 407 U.S. 67 (1972).

[11] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). More recently, the Court has applied a variant of the *Mathews* formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991).

[12] *Mitchell*, 416 U.S. at 615–18 (1974). Efforts to litigate challenges to seizures in actions involving two private parties may be thwarted by finding that the case involves no state action, but there often is sufficient participation by state officials in transferring possession of property to constitute state action and implicate due process. *Compare* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (no state action in warehouseman's sale of goods for nonpayment of storage, as authorized by state law), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (state officials' joint participation with private party in effecting prejudgment attachment of property), *and* Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (probate court was sufficiently involved with actions activating time bar in nonclaim statute).

[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In *Barry v. Barchi*, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. *See also* FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with ninety-day delay before decision resulting from post-suspension hearing).

[14] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[15] 481 U.S. 252 (1987).

the equation: that of the employer "in controlling the makeup of its workforce," and that of the employee in not being discharged for whistleblowing.[16]

In other cases, the government may dispense with hearings providing even minimum procedures when establishing grounds for a deprivation of a protected interest is so pro forma or routine that the likelihood of error is very small.[17] In a case dealing with state agency's negligent failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[18]

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*, a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the City.[19] When he subsequently sought to challenge the imposition of the impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. The Court also considered the fact that a thirty-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would impose an administrative burden on the city.

In another context, the Supreme Court applied the *Mathews* test to strike down a provision in Colorado's Exoneration Act.[20] That statute required individuals whose criminal convictions had been invalidated to prove their innocence by clear and convincing evidence in order to recoup any fines, penalties, court costs, or restitution paid to the state as a result of the conviction. The Court, noting that "[a]bsent conviction of crime, one is presumed innocent,"[21] concluded that all three considerations under *Mathews* "weigh[ed] decisively against Colorado's scheme."[22] Specifically, the Court reasoned that (1) those affected by the Colorado statute have an "obvious interest" in regaining their funds;[23] (2) the burden of proving one's innocence by clear and convincing evidence unacceptably risked erroneous deprivation of those funds;[24] and (3) the state had "no countervailing interests" in withholding money to which it had "zero claim of right."[25] As a result, the Court held that the state could not impose "anything more than minimal procedures" for the return of funds that occurred as a result of a conviction that was subsequently invalidated.[26]

In other areas, the balancing standard of *Mathews* has resulted in states having greater flexibility in determining what process is required. For instance, when a state alters previously

[16] *Id.* at 263.

[17] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of driver's license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

[18] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[19] 538 U.S. 715 (2003).

[20] Nelson v. Colorado, No. 15-1256, slip op. (April 19, 2017).

[21] *Id.* at 1.

[22] *Id.* at 4.

[23] *Id.* In so concluding, the Court rejected Colorado's argument that the money in question belonged to the State because the criminal convictions were in place at the time the funds were taken. *Id.* The Court reasoned that after a conviction has been reversed, the criminal defendant is presumed innocent and any funds provided to the State as a result of the conviction rightfully belong to the person who was formerly subject to the prosecution. *Id.* at 5 ("Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.").

[24] *Id.* at 5–6. In particular, the Court noted that when a defendant seeks to recoup small amounts of money under the Exoneration Act, the costs of mounting a claim and retaining a lawyer "would be prohibitive," amounting to "no remedy at all" for any minor assessments under the Act. *Id.* at 9.

[25] *Id.* at 6.

[26] *Id.*

existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract.[27] Thus, in considering corporal punishment in public schools, the Court held that the existence of common-law tort remedies for wrongful or excessive punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonable punishment), reasonably assured the probability that a child would not be punished without cause or excessively.[28] The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.[29]

The Court has required greater due process protection against property deprivations resulting from operation of established state procedures than those resulting from random and unauthorized acts of state employees.[30] Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is the state system itself that destroys a complainant's property interest.[31] Although the Court briefly entertained the theory that a negligent (i.e., non-willful) action by a state official was sufficient to invoke due process, and that a post-deprivation hearing regarding such loss was required,[32] the Court subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."[33]

In rare and extraordinary situations where summary action is necessary to prevent imminent harm to the public and the private interest infringed is reasonably deemed to be of less importance, the Court has held that the government can take action with no notice and no opportunity to defend, subject to a later full hearing.[34] Examples—most of which predate

[27] *See, e.g.*, Lujan v. G & G Fire Sprinklers, Inc., 523 U.S. 189 (2001) (breach of contract suit against state contractor who withheld payment to subcontractor based on state agency determination of noncompliance with Labor Code sufficient for due process purposes).

[28] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977).

[29] *Id.* In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19–22 (1987), involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.

[30] Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." 455 U.S. 422, 436–37 (1982).

[31] *Id.* at 436.

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

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

[34] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981). A person may waive his due process rights though, as with other constitutional rights, the waiver must be knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

Mathews—include seizure of contaminated foods or drugs or other such commodities to protect the consumer,[35] collection of governmental revenues,[36] and the seizure of enemy property in wartime.[37] Citing national security interests, in a 1961 case the Court upheld an order issued without notice and an opportunity to be heard that excluded a short-order cook employed by a concessionaire from a Naval Gun Factory.[38] While the Court was ambivalent about a right-privilege distinction, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the government's interest in conducting a high-security program.[39] In the 1979 case *Mackey v. Montrym*, the Court applied the *Mathews* test and upheld a Massachusetts statute that mandated suspension of a driver's license because he refused to take a breath-analysis test upon arrest for drunk driving.[40] The Court cited pre-*Mathews* cases involving health and safety measures for the proposition that the Court has "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety."[41]

Amdt14.S1.5.4.3 Notice of Charge and Due Process

Fourteenth Amendment, Section 1:

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

The Supreme Court has explained that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[1] The notice requirement may include an obligation to take "reasonable followup measures" that may be available upon learning that an attempt at notice has failed.[2] In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[3] Ordinarily, service of notice must be reasonably structured to assure that the person

[35] North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *See also* Fahey v. Mallonee, 332 U.S. 245 (1947). *Cf.* Mackey v. Montrym, 443 U.S. 1, 17–18 (1979).

[36] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[37] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

[38] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[39] *Id.* at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (White, J., concurring in part and dissenting in part).

[40] 443 U.S. 1.

[41] *Id.* at 17–18.

[1] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[2] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked unclaimed; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so).

[3] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

to whom it is directed receives it.[4] However, the notice need not describe the legal procedures necessary to protect one's interest if the procedures are otherwise set out in published, generally available public sources.[5]

While due process often requires the government to provide a person with notice and an opportunity for a hearing before depriving the person of a protected interest,[6] there are some circumstances in which the Court has held those procedural protections are not required.[7] For instance, persons adversely affected by a law cannot challenge the law's validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view.[8] Similarly, when an administrative agency engages in a legislative function, for example by drafting regulations of general application, it need not hold a hearing prior to promulgation.[9] On the other hand, if a regulation affects an identifiable class of persons, the Court employs a multi-factor analysis to determine whether notice and hearing is required and, if so, whether it must precede such action.[10]

Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing

Fourteenth Amendment, Section 1:

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

As a general matter, procedural due process requires an opportunity for a meaningful hearing to review a deprivation of a protected interest.[1] The Supreme Court has held that "some form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[2] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment."[3]

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[4] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1972); Greene v. Lindsey, 456 U.S. 444 (1982).

[5] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[6] *E.g.*, Twining v. New Jersey, 211 U.S. 78, 11 (1908) (stating that those requirements "seem to be universally prescribed in all systems of law established by civilized countries"); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

[7] Notice and a hearing is not always needed before collection of taxes. *See* Amdt14.S1.5.7.1 State Taxes and Due Process Generally.

[8] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Bragg v. Weaver, 251 U.S. 57, 58 (1919). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[9] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

[10] *Id.* at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908). One factor the Court considers in this analysis is whether agency action is subject to later judicial scrutiny. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

[1] *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[2] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Parties whose rights are to be affected are entitled to be heard. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[3] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Frankfurter, J., concurring).

Amdt14.S1.5.4.4
Opportunity for Meaningful Hearing

Thus, the notice of hearing and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.[4] However, the type of hearing required, and when the hearing must occur, depend on the specific circumstances at issue.

The Court has held that it is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[5] However, due process does not necessarily require affording a party the opportunity to present every available defense before entry of judgment. A person may be remitted to other actions initiated by him,[6] or an appeal may suffice. Accordingly, in one case the Court held that a company objecting to the entry of a judgment against it without notice and an opportunity to be heard on the issue of liability was not denied due process where the state provided the opportunity for a hearing on appeal from the judgment.[7] Nor could the company show a denial of due process based on the fact that it lost the opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[8] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, the Supreme Court held that the plaintiff was denied due process because he did not have an opportunity to introduce evidence in rebuttal to testimony that the trial court deemed immaterial but the appellate court considered material.[9]

In interpreting the analogous Due Process clause of the Fifth Amendment, the Court has held that due process does not require a trial-type hearing in every conceivable case of governmental impairment of private interest. For instance, the Court held that the summary exclusion on security grounds of a concessionaire's cook at the Naval Gun Factory, without hearing or advice as to the basis for the exclusion, did not violate due process.[10] In *Hannah v.*

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[4] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[5] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 394, 403 (1917); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

[6] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if a person would suffer too severe an injury "between the doing and the undoing," he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[7] American Surety Co. v. Baldwin, 287 U.S. 156 (1932).

[8] *Id.* Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982).

[9] Saunders v. Shaw, 244 U.S. 317 (1917).

[10] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). In so holding, the Court considered the historical power of a commanding officer summarily to exclude civilians from the area of his command and applicable Navy regulations that confirm that authority, together with a stipulation in the contract between the restaurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements.

Manifesting a disposition to adjudicate on non-constitutional grounds employee dismissals under the Federal Loyalty Program, in *Peters v. Hobby*, 349 U.S. 331 (1955), the Court invalidated, as in excess of delegated authority, a Loyalty Review Board's finding of reasonable doubt as to the petitioner's loyalty that reopened his case on its own initiative after it had twice cleared him.

In *Cole v. Young*, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, the Court intimated that grave due process issues would be raised by applying to federal employees, not occupying sensitive positions, a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established administrative law rule that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than Congress required or that the agency action is discretionary. In both of the last cited decisions, the Court set aside dismissals of employees as security risks because the employing agency failed to conform the dismissal to its established security regulations. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

Again avoiding constitutional issues, in *Greene v. McElroy*, 360 U.S. 474 (1959), the Court invalidated the security clearance procedure the Defense Department required from defense contractors as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order that sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Felix Frankfurter, John Marshall Harlan, and Charles Whittaker

Larche, the Court upheld rules of procedure adopted by the Civil Rights Commission, under which state electoral officials and others accused of discrimination were not apprised of the identity of their accusers or accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings.[11] In upholding the procedures, the Court opined that the Commission acts solely as an investigative and fact-finding agency and makes no adjudications. It further noted that additional procedural protections have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations that do not determine private rights.

With respect to actions taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before a final order becomes effective.[12] In *Bowles v. Willingham*, the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying that "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires."[13] But in another case where the National Labor Relations Board undertook to void an agreement between an employer and a union after consideration of charges brought against the employer by an independent complaining union, the Court held that the union that formed the agreement was entitled to notice and an opportunity to participate in the proceedings.[14] Although a taxpayer must be afforded a fair opportunity for a hearing in connection with the assessment of taxes,[15] collection of taxes through summary administrative proceedings is lawful if the taxpayer is later afforded a hearing.[16]

When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality.[17] A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to respond to them.[18] In administrative proceedings, a variance between the initial charges and the

concurred without passing on the validity of such procedure, if authorized. Justice Tom Clark dissented. See also the dissenting opinions of Justices William O. Douglas and Hugo Black in *Beard v. Stahr*, 370 U.S. 41, 43 (1962), and in *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

[11] 363 U.S. 420, 493, 499 (1960). Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. 91-521, § 4, 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[12] Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941).

[13] 321 U.S. 503, 521 (1944).

[14] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[15] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907); Lipke v. Lederer, 259 U.S. 557 (1922).

[16] Phillips v. Commissioner, 283 U.S. 589 (1931). *Cf.* Springer v. United States, 102 U.S. 586, 593 (1881); Passavant v. United States, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See* Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). On the limitations on private prejudgment collection, see Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[17] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). *See also* Amdt14.S1.5.4.5 Impartial Decision Maker.

[18] Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has applied this principle with differing results to administrative hearings and subsequent review in selective service cases. *Compare* Gonzales v. United States, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* United States v. Nugent, 346 U.S. 1 (1953) (in auxiliary hearing that culminated in a Justice Department report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption"), *and* Gonzales v. United States, 364 U.S. 59 (1960) (finding no due process violation when petitioner at departmental proceedings was not permitted to

agency's ultimate findings will not invalidate the proceedings where the record shows that there was no misunderstanding as to the basis of the complaint.[19] The admission of evidence that would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[20] An administrative hearing may consider hearsay evidence, and hearsay may constitute by itself substantial evidence in support of an agency determination, provided that there are assurances of the underlying reliability and probative value of the evidence and the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them.[21] However, a provision that an administrative body shall not be controlled by rules of evidence does not justify the issuance of orders without a foundation in evidence having rational probative force. Although the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[22] it has refused to lay down a general rule that would cover all cases.[23]

Amdt14.S1.5.4.5 Impartial Decision Maker

Fourteenth Amendment, Section 1:

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

The Due Process Clause requires that the decision to deprive a person of a protected interest be entrusted to an impartial decision maker. This rule applies to both criminal and civil cases.[1] The Supreme Court has explained that the "neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law" and "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[2]

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rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board; likewise finding no violation where petitioner at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

[19] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 349–50 (1938).

[20] Western Chem. Co. v. United States, 271 U.S. 268 (1926). *See also* United States v. Abilene & So. Ry., 265 U.S. 274, 288 (1924).

[21] Richardson v. Perales, 402 U.S. 389 (1971).

[22] Londoner v. Denver, 210 U.S. 373 (1908).

[23] FCC v. WJR, 337 U.S. 265, 274–77 (1949). *See also* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C §§ 1001–1011. *Cf.* Link v. Wabash R.R., 370 U.S. 626, 637, 646 (1962), in which the majority rejected Justice Black's dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter's failure to appear at a pre-trial conference, amounted to a taking of property without due process of law.

[1] Tumey v. Ohio, 273 U.S. 510 (1927); *In re* Murchison, 349 U.S. 133 (1955); Goldberg v. Kelly, 397 U.S. 254, 271 (1970). *See also* Amdt14.S1.5.5.2 Impartial Judge and Jury.

[2] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982). Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them. Gibson v.

There is a "presumption of honesty and integrity in those serving as adjudicators," so the burden is on an objecting party to show a conflict of interest or some other reason for disqualification of a specific officer or for disapproval of an adjudicatory system as a whole. The Court has held that combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[3] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not sufficient to disqualify them.[4]

Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In the 2009 case *Caperton v. A. T. Massey Coal Co.*, the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."[5] The Court added, however, that "the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."[6] In addition, although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,'" there are "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.'"[7] Those circumstances include "where a judge had a financial interest in the outcome of a case" or "a conflict arising from his participation in an earlier proceeding."[8]

In judicial recusal cases, the Court has explained, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[9] In *Caperton*, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when "[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice."[10] The justice was elected, declined to recuse himself, and joined a 3-2 decision overturning the jury verdict. The Supreme Court, in a 5-4 opinion written by Justice Anthony Kennedy, concluded that there was "a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a

Berryhill, 411 U.S. 564 (1973). Similarly, the Court has held that the conduct of deportation hearings by a person who, while he had not investigated the case, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem. The Court resolved the issue through statutory construction. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[3] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, a lower standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Id.* at 249.

[4] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

[5] 556 U.S. 868, 876 (2009) (citations omitted).

[6] *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

[7] *Id.*

[8] *Id.* at 877.

[9] *Id.* at 881.

[10] *Id.* at 886.

significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[11]

Subsequently, in the 2016 case *Williams v. Pennsylvania*, the Court found that the right of due process was violated when a judge on the Pennsylvania Supreme Court who participated in a case denying post-conviction relief to a prisoner convicted of first-degree murder and sentenced to death had, in his former role as a district attorney, given approval to seek the death penalty in the prisoner's case.[12] Relying on *Caperton*, which the Court viewed as having set forth an "objective standard" that requires recusal when the likelihood of bias on the part of the judge is "too high to be constitutionally tolerable,"[13] the *Williams* Court held that there is an impermissible risk of actual bias when a judge had previously had a "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[14] The Court based its holding, in part, on earlier cases that had found impermissible bias occurs when the same person serves as both "accuser" and "adjudicator" in a case.[15] It reasoned that authorizing another person to seek the death penalty represents "significant personal involvement" in a case,[16] and took the view that the involvement of multiple actors in a case over many years "only heightens"—rather than mitigates—the "need for objective rules preventing the operation of bias that otherwise might be obscured."[17] As a remedy, the Court remanded the case for reevaluation by the reconstituted Pennsylvania Supreme Court. Notwithstanding the fact that the judge in question did not cast the deciding vote, the *Williams* Court viewed the judge's participation in the multi-member panel's deliberations as sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error.[18]

Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[11] *Id.* at 884.

[12] 136 S. Ct. 1899, 1903 (2016).

[13] *Id.* (internal quotations omitted).

[14] *Id.* at 1905.

[15] *Id.* at 1905 (citing *In re* Murchison, 349 U.S. 133, 136–37 (1955)). The Court also noted that "[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision." *Id.* at 1906.

[16] *Id.* at 1907. *See also id.* at 1907–08 (noting that the judge in this case had highlighted the number of capital cases in which he participated when campaigning for judicial office).

[17] *Id.* at 1907.

[18] *Id.* at 1909–10. Likewise, the Court rejected the argument that remanding the case would not cure the underlying due process violation because the disqualified judge's views might still influence his former colleagues, as an "inability to guarantee complete relief for a constitutional violation . . . does not justify withholding a remedy altogether." *Id.* at 1910.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Beyond the requirements of notice and a hearing before an impartial decision maker,[1] due process may also require other procedural protections such as an opportunity for confrontation and cross-examination of witnesses, discovery, a decision based on the record, or the opportunity to be represented by counsel.

With respect to confrontation and cross-examination of witnesses, the Supreme Court has held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[2] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," a party's right to show that it is untrue depends on the rights of confrontation and cross-examination. The Court has thus "been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[3]

With respect to discovery, the Court has held that criminal defendants have a due process right to discover exculpatory evidence held by the government[4] but has not directly confronted the questions of whether and when due process requires discovery in civil or administrative proceedings. However, in one case the Court observed in dictum that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[5] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference of the United States has recommended that all do so.[6] There appear to be no cases, however, holding that they must.[7]

The Supreme Court has also held that due process requires decisions to be based on the record before the decision maker. Although this issue arises principally in the area of administrative law, it applies generally.[8] The Court has explained that a decision maker's conclusion "must rest solely on the legal rules and evidence adduced at the hearing. . . . [T]he decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[9]

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[1] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process; Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing; Amdt14.S1.5.4.5 Impartial Decision Maker.

[2] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[3] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[4] Brady v. Maryland, 373 U.S. 83 (1963); *see also* Amdt14.S1.5.5.6 Evidentiary Requirements in Criminal Cases.

[5] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[6] Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).

[7] At least one federal appeals court has held that federal agencies cannot adopted discovery rules absent congressional authorization. FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

[8] The exclusiveness of the record is fundamental in administrative law. *See* Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). To succeed on a challenge on this ground, a person must show not only that the agency used ex parte evidence but also it caused prejudice. Market Street R.R. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding ex parte evidence).

[9] Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (citations omitted).

In some civil and administrative cases, due process requires that a party have the option to be represented by counsel.[10] In the 1970 case *Goldberg v. Kelly*, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[11] In a subsequent case, the Court established a presumption that an indigent litigant does not have the right to appointed counsel unless his "physical liberty" is threatened.[12] The Court has also held the fact that an indigent litigant may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court considers the circumstances in individual cases, and may hold that appointment of counsel is not required if the state provides appropriate alternative safeguards.[13]

Amdt14.S1.5.4.7 Power of States to Regulate Procedures

Fourteenth Amendment, Section 1:

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

In general, as long as parties receive sufficient notice,[1] an opportunity to defend their protected interests,[2] and any other required procedural safeguards,[3] the Due Process Clause of the Fourteenth Amendment does not specify the particular forms of procedure to be used in state courts.[4] The states may regulate the manner in which rights may be enforced and wrongs remedied,[5] and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.[6] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it causes hardship for a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues that ordinarily do not implicate the

[10] In contrast to the procedural due process requirements for civil and administrative proceedings discussed in this section, criminal defendants have a right to counsel under the Sixth Amendment as applied to the states by the Fourteenth Amendment. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[11] 397 U.S. 254, 270–71 (1970).

[12] Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

[13] Turner v. Rogers, 564 U.S. 431 (2011) (denying an indigent defendant appointed counsel in a civil contempt proceeding to enforce a child support order, even though the defendant faced incarceration unless he showed an inability to pay the arrearages, but reversing the contempt order because the procedures followed remained inadequate).

[1] *See* Amdt14.S1.5.4.3 Notice of Charge and Due Process.

[2] *See* Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

[3] *See* Amdt14.S1.5.4.5 Impartial Decision Maker; Amdt14.S1.5.4.6 Additional Requirements of Procedural Due Process.

[4] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A state "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the Contract, Full Faith and Credit, and Privileges and Immunities Clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).

[5] Insurance Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Iowa Central Ry. v. Iowa, 160 U.S. 389, 393 (1896); Honeyman v. Hanan, 302 U.S. 375 (1937). *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

[6] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

Fourteenth Amendment. The Supreme Court has explained that the function of the Fourteenth Amendment is negative rather than affirmative[7] and in no way obligates the states to adopt specific measures of reform.[8]

A state may impose certain conditions on the right to institute litigation. However, foreclosure of all access to the courts through imposition of financial barriers is subject to constitutional scrutiny and must be justified by a state interest of suitable importance. Thus, the Court has upheld a state law that denied access to the courts to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[9] The Court has also held that a state, as the price of opening its tribunals to a nonresident plaintiff, may impose the condition that the nonresident stand ready to answer all cross actions filed and accept any in personam judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[10] For similar reasons, the Court did not deem arbitrary or unreasonable a requirement for a chemical analysis as a condition precedent to a suit to recover for damages to crops from allegedly deficient fertilizers, where other evidence was also allowed.[11] By contrast, where a state has monopolized the avenues for settling disputes between persons by prescribing judicial resolution, and where a dispute involves a fundamental interest, such as marriage and its dissolution, the state may not deny access to persons unable to pay its fees.[12]

Just as a state may condition the right to institute litigation, it may also establish terms for raising certain defenses. For instance, the Court has held that a state may validly provide that a person sued in a possessory action cannot bring an action to try title until after judgment is rendered and he has paid the judgment.[13] A state may limit available defenses in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[14] A state may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents; the

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

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

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

[10] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[11] Jones v. Union Guano Co., 264 U.S. 171 (1924).

[12] Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Little v. Streater, 452 U.S. 1 (1981) (state-mandated paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parental status termination proceeding); Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental custody).

[13] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[14] Lindsey v. Normet, 405 U.S. 56, 64–69 (1972). *See also* Bianchi v. Morales, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment).

Court has held that no person has a vested right in such defenses.[15] Similarly, a nonresident defendant in a suit begun by foreign attachment cannot challenge the validity of a statute that requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend, even if he has no resources or credit other than the property attached.[16]

Once a suit is underway, the amendment of pleadings is largely within the discretion of the trial court and, absent a gross abuse of discretion, there is no ground for reversal. Thus, in one case, the Court found no denial of due process in rendition of a foreclosure decree without leave to file a supplementary answer that sought to raise a meritless defense.[17]

The Due Process Clause allows states significant discretion in whether to provide for jury trials or appeals in civil cases. Unlike in criminal trials,[18] the Court has not deemed jury trials essential to due process in state civil proceedings, and has not interpreted the Fourteenth Amendment to restrain the states in retaining or abolishing civil juries.[19] Thus, the Court has upheld state laws abolishing juries in proceedings to enforce liens,[20] mandamus[21] and quo warranto[22] actions, and eminent domain[23] and equity proceedings.[24] States are also free to adopt innovations respecting selection and number of jurors. States may allow verdicts to be rendered by ten out of twelve jurors rather than a unanimous jury,[25] and may establish petit juries containing eight jurors rather than the conventional twelve.[26]

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.[27] But, if an appeal is afforded, the state must not structure it so as to arbitrarily deny to some persons the right or privilege available to others.[28]

State legislatures and state courts have substantial discretion to allocate the costs of litigation and impose awards of damages or financial penalties. The Supreme Court has held that it is up to courts to determine what costs are allowed by law, and an erroneous judgment of what the law allows does not deprive a party of property without due process of law.[29] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[30]

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[15] Bowersock v. Smith, 243 U.S. 29, 34 (1917); Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54, 55 (1919); Herron v. Southern Pacific Co., 283 U.S. 91 (1931). *See also* Martinez v. California, 444 U.S. 277, 280–83 (1980) (state interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[16] Ownbey v. Morgan, 256 U.S. 94 (1921).

[17] Sawyer v. Piper, 189 U.S. 154 (1903).

[18] Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* Amdt6.4.1 Overview of Right to Trial by Jury.

[19] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[20] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[21] *In re* Delgado, 140 U.S. 586, 588 (1891).

[22] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[23] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[24] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[25] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[26] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[27] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

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

[29] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[30] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914). Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal. Walters v. National Ass'n of

The Court has also upheld against due process challenge a statutory procedure whereby a prosecutor is adjudged liable for costs, and committed to jail in default of payment thereof, when the court or jury finds that he instituted the prosecution without probable cause and from malicious motives.[31] Also, a state may permit harassed litigants to recover penalties in the form of attorney's fees or damages as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons.[32]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall be imprisoned and also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled, even if the defendant has made restitution.[33] The Court has explained that, whether the fine is understood as a penalty or punishment or a civil judgment, the convict is required to pay it as the result of his or her crime. On the other hand, when an appellant was held in contempt for frustrating enforcement of a judgment against it by refusing to surrender certain assets, the Court held that dismissal of an appeal from the original judgment was not a penalty for the contempt, but merely a reasonable method for sustaining the effectiveness of the state's judicial process.[34]

To deter careless destruction of human life, a state may allow punitive damages in actions against employers for deaths caused by the negligence of their employees,[35] and may also allow punitive damages for fraud perpetrated by employees.[36] Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.[37] Although the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties,"[38] the Court has indicated that a "grossly excessive" award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."[39] A court may determine the applicable limits by examining the degree of reprehensibility of the act, the ratio

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Radiation Survivors, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' Fifth Amendment due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish). *See also* United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) (upholding regulations under the Black Lung Benefits Act prohibiting contractual fee arrangements).

[31] Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).

[32] Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U.S. 35, 43–44 (1922); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 139 (1921); Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[33] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

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

[35] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[36] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[37] *Id.* (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review). *See also* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[38] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[39] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a new car had been repainted was grossly excessive in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a $145 million judgment for refusing to settle an insurance claim was

between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.[40] In addition, the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties."[41]

Amdt14.S1.5.4.8 Statutes of Limitations and Procedural Due Process

Fourteenth Amendment, Section 1:

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

A statute of limitations is a law that imposes a time limit for bringing a case; once the statute of limitations expires, a person cannot pursue even an otherwise valid claim. The Supreme Court has imposed few due process limits on state laws that create, alter, or eliminate statutes of limitations for civil suits.[1]

The Court has held that a statute of limitations does not deprive a person of property without due process of law, unless it applies to an existing right of action in a way that unreasonably limits the opportunity to enforce the right by suit. By the same token, a state may shorten an existing statute of limitations, provided that the state allows a reasonable time for bringing an action after the passage of the statute and before the bar takes effect. What constitutes a reasonable period depends on the nature of the right and the particular circumstances.[2]

A state may also extend the time in which civil suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. The Court has held that the repeal or extension of a statute of limitations does not impose an unconstitutional

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excessive as it included consideration of conduct occurring in other states). *But see* TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

[40] *BMW*, 517 U.S. at 574–75 (1996). The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. *Campbell*, 538 U.S. at 424 (2003).

[41] Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[1] By contrast, the Supreme Court has held that a legislature may not retroactively reimpose criminal liability after it the limitations period has lapsed. *See* ArtI.S9.C3.3.6 Imposing Criminal Liability and Ex Post Facto Laws.

[2] Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of states in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication). Thus, in a 1911 case, the Court held that where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property one year after such appointment. Blinn v. Nelson, 222 U.S. 1 (1911). The Court likewise found no constitutional violation when a state enacted a law prohibiting all actions to contest tax deeds that had been of record for two years unless such actions were brought within six months after passage of the law. Turner v. New York, 168 U.S. 90, 94 (1897). In another case, the Court upheld a statute providing that, when a person had been in possession of wild lands under a recorded deed continuously for twenty years and paid taxes thereon, while the former owner paid nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision. Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

deprivation of property on a debtor-defendant who previously might have invoked the statute as a defense. The Court explained, "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right" protected by the Constitution.[3] Accordingly, the Court has upheld against Fourteenth Amendment challenges to the revival of an action on an implied obligation to pay a child for the use of her property,[4] a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[5] and a right of an employee to seek an additional award out of a state-administered fund on account of the aggravation of a former injury.[6]

However, when a right of action to recover property has been barred by a statute of limitations and title as well as real ownership have become vested in the possessor, the Court has held that any later act removing or repealing the statute of limitations would be void as attempting an arbitrary transfer of title.[7] The Court has also held unconstitutional the application of a statute of limitation to extend a period that parties to a contract agreed should limit their right to remedies under the contract.[8]

Amdt14.S1.5.4.9 Burdens of Proof and Presumptions

Fourteenth Amendment, Section 1:

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

State legislatures have the authority to establish presumptions and rules respecting the burden of proof in litigation.[1] However, the Supreme Court has held that the Due Process Clause forbids the deprivation of liberty or property upon application of a standard of proof too lax to ensure reasonably accurate fact-finding. The Court has opined that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[2] With respect to presumptions, the Court has held that a presumption does not violate the Due Process Clause as long as it is not unreasonable and is not conclusive. A statute creating a presumption that is entirely arbitrary and operates to deny a fair opportunity to rebut it or to

[3] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[4] *Id.*

[5] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[6] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[7] *Campbell*, 115 U.S. at 623. *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[8] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930). ("When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired unconstitutionally imposes a burden in excess of that contracted.").

[1] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress's power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. Nishikawa v. Dulles, 356 U.S. 129 (1958); Woodby v. INS, 385 U.S. 276 (1966).

[2] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

present facts pertinent to a defense is void.[3] On the other hand, the Court has sustained legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact if there is a rational connection between what is proved and what is inferred.[4]

Applying the test laid out in *Mathews v. Eldridge* to determine what process is due in a particular situation,[5] the Court has held that a standard at least as stringent as "clear and convincing" evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.[6] Similarly, because parents' interest in retaining custody of their children is fundamental, the state may not terminate parental rights by a preponderance of the evidence—the burden of proof to award money damages in an ordinary civil action—but must prove that parents are unfit by clear and convincing evidence.[7] Furthermore, parental unfitness must be established affirmatively and may not be assumed based on some characteristic of the parent.[8]

For a time, the Court used what it called the "irrebuttable presumption doctrine" to curb legislative efforts to confer a benefit or to impose a detriment based on presumed characteristics of a person.[9] In *Stanley v. Illinois*, the Court found invalid a construction of the state statute that presumed unmarried fathers to be unfit parents and prevented them from objecting to state wardship.[10] The Court likewise struck down mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies based on a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[11]

In another case, the Court opined that a state may require that nonresidents pay higher tuition charges at state colleges than residents and assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, but held it was impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. Instead, the Due Process Clause required that the student have the opportunity to show that he is or has become a bona fide

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[3] Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989) (conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).

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

[5] Mathews v. Eldridge, 424 U.S. 319 (1976); *see also* Amdt14.S1.5.4.2 Due Process Test in Mathews v. Eldridge.

[6] Addington v. Texas, 441 U.S. 418 (1979).

[7] Santosky v. Kramer, 455 U.S. 745 (1982). The Court has upheld application of the traditional preponderance of the evidence standard in paternity actions. Rivera v. Minnich, 483 U.S. 574 (1987).

[8] Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). *Cf.* Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption that a child born to a married woman living with her husband is the child of the husband defeats the right of the child's biological father to establish paternity).

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

[10] 405 U.S. 645 (1972).

[11] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

resident entitled to the lower tuition.[12] Similarly, the Court invalidated a food stamp program provision making ineligible any household with a member age eighteen or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps, holding that the provision created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[13] The rule that emerged from these cases was that the legislature may not presume the existence of a decisive characteristic based on a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that the legislature intended to reach.[14]

The Court limited the irrebuttable presumption doctrine in the 1975 case *Weinberger v. Salfi*, upholding a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse.[15] Purporting to approve but distinguish prior cases, the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[16] The Court opined that extension of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[17]

There is some uncertainty about the viability and scope of the irrebuttable presumption doctrine since *Salfi*, and the doctrine has rarely appeared on the Court's docket in recent years.[18] In *Turner v. Department of Employment Security*, decided after *Salfi*, the Court invalidated a statute making pregnant women ineligible for unemployment compensation for a period extending from twelve weeks before the expected birth until six weeks after childbirth.[19] By contrast, in *Usery v. Turner Elkhorn Mining Co.*, the Court held that a provision granting benefits to miners "irrebuttably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption.[20]

Amdt14.S1.5.5 Criminal Cases

Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[12] Vlandis v. Kline, 412 U.S. 441 (1973).

[13] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

[14] The doctrine in effect afforded the Court the opportunity to choose between resort to the Equal Protection Clause or to the Due Process Clause in judging the validity of certain classifications. Thus, on the same day the Court decided *Murry*, it struck down a similar food stamp qualification on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[15] 422 U.S. 749 (1975).

[16] *Id.* at 768–70, 775–77, 785.

[17] *Id.* at 772.

[18] *Cf.* Elkins v. Moreno, 435 U.S. 647, 660–61 (1978) (declining to reach the question of whether to overrule or further limit Vlandis v. Kline, 412 U.S. 441 (1973), in light of *Salfi*, pending resolution of potentially dispositive state law issue).

[19] 423 U.S. 44 (1975)

[20] 428 U.S. 1 (1976); *see also* Califano v. Boles, 443 U.S. 282, 284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).

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enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment's guarantee of procedural due process affects procedures in state criminal cases in two ways. First, through the doctrine of incorporation, the Supreme Court has held that the Due Process Clause applies to the states nearly all the criminal procedural guarantees of the Bill of Rights, including those of the Fourth, Fifth, Sixth, and Eighth Amendments.[1] Second, the Court has held that the Due Process Clause prohibits government practices and policies that violate precepts of fundamental fairness, even if they do not violate specific guarantees of the Bill of Rights.[2] The procedural due process protections of the Fourteenth Amendment are comparable in scope to the limitations that the Fifth Amendment imposes on federal criminal proceedings.[3]

The Court has explained, "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[4] In assessing whether a challenged criminal procedure denies a person procedural due process, the Court generally considers whether the practice violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government."[5] The Court has also held that, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice," and that to find a denial of due

[1] Those provisions guarantee rights of criminal suspects and prisoners including the right to counsel, the right to speedy and public trial, the right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the right not to be subjected to cruel and unusual punishments. *See* Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights.

[2] For instance, *In re* Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. *See also, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1966 (2016) (holding that principles of due process did not prevent a defendant's prior uncounseled convictions in tribal court from being used as the basis for a sentence enhancement, as those convictions complied with the Indian Civil Rights Act, which itself contained requirements that ensure the reliability of tribal-court convictions); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Estelle v. Williams, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged).

[3] While the following essays focus primarily on Supreme Court litigation challenging state criminal procedures, some of the cases cited discuss federal criminal procedures. *See also* Amdt5.6.1 Overview of Due Process Procedural Requirements. The doctrine of incorporation applies only to state government action in criminal cases, because the Bill of Rights applies directly to the federal government without any need for incorporation.

[4] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[5] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The Court has also phrased the question as whether a claimed right is "implicit in the concept of ordered liberty," whether it "partakes of the very essence of a scheme of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or whether it "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," Rochin v. California, 342 U.S. 165, 169 (1952).

process the Court "must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[6]

Procedural due process analysis contains a historical component, as Supreme Court cases "have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country."[7] The Court thus asks "whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[8]

Amdt14.S1.5.5.2 Impartial Judge and Jury

Fourteenth Amendment, Section 1:

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

Bias or prejudice either inherent in the structure of a trial system or imposed by external events can infringe a person's right to a fair trial. Thus, as in the civil context,[1] procedural due process requires criminal cases to be overseen by an unbiased judge and decided by an impartial jury.

For instance, in *Tumey v. Ohio*, the Supreme Court held that it violated due process for a judge to receive compensation out of fines imposed on convicted defendants, and no compensation (beyond his salary) "if he does not convict those who are brought before him."[2] In other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify the judge from citing and sentencing the contemnors.[3]

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[6] Lisenba v. California, 314 U.S. 219, 236 (1941).

[7] Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968).

[8] *Id.*

[1] *See* Amdt14.S1.5.4.5 Impartial Decision Maker.

[2] 273 U.S. 510, 520 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Similarly, in *Rippo v. Baker*, the Supreme Court vacated the Nevada Supreme Court's denial of a convicted petitioner's application for post-conviction relief based on the trial judge's failure to recuse himself. 137 S. Ct. 905 (2017). During Rippo's trial, the trial judge was the target of a federal bribery probe by the same district attorney's office that was prosecuting Rippo. Rippo moved for the judge's disqualification under the Fourteenth Amendment's Due Process Clause, arguing the "judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." *Id.* at 906. After the judge was indicted on federal charges, a different judge subsequently assigned to the case denied Rippo's motion for a new trial. In vacating the Nevada Supreme Court's decision, the Supreme Court noted that "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.' Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Id.* at 907 (quoting Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 825 (1986); Withrow v. Larkin, 421 U.S. 35 (1975)). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

[3] Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority."). In the context of alleged contempt before a

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Impartial Judge and Jury

The Court has also found due process violations when a biased or otherwise partial juror participated in a criminal trial, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[4] Public hostility toward a defendant that intimidates a jury is a classic due process violation.[5] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[6] For instance, the Supreme Court has raised concerns about the impact on a jury of televising trials, though ultimately the Court has held that the Constitution does not altogether preclude televising state criminal trials.[7]

The way a criminal defendant appears in court may also raise due process concerns about jury impartiality. The Court has held that it violates due process when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[8] Likewise, Court has held that the use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, raises due process concerns. In *Deck v. Missouri*, the Court noted a rule dating back to British common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[9] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and

judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133, 136 (1955).

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

[5] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

[6] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); *But see* Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).

[7] Initially, the Court struck down televising of certain trials on the grounds that the harmful potential effect on the jurors was substantial, the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology that caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not entirely preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981).

[8] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied habeas relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation); Carey v. Musladin, 549 U.S. 70 (2006) (effect on defendant's fair-trial rights of private actors' courtroom conduct—in this case, members of victim's family wearing buttons with the victim's photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes habeas relief).

[9] 544 U.S. 622, 626 (2005). In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

"affronts the dignity and decorum of judicial proceedings."[10] The Court in *Deck* disapproved of the routine use of visible restraints when a defendant has already been found guilty and a jury is considering the application of the death penalty. The Court explained that such restraints can be used only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it.[11]

Amdt14.S1.5.5.3 Identification in Pre-Trial Process

Fourteenth Amendment, Section 1:

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

In criminal trials, the jury usually decides the reliability and weight to be accorded an eyewitness identification, guided by instructions from the trial judge and subject to judicial authority under the rules of evidence to exclude overly prejudicial or misleading evidence. At times, however, a defendant alleges that an out-of-court identification in the presence of police is so flawed that it is inadmissible as a matter of fundamental justice under the Due Process Clause.[1] These cases most commonly challenge police-arranged procedures such as lineups, showups, and photographic displays,[2] but some challenge identifications with less police involvement.[3]

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.[4] Two elements are required for due process-based suppression. First, law enforcement officers must have participated in an identification process that was both suggestive and unnecessary.[5] Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by

[10] *Id.* at 630, 631 (internal quotation marks omitted).

[11] *Id.* at 633.

[1] A hearing by the trial judge on whether an eyewitness identification should be barred from admission is not constitutionally required to be conducted out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

[2] *E.g.*, Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977) (only one photograph provided to witness); Neil v. Biggers, 409 U.S. 188, 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); Coleman v. Alabama, 399 U.S. 1 (1970) (lineup); Foster v. California, 394 U.S. 440 (1969) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); Simmons v. United States, 390 U.S. 377 (1968) (series of group photographs each of which contained suspect); Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought to witness's hospital room).

[3] Perry v. New Hampshire, 565 U.S. 228 (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged).

[4] *See Perry*, 565 U.S. at 237–38, 245–47.

[5] The Court stated; "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil*, 409 U.S. at 198. An identification process can be found to be suggestive regardless of police intent. *Perry*, 565 U.S. at 232 & n.1 (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, *Stovall*, 388 U.S. 293 (suspect brought handcuffed to sole witness's hospital room where it was uncertain whether witness would survive her wounds).

examining the "totality of the circumstances" of a case.[6] The Court has not recognized any per se rule for excluding an eyewitness identification on due process grounds.[7] Defendants have had difficulty meeting the Court's standards: Only one challenge has been successful.[8]

Amdt14.S1.5.5.4 Plea Bargaining in Pre-Trial Process

Fourteenth Amendment, Section 1:

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

A criminal defendant may elect to plead guilty instead of requiring that the prosecution prove him guilty. Often, a defendant who pleads guilty does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a lighter sentence or is allowed to plead guilty to a lesser offense.[1] The Supreme Court has held that the government may not structure its system to coerce a guilty plea.[2] However, the Court has upheld guilty pleas that are entered voluntarily, knowingly, and understandingly, even if the defendant pled guilty to obtain an advantage.[3]

The guilty plea and the often concomitant plea bargain are important components of the criminal justice system,[4] and it is permissible for a prosecutor negotiating a plea bargain to require a defendant to forgo his right to a trial in return for escaping additional charges that

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[6] *Neil*, 409 U.S. at 196–201; *Manson*, 432 U.S. at 114–17. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also Stovall*, 388 U.S. 293.

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

[8] Foster v. California, 394 U.S. 440 (1969) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* Amdt6.6.3.4 Lineups and Other Identification Situations and Right to Counsel.

[1] There are a number of other reasons why a defendant may be willing to plead guilty. For instance, there may be overwhelming evidence against him.

[2] United States v. Jackson, 390 U.S. 570 (1968). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not per se invalid. Town of Newton v. Rumery, 480 U.S. 386, 394 (1987).

[3] *See* Tollett v. Henderson, 411 U.S. 258, 265–66 (1973); North Carolina v. Alford, 400 U.S. 25, 38 (1970); Parker v. North Carolina, 397 U.S. 790, 795 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970); Brady v. United States, 397 U.S. 742, 758 (1970).

[4] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

are likely upon conviction to result in a more severe penalty.[5] A defendant who pleads guilty gives up the right to challenge most aspects of the proceeding against him. However, some constitutional challenges may survive a plea if they go to "'the very power of the State' to prosecute the defendant."[6] Moreover, a prosecutor denies due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[7]

In accepting a guilty plea, a court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly.[8] The Court has also held that "the adjudicative element" inherent in accepting a guilty plea must include safeguards "to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[9]

Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[5] Bordenkircher v. Hayes, 434 U.S. 357 (1978); *see also* United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction).

[6] Class v. United States, 138 S. Ct. 798, 809 (2018) (quoting Blackledge v. Perry, 417 U.S. 21, 30 (1974)) (holding guilty plea did not bar defendant from challenging the constitutionality of the statute of conviction on direct appeal). *See also* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) (holding guilty plea did not waive defendant's claim on direct appeal that double jeopardy prohibited his prosecution); Blackledge v. Perry, 417 U.S. 21, 31 (1974). (holding guilty plea did not foreclose defendant in habeas challenge from arguing that due process prohibited his prosecution). The state can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal habeas courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975).

[7] Blackledge v. Perry, 417 U.S. 21. The defendant in *Blackledge* was convicted in an inferior court of a misdemeanor. He had a right to a de novo trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court drew between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and post-trial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line drawing, but it appears to be one the Court is committed to.

[8] Boykin v. Alabama, 395 U.S. 238 (1969). In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. The Court stated: "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Id.* at 645 n.13. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

[9] Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Absent a guilty plea,[1] the Due Process Clause requires proof beyond a reasonable doubt before a person may be convicted of a crime. The reasonable doubt standard is closely related to the rule that a defendant is presumed innocent unless proven guilty.[2] These rules help to ensure a defendant a fair trial[3] and require that a jury consider a case solely on the evidence.[4] The Supreme Court has explained:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[5]

For many years, the Court presumed that "reasonable doubt" was the proper standard for criminal cases.[6] However, because the standard was so widely accepted, it was not until 1970 that the Court expressly held that due process required the standard. That year, the Court held in *In re Winship* that the Due Process Clauses of the Fifth and Fourteenth Amendments

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[1] *See* Amdt14.S1.5.5.4 Plea Bargaining in Pre-Trial Process.

[2] The presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances, it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the defendant bears a heavy burden to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (reiterating that courts must look to the totality of the circumstances in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1977). For other cases applying *Sandstrom*, see Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)); Middleton v. McNeil, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

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

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

[5] *In re* Winship, 397 U.S. 358, 363 (1970) (quoting *Coffin*, 156 U.S. at 453). Justice John Marshall Harlan's concurrence in *Winship* proceeded on the basis that, because there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard. *Id.* at 368.

[6] Miles v. United States, 103 U.S. 304, 312 (1881); Davis v. United States, 160 U.S. 469, 488 (1895); *Holt*, 218 U.S. at 253; Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

protect the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[7]

The Court had long held under the Due Process Clause that it must set aside convictions that are supported by no evidence at all.[8] However, the holding in *Winship* left open the question of whether appellate courts reviewing criminal convictions should weigh the sufficiency of trial evidence. In the 1979 case *Jackson v. Virginia*, the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt.[9] The appropriate inquiry is not whether the reviewing court itself believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[10]

Due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.[11] Thus, the Court held in *Mullaney v. Wilbur* that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce his offense from homicide to manslaughter.[12] The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision called into question practices in many states under which some burdens of persuasion were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion—a significant task given the large numbers of affirmative defenses.[13]

In a subsequent case, however, the Court rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense.[14] Later, in *Patterson v. New York*, the Court upheld a state statute that required a defendant asserting extreme emotional disturbance as

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[7] *Winship*, 397 U.S. at 364. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt). On the interrelationship of the reasonable doubt burden and defendant's entitlement to a presumption of innocence, see Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[8] Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Columbia, 378 U.S. 146 (1964); Johnson v. Florida, 391 U.S. 596 (1968). *See also* Chessman v. Teets, 354 U.S. 156 (1957).

[9] 443 U.S. 307 (1979).

[10] 443 U.S. at 316, 18–19. *See also* Musacchio v. United States, 136 S. Ct. 709 (2016) ("When a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the fact that the government did not introduce evidence of the additional element—which was not required to prove the offense, but was included in the erroneous jury instruction—does not implicate the principles that sufficiency review protects."); Griffin v. United States, 502 U.S. 46 (1991) (general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conviction, but is adequate to support conviction as to another object).

[11] Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case the convictions would violate due process.

[12] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

[13] The general notion of "burden of proof" can be divided into the "burden of production" (providing probative evidence on a particular issue) and the "burden of persuasion" (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). *Mullaney*, 421 U.S. at 695 n.20.

[14] Rivera v. Delaware, 429 U.S. 877 (1976) (dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence). *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of *Rivera*). Justice William Rehnquist and Chief Justice Warren Burger, concurring in *Mullaney*, had argued that the

an affirmative defense to murder to prove the defense by a preponderance of the evidence.[15] According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (including death, intent to kill, and causation) beyond a reasonable doubt, while allowing the defendant to prove by preponderance of the evidence an affirmative defense that would reduce the degree of the offense.[16]

Another distinction that can substantially affect the prosecution's burden is whether a fact to be proven in a criminal trial is an element of a crime or a factor in determining a convicted offender's sentence. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence standard." The Court has taken a formalistic approach to this issue, allowing states to designate which facts fall under which of these two categories. For instance, the Court has held that a state may designate as a sentencing factor the question whether a defendant "visibly possessed a gun" during a crime, allowing a judge to resolve the question based on the preponderance of evidence.[17]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited that principle in *Apprendi v. New Jersey*, holding that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[18] The Court subsequently overruled conflicting prior case law that had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.[19] These holdings are subject to at least one exception, however, as the *Apprendi* Court held that its limitation does not apply to sentencing enhancements based on recidivism.[20] Legislatures might also

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case did not require any reconsideration of the holding in *Leland v. Oregon*, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt. 421 U.S. at 704, 705.

[15] 432 U.S. 197 (1977). Proving the defense would reduce a murder offense to manslaughter.

[16] *See also* Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). Justice Lewis Powell criticized the distinction in *Patterson* as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses. Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. The Court followed *Patterson* in *Martin v. Ohio*, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. *Id.* at 236, 240.

[17] McMillan v. Pennsylvania, 477 U.S. 79 (1986). These types of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* Amdt6.6.3.1 Overview of When the Right to Counsel Applies.

[18] 530 U.S. 466, 490 (2000) (interpreting New Jersey's hate crime law). Prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of minimum sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, the Court subsequently reaffirmed *McMillan* in *Harris v. United States*, 536 U.S. 545 (2002).

[19] Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[20] 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony

evade these limitations by revising criminal provisions to increase maximum penalties, then providing for mitigating factors that could reduce sentences within the newly established sentencing ranges.

An issue related to the burden of proof involves statutory presumptions, where proof of a "presumed fact" that is a required element of a crime is established through proof of another fact, known as the "basic fact."[21] In *Tot v. United States*, the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test.[22] In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received the firearm in interstate commerce. "Under our decisions," it explained, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."[23]

In *Leary v. United States*, the Court applied a more stringent due process test to require that, for a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[24] The *Leary* Court struck down a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the greater part of marijuana consumed in the United States was of foreign origin, there was still a significant amount produced domestically, and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported.[25] The Court left open the question of whether a presumption that survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[26]

In a later case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its

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record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[21] *See, e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[22] 319 U.S. 463, 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[23] 319 U.S. at 467.

[24] 395 U.S. 6, 36 (1969).

[25] 395 U.S. at 37–54. The Court disapproved some of the reasoning in *Yee Hem*, *supra*, but factually distinguished that case as involving users of "hard" narcotics.

[26] 395 U.S. at 36 n.64. The matter was also left open in *Turner v. United States*, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in *Barnes v. United States*, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[27] But, with respect to permissive presumptions,

> the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.[28]

Applying that analysis, the Court concluded that a statute providing that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle did not violate due process.[29]

Amdt14.S1.5.5.6 Evidentiary Requirements in Criminal Cases

Fourteenth Amendment, Section 1:

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

Beyond the general rule that the prosecution must prove a criminal defendant's guilt beyond a reasonable doubt,[1] the Due Process Clause also imposes certain limitations on specific evidentiary matters in criminal trials. For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding hypnotically refreshed testimony.[2] And, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process calls for reciprocal discovery in such circumstances, requiring the state to give the defendant pretrial notice of its rebuttal evidence on the alibi issue.[3]

In evaluating whether certain procedures satisfy due process, the Court may consider how separate procedures interact. The combination of otherwise acceptable rules of criminal procedure may in some instances deny a defendant due process. Thus, in one case, the Court found that a defendant was denied his constitutional right to present his defense in a meaningful way by the combination of two rules that (1) denied the defendant the right to cross-examine his own witness in order to elicit exculpatory evidence and (2) denied him the right to introduce the testimony of witnesses about matters told to them out of court on the

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[27] Ulster County Court v. Allen, 442 U.S. 140, 167 (1979).

[28] 442 U.S. at 167.

[29] 442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, in the view of dissenting Justices O'Connor and Stevens, *id.* at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

[1] *See* Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt.

[2] Rock v. Arkansas, 483 U.S. 44 (1987).

[3] Wardius v. Oregon, 412 U.S. 470 (1973).

ground that the testimony would be hearsay.[4] Conversely, a questionable procedure may be saved by its combination with another. Thus, in another case, the Court held that it does not deny a defendant due process to subject him to trial before a non-lawyer police court judge when he can obtain a later trial de novo in the state's court system.[5]

The government violates the Due Process Clause when it obtains a conviction by presenting testimony the prosecuting authorities know was perjured. In one case, the Court stated in dictum that the clause

> cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[6]

The Court has applied that principle to require state officials to controvert allegations that knowingly false testimony had been used to convict[7] and to overturn convictions found to have been so procured.[8] Extending the principle, the Court in *Miller v. Pate* overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a crime belonged to the defendant and that they were stained with blood; the defendant showed in a habeas corpus proceeding that no evidence connected him with the shorts, the shorts were not in fact bloodstained, and the prosecution had known those facts.[9]

This line of reasoning has also required disclosure to the defense of information that the prosecution did not rely on at trial.[10] In *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due

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[4] Chambers v. Mississippi, 410 U.S. 284 (1973). *See also* Davis v. Alaska, 415 U.S. 308 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of mens rea).

[5] North v. Russell, 427 U.S. 328 (1976).

[6] Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[7] Pyle v. Kansas, 317 U.S. 213 (1942); White v. Ragen, 324 U.S. 760 (1945). *See also* New York *ex rel.* Whitman v. Wilson, 318 U.S. 688 (1943); *Ex parte* Hawk, 321 U.S. 114 (1914). *But see* Hysler v. Florida, 315 U.S. 411 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[8] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was the defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the habeas corpus hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. *Cf.* Durley v. Mayo, 351 U.S. 277 (1956). *But see* Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

[9] 386 U.S. 1 (1967).

[10] The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[11] In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.[12] In a subsequent case, the Court described the "heart of the holding in *Brady*" as concerning

> the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.[13]

In *United States v. Agurs*, the Court summarized and expanded the prosecutor's obligation to disclose exculpatory evidence to the defense, even in the absence of a request by the defendant, or upon a general request.[14] The *Agurs* Court laid out three due process principles that apply to the use of evidence in criminal cases. First, if the prosecutor knew or should have known that testimony given during the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[15] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[16] Third, as the Court held for the first time in *Agurs*, if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," the prosecution has a duty to reveal to the defense obviously exculpatory evidence.[17] Under the third prong, if the prosecutor did not reveal

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remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[11] 373 U.S. 83, 87 (1963). In *Jencks v. United States*, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements that had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

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

[13] Moore v. Illinois, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also* Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no due process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The Court has not extended *Brady* toward a general requirement of criminal discovery. *See* Giles v. Maryland, 386 U.S. 66 (1967). In *Cone v. Bell*, 556 U.S. 449, 472, 476 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence.

[14] 427 U.S. 97 (1976).

[15] 427 U.S. at 103–04; *cf.* Mooney v. Holohan, 294 U.S. 103 (1935).

[16] 427 U.S. at 104–06; *cf.* Brady v. Maryland, 373 U.S. 83 (1963). A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[17] 427 U.S. at 106–07.

relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[18]

Agurs left open questions about how courts should evaluate the materiality of undisclosed evidence. The Court addressed those questions in the 1985 case *United States v. Bagley*.[19] In *Bagley*, the Court established a uniform test for materiality, holding that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.[20] That materiality standard, also found in contexts outside of *Brady* inquiries,[21] applies not only to exculpatory material, but also to material that would be relevant to the impeachment of witnesses.[22] Thus, in a case where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and the punishment, concluding that there was no reasonable probability that the jury would have reached a different result.[23]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'," and that "'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'"[24]

Amdt14.S1.5.5.7 Competency for Trial

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[18] 427 U.S. at 106–14. This was the *Agurs* fact situation. There is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police); Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine eleven years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[19] 473 U.S. 667 (1985).

[20] 473 U.S. at 682. Put differently, a *Brady* violation requires a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 435 (1995). *Accord* Smith v. Cain, 565 U.S. 73 (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

[21] *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

[22] 473 U.S. at 676–77. *See also* Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016) (per curiam) (finding that a state post-conviction court had improperly (1) evaluated the materiality of each piece of evidence in isolation, rather than cumulatively; (2) emphasized reasons jurors might disregard the new evidence, while ignoring reasons why they might not; and (3) failed to consider the statements of two impeaching witnesses).

[23] Strickler v. Greene, 527 U.S. 263, 296 (1999); *see also* Turner v. United States, 137 S. Ct. 1885, 1894 (2017) (holding that, when considering the withheld evidence in the context of the entire record, the evidence was "too little, too weak, or too distant" from the central evidentiary issues in the case to meet *Brady*'s standards for materiality).

[24] Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995)).

Amdt14.S1.5.5.7
Competency for Trial

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has held that it is a denial of due process to try or sentence a defendant who is "insane" or incompetent to stand trial.[1] When it becomes evident during the trial that a defendant is or has become "insane" or incompetent, the court on its own initiative must conduct a hearing on the issue.[2] There is no constitutional requirement that the state assume the burden of proving a defendant competent, though the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[3]

A person found incompetent for trial may be committed to a psychiatric institution, but a state cannot indefinitely commit a person charged with a criminal offense based on a finding of incompetence to stand trial. Rather, a court has the power to commit the accused for a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that he will not, the state must either release the defendant or institute the ordinary civil commitment proceeding that would be required to commit any other citizen.[4]

When a defendant is found competent to stand trial, the state has significant discretion in how it takes account of any mental illness or defect that affected the defendant at the time of the offense in determining criminal responsibility.[5] The Court has identified several tests that states use in varying combinations to assess insanity defenses: the *M'Naghten* test (cognitive incapacity or moral incapacity),[6] volitional incapacity,[7] and the irresistible-impulse test.[8] Based on these varying tests, the Court has opined that "it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[9] To illustrate, in

[1] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. *Edwards*, 128 S. Ct. 2379.

[2] *Pate*, 383 U.S. at 378; *see also* Drope v. Missouri, 420 U.S. 162, 180 (1975) (noting the relevant circumstances that may require a trial court to inquire into the mental competency of the defendant). In *Ake v. Oklahoma*, the Court established that, when an indigent defendant's mental condition is both relevant to the punishment and seriously in question, the state must provide the defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985). While the Court has not decided whether *Ake* requires that the state provide a qualified mental health expert who is available exclusively to the defense team, *see* McWilliams v. Dunn, 137 S. Ct. 1790, 1799 (2017), a state nevertheless deprives an indigent defendant of due process when it provides a competent psychiatrist only to examine the defendant without also requiring that an expert provide the defense with help in evaluating, preparing, and presenting its case, *id.* at 1800.

[3] Medina v. California, 505 U.S. 437 (1992). It is a violation of due process, however, for a state to require that a defendant prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

[4] Jackson v. Indiana, 406 U.S. 715 (1972).

[5] Clark v. Arizona, 548 U.S. 735 (2006).

[6] M'Naghten's Case, 8 Eng. Rep. 718 (1843), states that "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[7] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible.").

the 2020 case *Kahler v. Kansas*, the Court held that the Due Process Clause does not require a state to adopt *M'Naghten*'s moral-incapacity test as a complete insanity defense resulting in an acquittal.[10] The Court stated that "[d]efining the precise relationship between criminal culpability and mental illness," because it involves "hard choices" among competing values and evolving understandings of mental health, "is a project for state governance, not constitutional law."[11]

Despite the requirement that states prove each element of a criminal offense,[12] criminal trials generally proceed with a presumption that the defendant does not have a severe mental illness, and states may limit the evidence that a defendant may present to challenge that presumption. In *Clark v. Arizona*, the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of mens rea, ruling that the use of such evidence could be limited to an insanity defense.[13] The *Clark* Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to "the controversial character of some categories of mental disease," the "potential of mental disease evidence to mislead," and the "danger of according greater certainty to such evidence than experts claim for it."[14]

If a criminal defendant is acquitted by reason of insanity, due process does not bar commitment of the defendant to a mental hospital, and the period of confinement may extend beyond the period for which he could have been sentenced to prison if convicted.[15] The Court has explained that the purpose of confinement is not punishment, but treatment, and therefore the length of a possible criminal sentence is "irrelevant to the purposes of . . . commitment."[16] Thus, a defendant acquitted by reason of insanity may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society."[17] However, a state may not indefinitely confine an insanity defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[18]

Substantive due process issues may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*, the Court had found that an individual has a significant "liberty interest" in avoiding the

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[8] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance.").

[9] *Clark*, 548 U.S. at 752. In *Clark*, the Court considered an Arizona statute, based on *M'Naghten*, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. *Id.* at 753.

[10] 140 S. Ct. 1021, 1027, 1037 (2020).

[11] *Id.* at 1037. *Cf.* Atkins v. Virginia, 536 U.S. 304, 317 (2002) (holding that the Eighth Amendment prohibits the states from executing certain persons with an intellectual disability, but "leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.").

[12] *See* Amdt14.S1.5.5.5 Guilt Beyond a Reasonable Doubt.

[13] 548 U.S. 735 (2006).

[14] 548 U.S. at 770, 774.

[15] Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere "idiosyncratic behavior." *Id.* at 367.

[16] 463 U.S. at 368.

[17] 463 U.S. at 370.

[18] Foucha v. Louisiana, 504 U.S. 71 (1992).

unwanted administration of antipsychotic drugs.[19] In *Sell v. United States*, the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial.[20] First, however, the government must engage in a fact-specific inquiry as to whether that interest is important in a particular case.[21] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.[22]

Amdt14.S1.5.5.8 Due Process Rights of Juvenile Offenders

Fourteenth Amendment, Section 1:

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

All fifty states and the District of Columbia have specialized laws to deal with juvenile offenders outside the criminal justice system for adult offenders.[1] Juvenile justice systems handle both offenses that would be criminal if committed by an adult and delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, conduct endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. Reforms during the early part of the twentieth century provided for separating juveniles from adult offenders in adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules that due process required in criminal trials. The justification for this lack of constitutional protections was that juvenile courts were deemed to be civil, not criminal, and that the state was acting as parens patriae for juvenile offenders and was not their adversary.[2]

In the 1960s, however, the Supreme Court imposed substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault* that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the beneficial features of the system—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, and low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.[3]

Thus, the Court in *Gault* required notice of charges in time for the juvenile to prepare a defense, a hearing in which the juvenile could be represented by retained or appointed counsel,

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[19] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[20] 539 U.S. 166 (2003).

[21] For instance, if the defendant is likely to remain civilly committed absent medication, this diminishes the government's interest in prosecution. 539 U.S. at 180.

[22] 539 U.S. at 181.

[1] For analysis of the state laws and application of constitutional principles to juveniles, see Samuel M. Davis, Rights of Juveniles: The Juvenile Justice System (2d ed. 2006).

[2] *In re* Gault, 387 U.S. 1, 12–29 (1967).

[3] 387 U.S. 1.

observance of the rights of confrontation and cross-examination, and protections against self-incrimination.[4] The Court also held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons.[5] Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult.[6] However, the Court has also held that jury trials are not constitutionally required in juvenile proceedings.[7]

On a few occasions, the Court has considered whether juveniles must be afforded the rights guaranteed to adults during investigation of crimes. In one such case, the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but also indicated that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach requires "inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him."[8] In another case, the Court ruled that, although the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[9] Instead, a simple reasonableness standard governs searches of students' persons and effects by school authorities.[10]

In *Schall v. Martin*, the Court ruled that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, the terms of confinement serve those legitimate purposes and are nonpunitive, and applicable procedures provide sufficient protection against erroneous and unnecessary detentions.[11] The Court found that a statute authorizing pretrial detention of accused juvenile delinquents upon a finding of "serious risk" that the juvenile

[4] 387 U.S. at 31–35.

[5] An earlier case had reached the same result based on statutory interpretation; the *Gault* Court apparently reached it on constitutional grounds. *Gault*, 387 U.S. at 30–31 (citing Kent v. United States, 383 U.S. 541 (1966)). The *Gault* Court did not rule on the right of appeal or the failure to make transcripts of hearings.

[6] *In re* Winship, 397 U.S. 358 (1970).

[7] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion won the support of a majority of the Justices. Justice Harry Blackmun's opinion of the Court, which was joined by Chief Justice Warren Burger and Justices Potter Stewart and Byron White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair fact-finding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. *Id.* at 551. Justice William Brennan concurred in one case and dissented in another because, in his view, open proceedings would operate to protect juveniles from oppression in much the same way a jury would. *Id.* at 553. Justice John Marshall Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. *Id.* at 557. Justices William O. Douglas, Hugo Black, and Thurgood Marshall dissented. *Id.* at 557.

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

[9] New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of school rule; evidence of drug activity held admissible in a prosecution under the juvenile laws). In *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), the Court found unreasonable a strip search of a thirteen-year-old girl suspected of possessing ibuprofen. *See also* Amdt4.6.6.6 School Searches.

[10] This single rule, the Court explained, permits school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice John Paul Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9.

[11] 467 U.S. 253 (1984).

would commit crimes prior to trial, providing for expedited hearings, and guaranteeing a formal, adversarial probable cause hearing satisfied those requirements.

Amdt14.S1.5.6 Criminal Cases Post-Trial

Amdt14.S1.5.6.1 Overview of Criminal Cases and Post-Trial Due Process

Fourteenth Amendment, Section 1:

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

The Supreme Court has struck down criminal sentences on due process grounds when the sentencing judge relied on inaccurate information[1] or the sentencing jurors considering invalid factors.[2] Aside from those circumstances, procedural due process imposes few limits on criminal sentencing.[3] *In Williams v. New York*, the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel.[4] The Court opined that it was undesirable to restrict judicial discretion in sentencing by requiring adherence to rules of evidence that would exclude highly relevant and informative material. Further, disclosure of such information to the defense could dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*, however, the Court limited the application of *Williams* to capital cases.[5]

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[1] In *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.*

[2] In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess a punishment of 40 years' imprisonment. The jury convicted and gave the defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed, holding that Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).

[3] Due process does not impose any limitation on the sentence that a legislature may affix to any offense; such restrictions come from the Eighth Amendment. Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, see Graham v. West Virginia, 224 U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[4] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

[5] 430 U.S. 349 (1977). In *Gardner*, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report that he did not characterize or make available to defense or prosecution. Justices John Paul Stevens, Potter Stewart, and Lewis Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice William Brennan thought the result was compelled by due process, *id.* at 364, while Justices Byron White and Harry Blackmun thought the result was necessitated by the Eighth Amendment, *id.* at 362, 364, as did Justice Thurgood Marshall, *id.* at 365. Chief Justice Warren Burger concurred only in the result, *id.* at 362,

In *United States v. Grayson*, a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his belief that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed.[6] The Court declared that the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation, and the defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[7]

There are some sentencing proceedings, however, that so implicate substantial rights that additional procedural protections are required.[8] In *Specht v. Patterson*, a defendant had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offender statute to an indefinite term of one day to life.[9] The sex offender law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. In *Mempa v. Rhay*, the Court held that, when sentencing is deferred subject to probation and the convicted defendant is later returned for sentencing following an alleged probation violation, the sentencing is a point in the process where substantial rights of the defendant may be affected, so the defendant must be represented by counsel.[10]

A state may also violate due process if it attempts to withhold relevant information from the sentencing jury. For instance, in *Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[11] But, in *Ramdass v. Angelone*, the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at time of sentencing.[12]

Due process prohibits penalizing a defendant for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial, if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals

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and Justice William Rehnquist dissented, *id.* at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[6] 438 U.S. 41 (1978).

[7] 438 U.S. at 49–52. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[8] *See, e.g.*, Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report that formed the basis for the court's decision. *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis. *In re* Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.

[9] 386 U.S. 605 (1967).

[10] 389 U.S. 128 (1967).

[11] 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 136 S. Ct. 1818, 1820 (2016) (holding that the possibility of clemency and the potential for future legislative reform does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of *Simmons*).

[12] 530 U.S. 156 (2000).

by others.[13] If the judge imposes a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.[14] By contrast, the Court has declined to apply the requirement of justifying a more severe sentence upon resentencing to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence, reasoning that the possibility of vindictiveness in jury resentencing is de minimis.[15] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea, as a trial may afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[16]

Amdt14.S1.5.6.2 Criminal Appeals and Procedural Due Process

Fourteenth Amendment, Section 1:

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

Procedural due process does not require states to allow appeals from criminal convictions, but does impose some requirements on appeals if a state chooses to authorize them. In an 1894 case, the Supreme Court opined,

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.[1]

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[13] North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* was held not to be retroactive in *Michigan v. Payne*, 412 U.S. 47 (1973). When a state provides a two-tier court system in which the accused may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial de novo in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, because the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Blackledge v. Perry, 417 U.S. 21 (1974).

[14] An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

[15] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial or the sentence imposed, nor would it feel either the personal or the institutional interests of judges leading to efforts to discourage the seeking of new trials. The presumption that an increased, judge-imposed second sentence represents vindictiveness is also inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

[16] Alabama v. Smith, 490 U.S. 794 (1989).

[1] McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

The Court has since reaffirmed that holding.[2] However, it has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[3]

While states may decline to allow traditional criminal appeals, they are not free to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*, the Court held that a conviction obtained in a mob-dominated trial violated due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."[4] The Court has stated numerous times that the Fourteenth Amendment requires some form of corrective process when a convicted defendant alleges a federal constitutional violation.[5] To burden that process, such as by limiting the right to petition for a writ of habeas corpus, violates the defendant's constitutional rights.[6]

The government has discretion to determine the means by which defendants can vindicate federal constitutional rights after conviction. The Court has explained that "[w]ide discretion must be left to the States" in this area:

> A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis . . . or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.[7]

If a state provides a mode of redress, a defendant must first exhaust that remedy. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of habeas corpus.[8]

When a state provides appellate or other corrective process, that process is subject to scrutiny for alleged unconstitutional deprivations of life or liberty like any other part of a criminal case. At first, the Court appeared to assume that, when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the affirmance of a trial court's sentence of execution was ample assurance that life would not be forfeited without due process of law.[9] But, in *Moore v. Dempsey*, the Court directed a federal district court considering a petition for a writ of habeas corpus to make an independent investigation of the facts alleged by the petitioners, notwithstanding that the state appellate

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[2] Griffin v. Illinois, 351 U.S. 12, 18 (1956); Ross v. Moffitt, 417 U.S. 600 (1974).

[3] The line of cases begins with *Griffin v. Illinois*, 351 U.S. 12 (1956), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions.

[4] 237 U.S. 309, 335 (1915).

[5] Moore v. Dempsey, 261 U.S. 86, 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103, 113 (1935); New York *ex rel.* Whitman v. Wilson, 318 U.S. 688, 690 (1943); Young v. Ragan, 337 U.S. 235, 238–39 (1949).

[6] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[7] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[8] In *Case v. Nebraska*, 381 U.S. 336 (1965) (per curiam), the Court granted review in a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Thomas Clark and William Brennan each wrote a concurring opinion. For additional discussion of habeas review of state criminal convictions, see ArtIII.S1.6.9 Habeas Review.

[9] Frank v. Mangum, 237 U.S. 309 (1915).

court had ruled against the legal sufficiency of the same allegations.[10] In *Moore* and a subsequent case, *Brown v. Mississippi*,[11] the Court declined to defer to decisions of state appellate tribunals holding that proceedings in a trial court were fair.

In a 2009 case, the Court held that the Due Process Clause does not provide convicted persons a right to post-conviction access to the state's evidence for DNA testing.[12] Chief Justice John Roberts, in a 5-4 decision, noted that forty-six states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute allowing federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate post-conviction relief procedures. The Court, therefore, saw "no reason to constitutionalize the issue."[13]

Amdt14.S1.5.6.3 Probation, Parole, and Procedural Due Process

Fourteenth Amendment, Section 1:

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

Sometimes convicted defendants are not sentenced to imprisonment, but instead are placed on probation subject to incarceration if they violate the conditions that are imposed; others who are incarcerated may qualify for release on parole before completing their sentence, subject to reincarceration if they violate imposed conditions. The Court has deemed both parole and probation to be statutory privileges granted by the government, and thus early cases assumed that the government did not have to provide procedural due process in granting or revoking either.[1] Under modern doctrine, however, both granting and revocation of parole and probation are subject to due process analysis.

In *Morrissey v. Brewer*, a unanimous Court held that parole revocations must comply with due process hearing and notice requirements.[2] The Court explained,

> [T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of

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[10] 261 U.S. 86 (1923).

[11] 297 U.S. 278 (1936).

[12] District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009).

[13] 557 U.S. at 55. The Court also expressed concern that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?" *Id.* at 74 (citation omitted).

[1] *Ughbanks v. Armstrong*, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In *Escoe v. Zerbst*, 295 U.S. 490 (1935), the Court's premise was that the parolee was being granted a privilege as a matter of grace and that he should neither expect nor seek due process. Then-Judge Warren Burger in *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[2] 408 U.S. 471 (1972).

> the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[3]

The Court held that what process is due depended on the state's interests. The state's principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, it should be "able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.[4]

The *Morrissey* Court held that minimal due process dictates that at both stages of the parole revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole.[5] The parolee should be given adequate notice that the hearing will take place and what violations are alleged; the parolee should be able to appear and speak on his or her own behalf and produce other evidence and should be allowed to examine those who have given adverse evidence against him or her unless it is determined that the identity of such informant should not be revealed. In addition, the hearing officer should prepare a digest of the hearing and base his or her decision upon the evidence adduced at the hearing.[6]

Prior to the final decision on revocation, there should be a more formal revocation hearing involving a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody, and he or she must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the states to develop, but the Court specified minimum requirements of due process, including

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.[7]

Ordinarily, the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[8] but a sentencing court must consider such

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[3] 408 U.S. at 480, 482.

[4] 408 U.S. at 483.

[5] The preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though it need not be a judicial officer. 408 U.S. at 485–86.

[6] 408 U.S. at 484–87.

[7] 408 U.S. at 489.

[8] Black v. Romano, 471 U.S. 606 (1985).

alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[9]

The Court has applied a flexible due process standard to the provision of counsel in parole or probation revocation proceedings. The Court has not always required provision of counsel in such proceedings. However, it has held that the state should provide the assistance of counsel where an indigent person may have difficulty in presenting his or her version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel and makes a timely and colorable claim that he or she has not committed the alleged violation, or if there are reasons in justification or mitigation that might make revocation inappropriate.[10] In *Mempa v. Rhay*, the Court held that a criminal defendant was entitled to counsel at a deferred sentencing hearing conducted after he violated the conditions of his probation.[11]

The Court analyzed of the Due Process Clause's requirements with respect to granting parole in *Greenholtz v. Nebraska Penal Inmates*.[12] The Court rejected the theory that the mere possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to be dealt with in any particular way. On the other hand, the Court recognized that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[13] and the full panoply of due process guarantees is not required.[14] However, when state statutes and regulations impose no obligation on the pardoning authority and thus create no legitimate expectancy of release, the prisoner may not demonstrate such a legitimate expectancy by showing that others have been granted release. The power of the executive to pardon or grant clemency is a matter of grace and is rarely subject to judicial review.[15]

Amdt14.S1.5.6.4 Prisoners and Procedural Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[9] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[10] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[11] 389 U.S. 128 (1967).

[12] 442 U.S. 1 (1979).

[13] Following *Greenholtz*, the Court held in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner shall be released upon certain findings by a parole board. *Accord* Swarthout v. Cooke, 562 U.S. 216 (2011) (per curiam).

[14] The Court in *Greenholtz* held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. That goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard, and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. *Accord Id.*

[15] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (involving commutation of a life sentence, which was necessary to become eligible for parole); Jago v. Van Curen, 454 U.S. 14 (1981).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In an 1871 case, the Supreme Court embraced a narrow view of prisoners' due process rights, stating that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[1] However, that view is not currently the law.[2] In 1948, the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," suggesting that some rights and privileges may remain.[3] Subsequent cases make clear that the Due Process and Equal Protection Clauses apply to prisoners to some extent.[4]

The Court described its role in protecting the constitutional rights of prisoners in a 1972 case:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the government for redress of grievances.[5]

While the Court has affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, concerns of federalism and judicial restraint have caused the Court to emphasize the necessity of deference to the judgments of prison officials and others responsible for administering such systems.[6]

Aside from challenges to conditions of confinement of pretrial detainees,[7] the Court has normally analyzed constitutional challenges to general prison conditions under the Cruel and Unusual Punishments Clause of the Eighth Amendment,[8] while challenges to particular

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[1] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[2] *Cf. In re* Bonner, 151 U.S. 242 (1894).

[3] Price v. Johnston, 334 U.S. 266, 285 (1948).

[4] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[5] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

[6] Bell v. Wolfish, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351–352 (1981).

[7] *See Wolfish*, 441 U.S.at 535–40. Persons not yet convicted of a crime may be detained by the government upon the appropriate determination of probable cause, and the government is entitled to "employ devices that are calculated to effectuate [a] detention." *Id.* at 537. Nonetheless, the Court has held that the Due Process Clause protects a pretrial detainee from being subject to conditions that amount to punishment. *See Wolfish*, 441 U.S. at 538, 561. More recently, the Court clarified the standard by which the due process rights of pretrial detainees are adjudged with respect to excessive force claims. Specifically, in *Kingsley v. Hendrickson*, the Court held that, in order for a pretrial detainee to prove an excessive force claim in violation of his due process rights, a plaintiff must show that an officer's use of force was objectively unreasonable, depending on the facts and circumstances from the perspective of a reasonable officer on the scene, aligning the due process excessive force analysis with the standard for excessive force claims brought under the Fourth Amendment. 135 S. Ct. 2466, 2473–74 (2015); *cf.* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that a "free citizen's claim that law enforcement officials used excessive force . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"). Liability for actions taken by the government in the context of a pretrial detainee due process lawsuit does not, therefore, turn on whether a particular officer subjectively knew that the conduct being taken was unreasonable. *See Kingsley*, 135 S. Ct. at 2470.

[8] *See* Amdt8.4.7 Conditions of Confinement.

incidents and practices proceed under the Due Process Clause[9] or other provisions such as the First Amendment's speech and religion clauses.[10] Prior to formulating its current approach, the Court recognized several rights of prisoners. The Court has held that prisoners have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[11] and to bring actions in federal courts to recover for damages wrongfully caused by prison administrators.[12] They also have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[13]

In *Turner v. Safley*, the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[14] The Court indicated that several considerations are appropriate in determining the reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security. Availability of other avenues for exercise of an inmate's right supports a finding of reasonableness.[15] A regulation is also more likely to be deemed reasonable if accommodation would have a negative effect on the liberty or safety of guards, other inmates,[16] or visitors.[17] On the other hand, "if an inmate claimant can point to an alternative that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests," it suggests the regulation is unreasonable.[18]

The Court has held that Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions"; hence, a prisoner has no reasonable expectation of privacy in his or her prison cell protecting him from "shakedown"

[9] *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308 (1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[10] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977). On religious practices and ceremonies, see Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972).

[11] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the state "enable [a] prisoner to discover grievances, and to litigate effectively").

[12] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[13] Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. *Id.* at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to sixty days before they are given a regular housing assignment).

[14] 482 U.S. 78, 89 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child). *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over which a prisoner's parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse).

[15] For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. *Bazzetta*, 539 U.S. at 135.

[16] 482 U.S. at 90, 92.

[17] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

[18] 482 U.S. at 91.

searches designed to root out weapons, drugs, and other contraband.[19] The Court has not totally blocked redress "for calculated harassment unrelated to prison needs," as inmates may still seek protection under the Eighth Amendment or state tort law.[20] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[21] The Court has held that negligent deprivation of life, liberty, or property by prison officials does not implicate due process at all.[22]

A change to a prisoner's housing conditions, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an "atypical and significant hardship" on the inmate.[23] In *Wolff v. McDonnell*, the Court articulated due process standards to govern prisoner discipline.[24] The Court held that due process applies but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of defendant rights is not available. Rather, the analysis must proceed by identifying the interest in "liberty" that the Due Process Clause protects. Thus, where the state provides good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of liberty entitles him to the minimum procedures appropriate under the circumstances.[25] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions.

The Court in *Wolff* held that a prison must afford the subject of a disciplinary proceeding "advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken."[26] In addition, "an inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[27] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would threaten valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a limited right to an impartial tribunal was recognized, with the Court ruling that imposing limitations on the discretion of a committee of prison officials sufficed for this purpose.[28] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[29]

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[19] *Hudson*, 468 U.S. at 526; Block v. Rutherford, 468 U.S. 576 (1984) (holding also that needs of prison security support a rule denying pretrial detainees contact visits with spouses, children, relatives, and friends).

[20] *Hudson*, 468 U.S. at 530.

[21] *Hudson*, 468 U.S. at 533 (holding that state tort law provided adequate post-deprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of post-deprivation remedy is inadequate when deprivation is foreseeable, pre-deprivation process was possible, and official conduct was not "unauthorized").

[22] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[23] Sandin v. Conner, 515 U.S. 472, 484 (1995) (thirty-day solitary confinement not atypical "in relation to the ordinary incidents of prison life").

[24] 418 U.S. 539 (1974).

[25] *Id.* at 557.

[26] *Id.* at 563.

[27] *Id.* at 566. However, the Court later ruled that the reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[28] 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980); *id.* at 497–500 (Powell, J., concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[29] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

Determination of whether due process requires a hearing before a prisoner is transferred from one institution to another requires analysis of the applicable statutes and regulations as well as consideration of the particular harm suffered by the transferee. In one case, the Court found that no hearing needed to be held prior to transferring a prisoner from one prison to another prison in which the conditions were substantially less favorable. Because the state had not conferred any right to remain in the facility to which the prisoner was first assigned, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all.[30] The same principles govern interstate prison transfers.[31]

By contrast, transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[32] The Court has also held that transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must be preceded by a hearing. The Court first noted that the statute in that case gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[33]

Another case, *Washington v. Harper*, concerned the kind of hearing that is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will.[34] The Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which the inmate had the right to a lay advisor but not an attorney.

Amdt14.S1.5.7 State Taxes

Amdt14.S1.5.7.1 State Taxes and Due Process Generally

Fourteenth Amendment, Section 1:

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

The Due Process Clause imposes some limits on states' assessment and collection of taxes, which vary based on the type of tax at issue. With respect to imposition of special taxes (taxes collected from property owners to fund local government plans such as infrastructure projects), the Court has held that "notice to the owner at some stage of the proceedings, as well as an

[30] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[31] Olim v. Wakinekona, 461 U.S. 238 (1983).

[32] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one thirty-day review and then annually. *Id.* at 219–20.

[33] Vitek v. Jones, 445 U.S. 480 (1980).

[34] 494 U.S. 210 (1990).

opportunity to defend, is essential."[1] By contrast, it has ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be "construed with the utmost liberality," and that no notice is necessary.[2]

As applied to taxation, due process does not require judicial process.[3] Nor does due process in tax proceedings require the same kind of notice as is required in a suit at law or in proceedings for taking private property under the power of eminent domain.[4] Due process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the state for such purpose.[5]

When no other remedy is available, a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax violates due process.[6] The Court has also found due process violations in a statute that limited a taxpayer's right to challenge an assessment to cases of fraud or corruption,[7] and when a state tribunal prevented the recovery of unlawful taxes under a state law that allowed suits to recover taxes alleged to have been assessed illegally only if the taxes had been paid at the time and in the manner provided.[8] In a case involving a tax held unconstitutional as a discrimination against interstate commerce and not invalidated in its entirety, Court held that the state had several alternatives for equalizing incidence of the tax: it could pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors, assess and collect back taxes from those competitors, or combine the two approaches.[9]

Under the doctrine of laches, persons who fail to exercise an opportunity to object and be heard cannot thereafter complain that a tax assessment is arbitrary and unconstitutional.[10] Likewise, a company that failed to report its gross receipts, as required by statute, had no further right to contest the state comptroller's estimate of those receipts and his adding to his estimate the 10% penalty permitted by law.[11]

Due process and state taxation issues include due process requirements for the assessment,[12] notice,[13] and collection[14] of state taxes.

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[1] Turpin v. Lemon, 187 U.S. 51, 58 (1902).

[2] Glidden v. Harrington, 189 U.S. 255 (1903).

[3] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[4] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[5] Hodge v. Muscatine County, 196 U.S. 276 (1905).

[6] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[7] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[8] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920). As in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply pre-deprivation, but a state that denies a pre-deprivation remedy by requiring that tax payments be made before objections are heard must provide a post-deprivation remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

[9] *Carpenter*, 280 U.S. 363.

[10] Farncomb v. Denver, 252 U.S. 7 (1920).

[11] Pullman Co. v. Knott, 235 U.S. 23 (1914).

[12] *See* Amdt14.S1.5.7.2 Assessment of State Taxes and Due Process.

[13] *See* Amdt14.S1.5.7.3 Notice of State Taxes and Due Process.

[14] *See* Amdt14.S1.5.7.4 Collection of State Taxes and Due Process.

Amdt14.S1.5.7.2 Assessment of State Taxes and Due Process

Fourteenth Amendment, Section 1:

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

In the 1884 case *Hagar v. Reclamation District No, 108*, the Court distinguished between the due process requirements for fixed taxes and taxes assessed based on the value of specific property.[1] The *Hagar* Court noted that "there is a vast number [of taxes] of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations."[2] With respect to these taxes, where "there is nothing the owner can do which can affect the amount to be collected from him," the Court held that no notice or hearing was required. By contrast, "where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially."[3] The Court noted that most states provided procedures "for the correction of errors" in such assessments, and concluded, "The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[4]

The Court has never considered it necessary that a taxpayer shall have been present, or had an opportunity to be present, in a tribunal when liability was assessed.[5] Nor is there any constitutional command that notice of an assessment and an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the state for remittance becomes final.[6]

However, when a political subdivision, taxing board, or court makes assessments based on enjoyment of a special benefit, the property owner is entitled to a hearing on the amount of the assessment and its determination.[7] The hearing need not amount to a judicial inquiry,[8] but a

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[1] 111 U.S. 701 (1884).

[2] 111 U.S. at 709.

[3] 111 U.S. at 710.

[4] 111 U.S. at 710.

[5] McMillen v. Anderson, 95 U.S. 37, 42 (1877). Where a law fixes when a tax board sits and its sessions are not secret, no obstacle prevents any one from appearing before it to assert a right or redress a wrong and this is sufficient for tax assessment purposes. State Railroad Tax Cases, 92 U.S. 575, 610 (1876).

[6] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). Rehearings and new trials are not essential to due process of law provided there is a hearing before judgment, with full opportunity to submit evidence and arguments. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is allowed to appeal it and present evidence and be heard on the valuation of his property. Pittsburgh C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[7] St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419, 430 (1916); Paulsen v. Portland, 149 U.S. 30, 41 (1893); Bauman v. Ross, 167 U.S. 548, 590 (1897).

[8] Tonawanda v. Lyon, 181 U.S. 389, 391 (1901).

mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[9] Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, property owners are not entitled to be heard in advance on the extent to which the improvement benefits their property.[10] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner has the right to be heard respecting benefits to his or her property before it can be included in the improvement district and assessed; but, in the absence of actual fraud or bad faith, due process is not denied if the decision of the agency vested with the initial determination of benefits is made final.[11] The owner has no constitutional right to be heard in opposition to the launching of a project that may result in an assessment, and once his or her land has been duly included within a benefit district, the only privilege the owner thereafter enjoys is a hearing upon the apportionment—that is, the amount of the tax he or she has to pay.[12] Where the mode of assessment for a tax resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[13]

Amdt14.S1.5.7.3 Notice of State Taxes and Due Process

Fourteenth Amendment, Section 1:

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

Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,[1] or by delivery to a statutorily designated agent.[2] With regard to land, when a state intends to sell land "for taxes upon

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[9] Londoner v. City of Denver, 210 U.S. 373 (1908).

[10] Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 269 U.S. 396, 405 (1926). Likewise, committing to a board of county supervisors the authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Bd. of Supervisors, 257 U.S. 118 (1921).

[11] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 168, 175 (1896); Browning v. Hooper, 269 U.S. 396, 405 (1926).

[12] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912). Nor can a taxpayer rightfully complain because a statute renders conclusive, after a hearing, the determination as to apportionment by the same body that levied the assessment. Hibben v. Smith, 191 U.S. 310, 321 (1903).

[13] Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization before issuance of an order increasing the valuation of all property in a city by 40%. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915). Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law. City of Detroit v. Parker, 181 U.S. 399 (1901). In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard. Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[1] Londoner v. City of Denver, 210 U.S. 373 (1908). *See also* Kentucky Railroad Tax Cases, 115 U.S. 321, 331 (1885); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537 (1895); Merchants Bank v. Pennsylvania, 167 U.S. 461, 466 (1897); Glidden v. Harrington, 189 U.S. 255 (1903).

[2] A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent the stockholder in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court," and may provide due process through "a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not."[3] Compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an in rem case, even if there are technical defects in the notice.[4]

Whether statutorily required notice is sufficient may vary depending on the circumstances. Thus, where a taxpayer was not legally competent, no guardian had been appointed, and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.[5] On the other hand, due process was not denied to persons who were unable to avert foreclosure on certain trust lands because their own bookkeeper failed to inform them of the receipt of mailed notices.[6]

Amdt14.S1.5.7.4 Collection of State Taxes and Due Process

Fourteenth Amendment, Section 1:

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

States may employ a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring safe deposit boxes to be sealed for at least ten days after a renter's death and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the state.[1] A state may compel retailers to collect gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[2] In collecting personal income taxes, most states require employers to deduct and withhold the tax from employees' wages.[3]

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[3] Leigh v. Green, 193 U.S. 79, 92–93 (1904).

[4] Thus, the Court will sustain an assessment for taxes and a notice of sale when such taxes are delinquent as long as there is a description of the land and the owner knows that the property so described is his, even if the description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are in rem, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, an owner who stands by and sees his property sold for delinquent taxes is not thereby wrongfully deprived of property. *Id. See also* Longyear v. Toolan, 209 U.S. 414 (1908).

[5] Covey v. Town of Somers, 351 U.S. 141 (1956).

[6] Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was not affected by the disparity between the value of the land taken and the amount owed to the city. The Court held that, having issued appropriate notices, the city could not be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor was it obligated to inquire why appellants regularly paid real estate taxes on their property.

[1] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[2] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[3] The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

States may also use various procedures to collect taxes from prior tax years. To reach property that has escaped taxation, a state may tax estates of decedents for a period prior to death and grant proportionate deductions for all prior taxes that the personal representative can prove to have been paid.[4] In addition, the Court found no violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier's operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[5]

A state may provide in advance that taxes will accrue interest from the time they become due, and may with equal validity stipulate that taxes that have become delinquent will bear interest from the time the delinquency commenced. A state may also adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[6] After a taxpayer's liability has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[7] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[8]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[9] No less constitutional, as a means of facilitating collection, is an in rem proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.[10] On the other hand, although the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[11] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[12]

Amdt14.S1.5.8 Other Contexts

Amdt14.S1.5.8.1 Parental and Children's Rights and Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[4] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

[5] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).

[6] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[7] Palmer v. McMahon, 133 U.S. 660, 669 (1890).

[8] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

[9] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).

[10] Leigh v. Green, 193 U.S. 79 (1904).

[11] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).

[12] Dewey v. City of Des Moines, 173 U.S. 193 (1899).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has applied the Due Process Clause to require certain procedural protections in cases involving parental rights. In a case arising from a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one."[1] However, the Court also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[2] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.[3]

Amdt14.S1.5.8.2 Protective Commitment and Due Process

Fourteenth Amendment, Section 1:

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

Like juvenile offenders,[1] several other classes of persons may be subject to confinement by court processes deemed civil rather than criminal. This category of "protective commitment" includes involuntary commitments for treatment of mental illness or mental disability, alcoholism, narcotics addiction, or sexual psychopathy. In *O'Connor v. Donaldson*, the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[2] The Court declined to resolve questions including "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or

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[1] Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 31 (1981).

[2] 452 U.S. at 32.

[3] *See, e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a state-mandated paternity action); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[1] *See* Amdt14.S1.5.5.8 Due Process Rights of Juvenile Offenders.

[2] 422 U.S. 563, 576 (1975). The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined. *Id.* at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). Prior to *O'Connor v. Donaldson*, only in Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940), had the Court considered the issue. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Lynch v. Overholser, 369 U.S. 705 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); McNeil v. Director, 407 U.S. 245 (1972). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

safety, or to alleviate or cure his illness"[3] and the confined person's right, if any, to receive treatment for the illness. In another case, the Court held that, to conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful post-deprivation remedy can cure the due process violation.[4]

Procedurally, an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the standard of a "preponderance of the evidence," normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of "beyond a reasonable doubt" is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[5]

In *Parham v. J.R.*, the Court considered due process requirements in the context of commitment of children to an institution for treatment of mental illness by their parents or by the state, when such children are wards of the state.[6] Under the challenged laws, there were no formal preadmission hearings, but psychiatric and social workers interviewed parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced it against factors including the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing care and interfere with the ability of parents to assist with the care of institutionalized children.[7] The same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.[8]

Amdt14.S1.6 Substantive Due Process

Amdt14.S1.6.1 Overview of Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[3] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[4] Zinermon v. Burch, 494 U.S. 113 (1990).

[5] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[6] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[7] 442 U.S. at 598–617.

[8] 442 U.S. at 617–20. The Court left open the question of the due process requirements for post-admission review of the necessity for continued confinement. *Id.* at 617.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has interpreted the Fifth and Fourteenth Amendments' Due Process Clause—which prohibits the government from depriving "any person of life, liberty, or property without due process of law"—to protect certain fundamental constitutional rights from government interference, regardless of the procedures that the government follows when enforcing the law. These protected rights, though not listed in the Constitution, are deemed so fundamental that courts must subject government actions infringing on them to closer scrutiny. The Fourteenth Amendment, in particular, adopted as one of the Reconstruction Amendments after the Civil War, protects individuals from interference by state actions.[1]

Although the Court, in the immediate years following the Fourteenth Amendment's ratification, declined to interpret the Due Process Clause as placing a substantive constraint on state actions, it went on to apply to robust notion of substantive due process to economic legislation prior to the Great Depression Era. During this period, the Court, recognizing "liberty of contract" as an interest protected by the Due Process Clause, struck down a variety of economic regulations as unconstitutional. The Court, however, ultimately retreated from the doctrine of economic substantive due process as the *laissez-faire* approach to economic regulation receded with the Great Depression.[2]

In contrast to the Court's shift away from economic substantive due process, the Court continued to develop the doctrine of noneconomic due process during the twentieth century, invalidating several governmental actions as impermissibly infringing upon certain fundamental rights, including the right to use contraceptives, to marry, and to engage in certain adult consensual intimate conduct. Since the 1980s, however, the Court—with the exception of two cases involving the right of same-sex couples—has generally declined to invalidate government actions on substantive due process grounds. In 2022, the Court further signaled a potential retreat from noneconomic substantive due process when it reversed the position it had held for nearly five decades to hold that the right to abortion is not a constitutionally protected fundamental right.[3]

Amdt14.S1.6.2 Economic

Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

[1] The Fifth Amendment's Due Process Clause protects individuals from federal government interference. For more about the substantive due process under the Fifth Amendment see Amdt5.7.1 Overview of Substantive Due Process Requirements.

[2] *See* Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process to Amdt14.S1.6.2.3 Laws Regulating Working Conditions and Wages.

[3] *See* Amdt14.S1.6.3.1 Overview of Noneconomic Substantive Due Process to Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

For approximately the first third of the twentieth century, the Supreme Court applied a doctrine known as economic substantive due process, which recognized "liberty of contract" as an interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, to strike down a variety of economic regulations unconstitutional.[1] In the years immediately following the adoption of the the Fourteenth Amendment in the late nineteeth century, however, there was little indication of the Due Process Clause's potential to serve as a substantive restraint on state action.[2] Long before the Fourteenth Amendment's passage, the Court had recognized the Due Process Clause of the Fifth Amendment as a restraint upon the federal government, but only in the narrow sense that a legislature needed to provide procedural "due process" when enforcing law.[3]

Early invocations of a "substantive" economic due process right were unsuccessful. In the *Slaughter-House Cases*,[4] a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the prohibition against a deprivation of property without due process "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power."[5] Nearly all state constitutions, the Court observed, also included a similar restraint on state power.[6] In upholding the state law, the Court stated that "under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[7]

Four years later, in *Munn v. Illinois*,[8] the Court reviewed the constitutionality of a state law that regulated the maximum rates private companies can charge for transporting and warehousing grain, and again refused to interpret the Due Process Clause as invalidating substantive state legislation. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its services and by transferring an interest in a private enterprise to the public, Chief Justice Morrison Waite took a broad view of the state's police power and concluded that states may regulate the use of private property "when such regulation becomes

[1] For a discussion of the economic substantive due process as applied to federal actions, see Amdt14.S1.6.2.1 Overview of Economic Substantive Due Process.

[2] In the years following the Fourteenth Amendment's ratification, the Supreme Court often observed that the Due Process Clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the Fourteenth Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See Akhil Reed Amar, The Bill of Rights 181–197 (1998).

[3] The conspicuous exception to this was the holding in the *Dred Scott* case that former slaves, as non-citizens, could not claim the protections of the clause. 60 U.S. (19 How.) 393, 450 (1857)

[4] 83 U.S. (16 Wall.) 36 (1873).

[5] *Id.* at 80–81.

[6] *Id.*

[7] 83 U.S. (16 Wall.) at 80–81.

[8] 794 U.S. 113, 134 (1877).

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necessary for the common good."[9] While Chief Justice Waite acknowledged that state legislatures may abuse rate regulation, he emphasized that such possibility is "no argument against its existence," for the people "must resort to the polls, not to the courts" for protection against abuses by legislatures.[10]

A year later, in *Davidson v. New Orleans*,[11] the Court similarly upheld a special assessment on certain real estate properties for drainage purposes. Writing for the Court, Justice Samuel Miller counseled against departing from the then-conventional applications of due process but acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, . . . this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion."[12] But only a few years after due process became part of the Constitution as a restraint upon the states through the ratification of the Fourteenth Amendment, he noted, "the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."[13] Justice Miller opined that "no more useful construction could be furnished by this or any other court" than to define "what it is for a State to deprive a person of life, liberty, or property without due process of law."[14] But such construction, he continued, should be fleshed out "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[15]

Just six years later, however, in *Hurtado v. California*,[16] the Court indicated it was modifying its views. Justice Stanley Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in British common law in that the latter applied only to executive and judicial acts, whereas the former also applied to legislative acts. Consequently, the limits of due process under the Fourteenth Amendment could not be appraised solely in terms of the "sanction of settled usage" under common law.[17] The Court then declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law" and that the constitutional limits placed on the action of both state and federal governments "are essential to the preservation of public and private rights."[18] "The enforcement of these limitations by judicial process," Justice Mathews continued, "is the device of self-governing communities to protect the rights of individuals and minorities."[19] By this language, the states were put on notice that all types of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

As the Court expanded the scope of the Due Process Clause over the next twenty years, two strands of reasoning developed to support this expansion. The first was a view advanced by

[9] *Id.* at 124.
[10] *Id.* at 134.
[11] 96 U.S. 97, 103–04 (1878).
[12] *Id.* at 104.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 9110 U.S. 516, 528, 532, 536 (1884).
[17] *See id.* at 528.
[18] *Id.* at 536.
[19] *Id.*

Justice Johnson Field in a dissent in *Munn v. Illinois*.[20] According to Justice Field, the state police power is limited to preventing injury to the "peace, good order, morals, and health of the community."[21] The second strand, which Justice Joseph Bradley espoused in his dissent in the *Slaughter-House Cases*,[22] tentatively transformed ideas embodying the social compact and natural rights into constitutionally enforceable limitations upon government.[23] Under this view, not only were states limited to exercising their police powers to further only those purposes of health, morals, and safety that the Court had enumerated, but states could also only employ means that do not unreasonably interfere with fundamental natural rights of liberty and property.[24] As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.[25]

As more Justices endorsed Justice Bradley's view,[26] and as the laissez-faire approach to economic regulation became dominant,[27] the Court also began to deviate from presuming a state statute to be valid unless clearly shown to be otherwise, by examining whether facts justified a particular law.[28] In earlier cases such as *Munn v. Illinois*,[29] the Court had upheld state laws by presuming that facts justifing the legislation "actually did exist when the statute now under consideration was passed." Ten years later, however, in *Mugler v. Kansas*,[30] the Court upheld a statewide anti-liquor law because the Court was aware of the deleterious social effects caused by excessive use of alcoholic liquors,[31] thereby establishing precedent for the Court to appraise independently the facts inducing legislatures to enact statutes.[32]

Mugler was significant because it implied that, unless the Court found facts justifying a state law, the Court would invalidate the law as an improper exercise of the state's police power because the law lacked a reasonable or adequate relation to promoting public health, morals, or safety.[33] The Court used this approach when challenged legislation involved potential

[20] 94 U.S. 113, 141–48 (1877).

[21] *Id.* 94 U.S. 145–46.

[22] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

[23] *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1875) (noting that "[t]here are . . . rights in every free government beyond the control of the State" and "limitations on [governmental power] which grow out of the essential nature of all free governments," and that the social compact "could not exist" without such "[i]mplied reservations of individual rights").

[24] *See id.*

[25] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Bradley, J., dissenting) ("This right to choose one's calling is an essential part of that [fundamental] liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.").

[26] *See* Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) (declaring "[t]he paternal theory of government" to be "odious" and expressing the view that "[t]he utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government").

[27] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting the "*laissez-faire* approach" to economic regulation that had dominated prior to the Great Depression).

[28] *See* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810).

[29] 94 U.S. 113, 123, 182 (1877).

[30] 123 U.S. 623 (1887).

[31] *Id.* at 662. ("We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil.").

[32] The following year the Court, addressed an act restricting sales oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[33] *See Mugler*, 123 U.S. at 662–63.

governmental interference in economic relations. In these cases, the Court tended to shift the burden of proof from litigants challenging the legislation to the state seeking enforcement.[34] Thus, the state had to demonstrate that the Constitution authorized, rather than did not expressly prohibit, a statute that interfered with a natural right of liberty or property. Applying this approach from the turn of the century through the mid-1930s, the Court struck down numerous laws that it saw as restricting economic liberties.

During the Great Depression, however, the laissez-faire approach to economic regulation lost favor to New Deal approaches.[35] Thus, in 1934, the Court in *Nebbia v. New York*[36] discarded its prior approach to evaluating economic legislation. The Court's modern approach is exemplified by its 1955 decision, *Williamson v. Lee Optical Co.*,[37] which upheld a statutory scheme regulating sales of eyeglasses that favored ophthalmologists and optometrists in private professional practice and disadvantaged opticians and those employed by or using space in business establishments. As the Court stated, "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[38] "For protection against abuses by legislatures," the Court emphasized, "the people must resort to the polls, not to the courts."[39]

Amdt14.S1.6.2.2 Liberty of Contract and Lochner v. New York

Fourteenth Amendment, Section 1:

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

The doctrine of economic substantive due process is grounded in the concept that "liberty of contract" is a right protected by the Due Process Clause. This idea, originally advanced by Justices Joseph Bradley and Stephen Field in dissent in the *Slaughter-House Cases*,[1] later

[34] *See* Amdt14.S1.6.2.2 Liberty of Contract and Lochner v. New York.

[35] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting that after the Great Depression brought "unparalleled economic despair" and "undermined . . . the assumption that a wholly unregulated market could meet basic human needs," the "laissez-faire approach" "was recognized everywhere outside the Court to be dead" (internal quotations omitted)).

[36] 291 U.S. 502 (1934).

[37] 348 U.S. 483 (1955).

[38] *Id.* at 488.

[39] *Id.* The Court generally applies a "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such economic regulation is generally accorded the traditional presumption of validity and "upheld absent proof of arbitrariness or irrationality on the part of Congress." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." *Id. See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[1] *See* 183 U.S. (16 Wall.) 36, 83–111 (1873) (Field, J., dissenting); *id.* at 111–124 (Bradley, J., dissenting).

became accepted doctrine in *Allgeyer v. Louisiana*,[2] in which the Court invalidated a state law that prohibited out-of-state insurance corporations from conducting business in the state without maintaining a place of business and authorized agent there. In concluding that the state law violated the Due Process Clause, the Court held that "[t]he liberty mentioned in that [Fourteenth] amendment . . . embrace[s] the right of the citizen to . . . earn his livelihood by any lawful calling[,] to pursue any livelihood or avocation," and to enter all contracts necessary to fulfill those purposes.[3] The Court subsequently applied this doctrine repeatedly through the early part of the twentieth century to strike down both state and federal economic regulations.

The Court, however, upheld some labor regulations and acknowledged that freedom of contract was "a qualified and not an absolute right."[4] Liberty, according to the Court, "implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Thus, with respect to labor regulations, the Court reasoned the legislature has a "wide field of discretion" to impose regulations suitable to protect "health and safety" and "designed to insure wholesome conditions of work and freedom from oppression."[5]

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative efforts to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently shifted the burden of proof in a manner best illustrated by comparing the early cases of *Holden v. Hardy*[6] and *Lochner v. New York*.[7] In *Holden v. Hardy*,[8] the Court considered the constitutionality of a state law that limited the number of work hours for underground miners and smelters. In upholding the state law, the Court presumed the law's validity and allowed the burden of proof to remain with those attacking the law.[9] Recognizing that mining had long been the subject of state regulation due to the associated health and safety risks, the Court registered its willingness to sustain a law that the state legislature had determined to be "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."[10]

Seven years later, however, a different Court found in *Lochner v. New York*[11] that a state law restricting employment in bakeries to ten hours per day and sixty hours per week was a labor regulation rather than a true health measure, and thus unconstitutionally interfered with the right of adult laborers to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Rufus Peckham, writing for the Court, nevertheless maintained that whether the act was within the police power of the state was a question the Court must answer.[12] Notwithstanding the medical evidence proffered—and implicitly shifting the burden of proof onto the state seeking to

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[2] 165 U.S. 578, 589 (1897); *see also* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (stating that "[i]ncluded in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property," "including for personal employment, and that [i]f this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense").

[3] *Allgeyer*, 165 U.S. at 589.

[4] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567 (1911).

[5] *Id.* at 570. *See also* Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).

[6] 169 U.S. 366 (1898).

[7] 198 U.S. 45 (1905).

[8] 169 U.S. at 398.

[9] *See id.* 393–98.

[10] *Id.* at 398.

[11] 198 U.S. 45 (1905).

[12] *Id.* at 57.

enforce the law—the Justice questioned whether the proffered statistics adequately demonstrated the trade of a baker to be "an unhealthy one."[13]

In dissent, Justice John Harlan argued that the law was a health regulation, noting the abundance of medical testimony in the record showing that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages.[14] In his view, the existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature.[15]

A second dissenting opinion, written by Justice Oliver Wendell Holmes, did not reject the basic concept of substantive due process, but rather the Court's categorical presumption against economic regulation based on a particular economic theory.[16] In his view, "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire."[17] Rather, he continued, "it is made for people of fundamentally differing views."[18] Thus, according to Justice Holmes, "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," i.e., a duly enacted state law, unless the law "would infringe fundamental principles as they have been understood by the traditions of our people and our law."[19] As such, in Justice Holmes' view, presuming the validity of state laws—including those that regulate economic regulation—was the better approach.

Following Justice Holmes's dissent, *Muller v. Oregon*[20] and *Bunting v. Oregon*[21] upheld state regulations that limited work hours in certain industries. The Court reached these results by concluding that the regulations were supported by evidence despite the shift in the burden of proof.[22] As a result of these decisions, counsel defending the constitutionality of similar legislation developed the practice of submitting voluminous factual briefs, known as "Brandeis Briefs,"[23] replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals.[24]

While the Court generally approved regulating work hours as permissible health measures, it rejected minimum wage law as unlawfully interfering with the freedom of

[13] *Id.* at 59.

[14] *See id.* at 69–72.

[15] *See id.* at 73–74 (Harlan, J., dissenting) ("No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [L]egislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.").

[16] *See id.* at 75–76.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 208 U.S. 412 (1908).

[21] 243 U.S. 426 (1917).

[22] *See Muller*, 208 U.S. at 419–20; *Bunting*, 243 U.S. at 438–39.

[23] Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support regulating women's working hours in *Muller v. Oregon*, 208 U.S. 412 (1908).

[24] *See Muller*, 208 U.S. at 419 (referencing the Brandeis brief filed in the case as containing a "very copious collection" of relevant factual support for the state regulation).

contract.[25] Over objections that regulating wages were just as relevant to workers' health and morals as regulating work hours,[26] the Court held that a minimum wage regulation is a "price-fixing" law that bore no reasonable connection to the objectives of health or safety.[27]

During the Great Depression, however, the laissez-faire tenet of self-help was replaced by the belief that a government role is to help those who are unable to help themselves.[28] To sustain such remedial legislation, the Court had to revisit its concepts of liberty under the Due Process Clause. Thus, in *West Coast Hotel v. Parrish*,[29] the Court expressly overturned its precedents to uphold a Washington minimum wage law, taking into account the "unparalleled demands for relief" resulting from the Great Depression. In so holding, the Court reiterated that freedom of contract is "a qualified and not an absolute right" that may be restricted in furtherance of public interest.[30]

Amdt14.S1.6.2.3 Laws Regulating Working Conditions and Wages

Fourteenth Amendment, Section 1:

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

Even when the *Lochner*-era Supreme Court recognized "liberty of contract" as a substantive right protected by the Due Process Clause, the Court still construed the Clause as permitting certain labor regulations, including maximum hours laws applicable to women workers,[1] other workers in specified lines of employment,[2] and those working on public projects.[3] The Court likewise upheld regulation of *how* wages were to be paid, including the

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[25] The Court first considered the validity of minimum wage laws in the context of a Distict of Columbia statute in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Because the Fifth and not the Fourteenth Amendment applies to the District of Columbia, the Court analyzed the statute under the Fifth Amendment's Due Process Clause but incorporated the relevant case law it had developed under the Fourteenth Amendment with respect to state laws. *See id.* at 545–50. The Court later applied *Adkins* to strike down a New York minimum wage law in Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[26] *See Adkins*, 261 U.S. at 565–66 (Taft, C.J., dissenting) ("If I am right in thinking that the legislature can find as much support in experience for the view that a sweating wage has as great and as direct a tendency to bring about an injury to the health and morals of workers, as for the view that long hours injure their health, then I respectfully submit that *Muller v. Oregon*, 208 U.S. 412, controls this case."); *id.* at 569–70.

[27] *Id.* at 554–59.

[28] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op 44 (U.S. June 24, 2022) (Kagan, J., dissenting) (noting that after the Great Depression brought "unparalleled economic despair" and "undermined . . . the assumption that a wholly unregulated market could meet basic human needs," the "laissez-faire approach" "was recognized everywhere outside the Court to be dead" (internal quotations omitted)).

[29] 300 U.S. 379, 395–99 (1937).

[30] *See id.* at 392.

[1] *See, e.g.*, Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to eight hours per day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (ten hours per day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

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

[3] *See* Atkin v. Kansas, 191 U.S. 207 (1903).

form of payment,[4] its frequency,[5] and how such payment was to be calculated.[6] In addition, the Court upheld a state law that prohibited the employment of persons under 16 years of age in dangerous occupations and required employers to ascertain whether their employees were in fact below that age.[7]

During that era, the Court also recognized the states had the power to regulate mines. Acknowledging that such health and safety regulation was clearly within a state's police power, the Court upheld various mining regulations, including state laws that required the inspection of coal mines (paid for by mine owners),[8] required the employment of licensed mine managers and mine examiners, and imposed liability upon mine owners for failing to furnish a reasonably safe place for workmen.[9] Other similar regulations that the Court sustained included laws requiring that underground passageways meet or exceed a minimum width,[10] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[11] and that wash houses be provided for employees.[12]

Until 1937, however, the Court interpreted economic substantive due process to generally preclude states from regulating how much wages employers were to pay employees.[13] According to the Court, such "price-fixing" laws did not bear a reasonable connection to the states' health and safety objectives and unlawfully interfered with the freedom to contract.[14] In 1937, however, the Court in *West Coast Hotel v. Parrish*[15] expressly overruled these precedents and allowed states to set minimum wages for employees. This decision reflected a larger shift in the Court's approach to economic regulations as it increasingly deferred to state legislation. As the Court explained in *Day-Brite Lighting, Inc. v. Missouri*,[16] its decisions since *West Coast Hotel* "make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." While the legislative power has limits, the Court emphasized that "state legislatures have constitutional authority to experiment with new techniques" and "may within extremely broad limits control practices in the business-labor field, so long as specific constitutional

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

[5] Laws that required railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), did not violate due process.

[6] Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915) (upholding requirement that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioned such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

[7] Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913).

[8] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902).

[9] Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).

[10] Barrett v. Indiana, 229 U.S. 26 (1913).

[11] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[12] Booth v. Indiana, 237 U.S. 391 (1915).

[13] *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Stettler v. O'Hara, 243 U.S. 629 (1917); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[14] *See, e.g.*, *Adkins*, 261 U.S. at 554–59.

[15] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923) and Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936)).

[16] 342 U.S. 421, 423 (1952).

prohibitions are not violated and so long as conflicts with valid and controlling federal laws."[17] Debatable issues of "business, economic, and social affairs," the Court states, are generally subject to legislative decisions.[18]

Amdt14.S1.6.3 Noneconomic

Amdt14.S1.6.3.1 Overview of Noneconomic Substantive Due Process

Fourteenth Amendment, Section 1:

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

After the Supreme Court retreated from the doctrine of economic substantive due process, it continued to develop and recognize, in disparate lines of cases, certain noneconomic substantive rights protected by the Due Process Clause. These protected rights are not explicitly listed in the Constitution, but they are deemed so fundamental that the courts must subject any legislation infringing on them to closer scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[1] serves as the basis for some of the most significant constitutional holdings in the modern era. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the incorporation of fundamental rights.[2] Other noneconomic due process holdings, however, such as the recognition of the right of a woman to have an abortion and the later reversal of this recognition, are controversial.[3]

A question confronting the Court is how to define the parameters of these abstract rights once they have been established. For instance, after recognizing the constitutional protections afforded to marriage, family, and procreation in *Griswold v. Connecticut*,[4] the Court extended the protection to apply to unmarried couples.[5] However, in *Bowers v. Hardwick*,[6] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types

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[17] *Id.*

[18] *Id.* at 424–25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining state statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[1] *See, e.g.*, Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge 1977).

[2] *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that legislation that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth" would be subject to closer juridical scrutiny).

[3] *Compare* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. 6 (U.S. June 24, 2022) (stating that the Court's decision in Roe v. Wade, 410 U.S. 113 (1973) to recognize the right to abortion as a fundamental right was "egregiously wrong from the start"), *with id.* at 4 (Breyer, J., dissenting) (stating that a "certain" result of *Dobbs*' overruling of *Roe* is "the curtailment of women's rights, and of their status as free and equal citizens").

[4] 381 U.S. 479 (1965).

[5] See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[6] 5478 U.S. 186 (1986).

of intimate activities engaged in by married as well as unmarried couples.[7] Then, in *Lawrence v. Texas*,[8] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

More broadly, the Court has not clearly articulated whether and how much to rely on history and tradition in defining a protected liberty interest. In *Washington v. Glucksberg*, the Court, in an effort to guide and restrain a court's determination of the scope of substantive due process rights, held that the concept of liberty protected under the Due Process Clause should first be understood to protect only those rights that are deeply rooted in this Nation's history and tradition.[9] Moreover, the Court in *Glucksberg* required a careful description of fundamental rights that would be grounded in specific historical practices and traditions that serve as crucial guideposts for responsible decisionmaking.[10] However, the Court, in *Obergefell v. Hodges* largely departed from *Glucksberg*'s formulation for assessing fundamental rights in holding that the Due Process Clause required states to license and recognize marriages between two people of the same sex.[11] Instead, the *Obergefell* Court recognized that fundamental rights do not come from ancient sources alone and instead must be viewed in light of evolving social norms and in a comprehensive manner.[12]

For the *Obergefell* Court, the two-part test relied on in *Glucksberg*—relying on history as a central guide for constitutional liberty protections and requiring a careful description of the right in question—was inconsistent with the approach taken in cases discussing certain fundamental rights, including the rights to marriage and intimacy, and would result in rights becoming stale, as received practices could serve as their own continued justification and new groups could not invoke rights once denied.[13] In *Dobbs v. Jackson Women's Health Organization*, however, the Court—in overruling its prior decisions that recognized a constitutionally protected right to abortion—again applied a history-focused analysis.[14]

Similar disagreement over reliance on history and tradition was also evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.[15] While recognizing the protection traditionally afforded a father, Justice Antonin Scalia, joined only by Chief Justice William Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (i.e. the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection.[16] In his view, courts should limit consideration to "the most

[7] The Court upheld the statute only as applied to the plaintiffs, who were homosexuals *See id.* at 188. In so concluded, the Court rejected an argument that there is a fundamental right of homosexuals to engage in acts of consensual intimate activities. *Id.* at 192–93. In a dissent, Justice Harry Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. *Id.* at 199–203 (Blackmun, J., dissenting).

[8] 539 U.S. 558 (2003) (overruling *Bowers*).

[9] *See* 521 U.S. 702, 720–21 (1997).

[10] *See id.* at 721 (internal citations and quotations omitted).

[11] *See* 576 U.S. 644, 671–72 (2015).

[12] *See id.*

[13] *Id.* at 671.

[14] *See* No. 19-1392, slip op. at 23–25 (U.S. June 24, 2022) (reasoning that a right to abortion "is not deeply rooted in the Nation's history and traditions," and thus not a constitutionally protected right, because abortion was, for instance, prohibited in three-quarters of the states when the Fourteenth Amendment was adopted, and thirty states still prohibited the procedure when *Roe* was decided).

[15] 491 U.S. 110 (1989) (plurality). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California's procedures for establishing paternity did not unconstitutionally impinge on that interest.

[16] 491 U.S. at 128 n.6.

specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[17] Dissenting Justice William Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"[18]

Another question for the Court is what standard of review to apply in reviewing infringements on the fundamental rights it has recognized. In *Poe v. Ullman*, Justice John Marshall Harlan in a dissent advocated for the application of a standard of reasonableness—the same standard he would have applied to test economic legislation.[19] In *Griswold*, however, the Court seemingly concluded that the relevant privacy right was protected from government intrusions with little or no consideration to the governmental interests that might justify such an intrusion.[20] On the other hand, in the abortion line of cases, the Court, during the period when it recognized a constitutional right to abortion, came to apply a specific "undue burden" standard that balanced the government's interest in potential life with a woman's right to decide to terminate her pregnancy.[21] In *Lawrence*, the Court struck down the relevant state law after concluding it "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[22] While this language is suggestive of rational basis review, a typically lenient form of review,[23] the Court was noticeably silent on the standard of review it applied. In his dissent, Justice Antonin Scalia commented on this silence, opining that the Court "appl[ied] an unheard-of form of rational-basis review" in invalidating the state law.[24] Consequently, questions remain concerning the applicable standard of review and how it should be applied with respect to specific fundamental rights.

Amdt14.S1.6.3.2 Historical Background on Noneconomic Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[17] *Id.*

[18] *Id.* at 142 (Brennan, J., dissenting).

[19] 367 U.S. 497 542–43 (1961) (Harlan, J., dissenting). *Poe* concerned a Connecticut statute banning the use of contraceptives, even by married couples. *Id.* at 522, 538–45. The Court dismissed as the case as non-justiciable without reaching the merits. *See id.*

[20] *See Griswold*, 381 U.S. at 486 (holding that the law banning the use of contraceptives cannot stand in light of the principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (internal quotations omitted)).

[21] *See* Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine.

[22] *Lawrence*, 539 U.S. at 578.

[23] *See id.* at 579 (O'Connor, J., concurring) (noting that "[l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster").

[24] *See Id.* at 586 (Scalia, J., dissenting). *See also id.* at 580 (O'Connor, J., concurring) (expressing the view that state law would be better analyzed under the Equal Protection Clause, subject to "a more searching form of rational basis review" because the law targets a politically unpopular group).

> *States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

One of the earliest formulations of noneconomic substantive due process was the right to privacy. In an 1890 Harvard Law Review article, Samuel Warren and Louis Brandeis first proposed this right as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright.[1] According to the authors,

> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.[2]

The concepts advanced in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a 1928 dissenting opinion by Louis Brandeis, by then a Supreme Court Justice, regarding the Fourth Amendment.[3] In the same decade, during the heyday of economic substantive due process, the Court also ruled in two cases that, although characterized in part as involving the protection of property, foreshadowed the rise of the protection of noneconomic interests.

In *Meyer v. Nebraska*, the Court struck down a state law that prohibited schools from teaching any language other than English to grade school children.[4] Two years later, in *Pierce v. Society of Sisters*, the Court declared it unconstitutional to require public school education of children aged eight to sixteen.[5] The Court characterized the rights at issue in each case as certain economic rights.[6] In *Meyer*, the Court found that the statute at issue interfered in part with the property interest of the plaintiff, a German teacher, in pursuing his occupation.[7] In *Pierce*, the Court found that the public school requirement threatened the private school plaintiffs with destruction of their businesses and the values of their properties.[8] Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents in the assertion of other noneconomic forms of "liberty" protected by the Due Process Clause. In particular, in *Meyer*, the Court also recognized "the power of parents to control the education of

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[1] Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 193–207 (1890).

[2] *Id.*

[3] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis expressed the view that the Framers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.* Accordingly, Justice Brandeis reasoned that the Framers "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* Thus, he continued, "[t]o protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.*

[4] 262 U.S. 390, 400–01 (1923).

[5] 268 U.S. 510, 534–35 (1925).

[6] *See Meyer*, 262 U.S. at 400.

[7] *See id.* at 401.

[8] *See Pierce*, 268 U.S. 531, 533–34. The Court has subsequently made clear that these cases dealt with a complete prohibition of the right to engage in a calling, holding that a brief interruption did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (holding that search warrant served on attorney that prevented attorney from assisting client appearing before a grand jury did not violate the attorney's Fourteenth Amendment right to practice one's calling).

their own" as a protected liberty interest.[9] Relying on this part of *Meyer*, the Court in *Pierce* also held that the public school requirement "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[10]

Although the Supreme Court after *Pierce* continued to describe noneconomic liberty broadly in dicta,[11] the doctrine had little practical impact in the ensuing decades.[12] In 1965, however, the Court in *Griswold v. Connecticut* held that a state law banning the use of contraceptives violated the right of marital privacy, but concluded that the right stemmed not from the Due Process Clause, but from the "penumbras" of several amendments of the Bill of Rights.[13] In *Roe v. Wade*, the Court, while leaving open the possibility this privacy right may be rooted in the Ninth Amendment's reservation of rights to the people, characterized the right as one "founded in the Fourteenth Amendment's concept of personal liberty."[14] From then on, the Court has generally recognized this protected privacy interest as stemming in large part from the Due Process Clause and encompassing, for instance, the right of same-sex couples to engage in adult consensual intimate activities,[15] and for nearly five decades, the right to abortion.[16]

Amdt14.S1.6.3.3 Informational Privacy, Confidentiality, and Substantive Due Process

Fourteenth Amendment, Section 1:

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

The Supreme Court has at times suggested that the privacy right protected by the Constitution encompasses a right to informational privacy or confidentiality. The Court first indicated the existence of this protected interest in *Whalen v. Roe*.[1] There, a group of patients and doctors sued to challenge a state law that required the state to record, in a centralized

[9] *See Meyer*, 262 U.S. at 401.

[10] *See Pierce*, 268 U.S. at 534–35. Some Justices have expressed the view that *Meyer* and *Pierce* are more appropriately resolved on First Amendment grounds. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Douglas, J., concurring). In both *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968), concerning a state law that prohibited the teaching of evolution, and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969), concerning a school policy prohibiting the wearing of armbands, the Court approvingly noted the due process basis of *Meyer* and *Pierce* but decided both cases on First Amendment grounds.

[11] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that care and nurture of children by the family are within "the private realm of family life which the state cannot enter").

[12] *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of mental illness or intellectual disability); Minnesota v. Probate Court *ex rel.* Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

[13] Griswold v. Connecticut, 381 U.S. 479, 481–84 (1965).

[14] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[15] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564–65 578–79 (2003).

[16] For a more detailed discussion of the evolution of the Court's analysis of the right to abortion, see Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine to Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine.

[1] 429 U.S. 589 (1977).

computer file, the names and addresses of all persons who have been prescribed certain drugs with abuse potential.[2] The plaintiffs argued that the law impermissibly invaded two protected privacy interests: (1) the individual interest in avoiding disclosure of personal matters; and (2) the autonomy interest in making certain health decisions about what medication to use.[3]

The Court assumed that both interests are protected, but held that the law on its face did not "pose a sufficiently grievous threat to either interest."[4] The record system, the Court observed, included extensive security protection that limited disclosure to that necessary to achieve the purpose of curtailing misuse of certain prescription drugs, nor did the law interfere with the decision to prescribe or use the relevant drugs.[5] Following *Whalen*, some lower courts have questioned whether the case established a "fundamental" right to informational privacy or confidentiality.[6]

More than two decades after *Whalen*, the Court, in *NASA v. Nelson*, declined to rule on whether such a privacy right exists.[7] In *Nelson*, a group of NASA workers sued to challenge the extensive background checks required to work at NASA facilities as violating their constitutional privacy rights.[8] Ruling unanimously in favor of the agency, the Court again assumed without deciding that a right to informational privacy could be protected by the Constitution.[9] The Court, however, held that the right does not prevent the government from asking reasonable questions in light of its interest as an employer and in light of the statutory protections that provide meaningful checks against unwarranted disclosures.[10] Consequently, questions remain concerning whether and to what extent a right to informational privacy or confidentiality exists.

Amdt14.S1.6.3.4 Family Autonomy and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[2] *Id.* at 591, 595–96.

[3] *Id.* at 599–600.

[4] *Id.* at 600.

[5] *Id.* at 600–04. The Court cautioned that it did not decide the privacy implications of the accumulation and disclosure of vast amounts of information in data banks, but it noted that a duty to safeguard such information collected for public purposes from disclosure arguably "has its roots in the Constitution," at least in some circumstances. *Id.* at 605. In *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425 (1977), however, the Court rejected President Richard Nixon's assertion that the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of over 42 million pages of documents and over 800 tape recordings of President Nixon, invaded his constitutionally protected privacy interest. *Id.* at 455–65. While recognizing that President Nixon had a legitimate expectation of privacy in at least some of the materials that were personal in nature, the Court balanced that interest against the relevant public interests—including that the disclosure would be limited to archivists for screening purposes—and upheld the law. *See id.*

[6] *See, e.g.*, Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (noting that the Supreme Court in *Whalen* and *Nixon* considered "the confidentiality strand of privacy" and applying a "balancing test" to evaluate a claim that certain state public disclosure requirements on elected officials violated their privacy interest).

[7] 562 U.S. 134 (2011).

[8] *See id.* at 148–56.

[9] *See id.*

[10] *Id.* For additional discussion on right to information privacy in the context of federal laws and actions, see Amdt5.7.7 Informational Privacy and Substantive Due Process.

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition to recognizing a fundamental right to marry,[1] the Supreme Court has also recognized several other family-related fundamental rights related to childrearing and family autonomy. In the early twentieth century, for instance, the Court in *Myer v. Nebraska* struck down a state law that prohibited schools from teaching any language other than English to grade school children.[2] While recognizing that the state had power to make "reasonable regulations for all schools, including a requirement that they shall give instructions in English," the Court held that the law's prohibition materially interfered with "the power of parents to control the education of their own" in violation of the Due Process Clause.[3] Two years later, in *Pierce v. Society of Sisters*,[4] the Court struck down an Oregon law that required parents and guardians in the state to send children between the ages of eight and sixteen to public schools.[5] The Court held that the law "unreasonably interefere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[6]

Since then, the Supreme Court has considered the rights of parenthood on several occasions, at times touching upon the complex questions raised by possible conflicts between parental rights and children's rights. In *Prince v. Massachusetts*, for instance, the Court upheld a state law that prohibited minors from selling any periodicals or other articles of merchandise in public places.[7] In so concluding, the Court reasoned that while there is a "private realm of family life which the state cannot enter," the state "has wide range of power for limiting parental freedom and authority in things affecting the child's welfare," including requiring school attendance, regulating child labor, and requiring vaccination as a condition of school entry.[8]

In other instances, however, the Court has reiterated parents' "fundamental liberty interest in the care, custody, and management of their children."[9] In *Troxel v. Granville*, the Court evaluated a Washington State law that allowed any person to petition a court at any time to obtain visitation rights whenever visitation may serve the best interests of a child.[10] There, a child's grandparents were awarded more visitation with a child against the wishes of the sole surviving parent.[11] A majority of the Court agreed that the statute was invalid, with a plurality of Justices concluding that the law's lack of deference to the parent's wishes infringed upon the parent's fundamental right and contravened the traditional presumption that a fit

[1] *See* Amdt14.S1.6.3.5 Marriage and Substantive Due Process.

[2] 262 U.S. 390 (1923).

[3] *Id.* at 400–01.

[4] 268 U.S. 510 (1925).

[5] *Id.* at 534–35.

[6] *Id.*

[7] 321 U.S. 158 (1944).

[8] *Id.* at 166–67. Before the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) in 2022, it struck down, in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) a state law provision requiring physicians to obtain parental consent before performing an abortion on a women under eighteen. *Danforth*, 418 U.S. at 72. In so concluding, the Court reasoned at the time that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75.

[9] Troxel v. Granville, 530 U.S. 57, 61 (2000).

[10] *Id.* at 60.

[11] *Id.* at 60–61.

parent will act in the best interests of a child.[12] In *Parham v. J.R.*, the Court likewise upheld a state's voluntary civil commitment procedures that allowed minors to be committed to state mental hospitals by their parents without an adversarial hearing before an impartial tribunal.[13] Such a hearing, according to the Court, would create an unacceptable intrusion into the parent-child relationship, and would be inconsistent with the traditional presumption of parental competence and good intentions.[14]

In addition to parental rights, the Supreme Court has also indicated that there may be a constitutional right to live together as a family,[15] and that this right may not be limited to the nuclear family.[16] In *Moore v. City of East Cleveland*, for instance, a plurality of Justices concluded that a local housing ordinance that zoned a neighborhood for single-family occupancy and defined "family" in a way that excluded a grandmother from living with two grandchildren who were cousins, violated the Due Process Clause as an "intrusive regulation of the family" without accruing any tangible state interest.[17] The Court has further suggested that the concept of family may extend beyond biological relationships to the situation of foster families, although the Court acknowledged that such a claim raises complex and novel questions, and that the relevant liberty interests may be limited.[18] On the other hand, the Court has upheld a state law that presumes a child born to a married woman living with her husband to be the husband's child, defeating the right of the child's biological father to establish paternity and visitation rights.[19]

Amdt14.S1.6.3.5 Marriage and Substantive Due Process

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[12] *See id.* 68–69.

[13] 442 U.S. 584, 597–98 (1979).

[14] *See id.* at 610.

[15] *See* Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) ("If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'").

[16] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality). Unlike the liberty interest in property, which derives from early statutory law, these liberties spring instead from natural law traditions, as they are "intrinsic human rights." *Smith*, 431 U.S. at 845.

[17] *Id.* at 499–500. The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. *See id.* at 513 (Stevens, J., concurring) (expressing the view that the ordinance was invalid because it constituted a taking of property without just compensation).

[18] *See Smith*, 431 U.S. at 842–47. As the Court noted, the rights of a biological family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of state-ordered arrangement. *See id.* As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. *See id.* Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the biological parents parents. *See id.* In *Smith*, the Court, without defining the specific liberty interst of foster parents, upheld certain state procedures that allowed a foster child to be removed from a foster home without a pre-removal hearing. *See id.* at 855–56.

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

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In several decisions, the Supreme Court recognized the right to marry as a fundamental right protected by the Due Process Clause,[1] such that only "reasonable regulations that do not significantly interfere with the decisions to enter the marital relationship" may be imposed.[2] In striking down a state anti-miscegenation law that criminalized interracial marriage, for instance, the Court in *Loving v. Virginia* held that the law violated due process by depriving individuals of their "freedom to marry"—"one of the basic civil rights of man, fundamental to our very existence and survival"—based on the "unsupportable basis" of racial classification.[3]

Based on the recognition of this fundamental right, the Court has struck down several state laws that restricted the ability of certain individuals to marry. In *Zablocki v. Redhail*, for instance, the Court considered a state law that prohibited any resident under an obligation to pay child support from marrying without a court order, which could only be obtained upon a showing that the resident is incompliance with his or her support obligation and that the children were not and were not likely to become public charges.[4] Finding that the law "interfere[d] directly and substantially" with the fundamental right to marry and thus required a "critical examination," the Court held that the restriction was not "closely tailored" to effectuate the relevant state interest of incentivizing compliance with support obligations.[5] In the Court's view, alternative devices to collect payment existed, and the restriction simply prevented marriage without delivering any money to the affected children.[6] Similarly, in *Turner v. Safley*, the Court concluded that a state regulation impermissibly burdened prison inmates' the right to marry, when it prohibited inmates from marrying unless the prison superintendent has approved the marriage after finding that there were compelling reasons for doing so.[7]

In *Obergefell v. Hodges*, the Supreme Court further clarified that the "right to marry" applies with "equal force" to same-sex couples, as it does to opposite-sex couples, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.[8] In so holding, the Court recognized marriage as being an institution of "both continuity and change," and, as a consequence, recent shifts in public attitudes respecting gay individuals and more specifically same-sex marriage necessarily informed the Court's conceptualization of the right to marry.[9]

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[1] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[2] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[3] 388 U.S. 1, 12 (1967).

[4] 434 U.S. 374, 376 (1978).

[5] *Id.* at 387–88.

[6] *Id.* 388–89. While the *Zablocki* Court held that the law violated the Equal Protection Clause, the Court applied must of the principles developed in the substantive due process context. *See* Obergefell v. Hodges, 576 U.S. 644, 673 (2015) (noting that *Zablocki*'s equal protection analysis "depended in central part on the Court's holding that the law burdened a right of fundamental importance" (internal quotations omitted)).

[7] 482 U.S. 78, 94–99.

[8] 576 U.S. 644, 665 (2015).

[9] *See id.* at 659–63. *But see* Dobbs v. Jackson Women's Health Organization No. 19-1392, slip op. at 23–25 (U.S. June 24, 2022) (evaluating whether right to abortion is a constitutionally protected right based on whether it is "deeply rooted in the Nation's history and tradition").

More broadly, the *Obergefell* Court recognized that the right to marry is grounded in four "principles and traditions."[10] These involve the concepts that (1) marriage (and choosing whom to marry) is inherent to individual autonomy protected by the Constitution; (2) marriage is fundamental to supporting a union of committed individuals; (3) marriage safeguards children and families;[11] and (4) marriage is essential to the nation's social order, because it is at the heart of many legal benefits.[12] With this conceptualization of the right to marry in mind, the Court found no difference between same- and opposite-sex couples with respect to any of the right's four central principles, concluding that a denial of marital recognition to same-sex couples ultimately "demean[ed]" and "stigma[tized]" those couples and any children resulting from such partnerships.[13] Given this conclusion, the Court held that, while limiting marriage to opposite-sex couples may have once seemed "natural," such a limitation was inconsistent with the right to marriage inherent in the "liberty" of the person as protected by the Fourteenth Amendment.[14]

In the context of federal Social Security benefits, the Court has approved certain benefits restrictions related to the incidents or prerequisites for marriage.[15] In these cases, the Court generally found that the regulations at issue did not substantially interfere with the decision to enter into marriage and at most had an indirect impact on that decision.[16]

Amdt14.S1.6.3.6 Sexual Activity, Privacy, and Substantive Due Process

Fourteenth Amendment, Section 1:

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

Since the 1960s, the Supreme Court has considered the constitutionality of several governmental actions aimed at regulating aspects of sexual conduct. These actions have included efforts to regulate the use of contraceptives; the possession or distribution of obscene materials; and individuals' engagement in same-sex intimate activities. To the extent that the Court has invalidated certain governmental actions in this context, it has often relied on the existence of a right to privacy in the Constitution. However, the manner in which the Court has interpreted this privacy right has evolved over time.

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[10] *Id.* at 665–69.

[11] In *Pavan v. Smith*, the Court reviewed an Arkansas law providing that when a married woman gives birth, her husband must be listed as the second parent on the child's birth certificate, including when he is not the child's genetic parent. No. 16-992, slip op. 1 (U.S. June 26, 2017) (per curiam). The lower court had interpreted the law to not require the state to extend the rule to similarly situated same-sex couples. *Id.* Relying on *Obergefell*, the Court struck down the law, noting that the "differential treatment of the Arkansas rules infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" *Id.* (quoting *Obergefell*, 576 U.S. at 670).

[12] *See Obergefell*, 576 U.S. at 665–69.

[13] *See id.* at 672.

[14] *See id.* at 670–71.

[15] *See, e.g.*, Califano v. Jobst, 434 U.S. 47, 54 (1977); Matthews v. De Castro, 429 U.S. 181 (1976); Califano v. Boles, 443 U.S. 282 (1979).

[16] *See* Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Burger, J., concurring) (noting that "[u]nlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue [in *Zablocki*], the Social Security Act provisions challenged in *Jobst* . . . at most[ ] had an indirect impact on [the] decision [to marry]"). For additional discussion of these cases, see Amdt5.7.5 Marriage and Substantive Due Process.

In 1965, the Court, in *Griswold v. Connecticut*, first recognized a protected right of marital privacy when it struck down a state law that banned the use of contraceptives.[1] The law, in the Court's view, "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation" and impermissibly intruded upon the fundamental right of privacy surrounding the marriage relationship.[2] At the time, the Court concluded that this privacy right stemmed not from the Fourteenth Amendment's Due Process Clause, but from the "penumbras" of the Bill of Rights.[3] In *Eisenstadt v. Baird*, through the application of equal protection principles, the Court effectively extended the right to use contraceptives to unmarried couples.[4]

After *Griswold*, the Court considered the right of privacy in a different context in *Stanley v. Georgia*. In that case, the Court struck down a state criminal law that banned the possession of "obscene matter."[5] The defendant in *Stanley* was charged under the state law after the authorities executed a warrant at his home in connection with an unrelated investigation and uncovered three reels of eight-millimeter film deemed to be "obscene."[6] In holding that both the First and Fourteenth Amendments "prohibit making mere private possession of obscene material a crime," the Court found that the mere categorization of the films as "obscene" was insufficient to justify "such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments."[7] In so concluding, the Court seemingly suggested that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home.[8] This broad conception of a privacy right could potentially protect even illegal personal activities if they are practiced in the privacy of one's home.

In a series of subsequent cases addressing both federal and state law regulating obscene materials, however, the Court upheld those laws and largely confined *Stanley* to its facts.[9] In *Paris Adult Theatre I v. Slaton*, the Court, in upholding a state-sought injunction prohibiting the showing of allegedly obscene films by two theaters, further rejected the argument "that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books."[10] In the Court's view, "[t]otally unlimited play for free will . . . is not allowed in our or any other society."[11]

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. Instead, the Court has

[1] Griswold v. Connecticut, 381 U.S. 479, 481–84 (1965).

[2] *Id.* at 482, 485–86.

[3] *Id.*

[4] 405 U.S. 438, 443 (1972).

[5] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[6] *Id.* at 558.

[7] *Id.*at 565, 568.

[8] *See id.* at 565 (stating that "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home" and that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch").

[9] *See, e.g.*, United States v. Reidel, 402 U.S. 351, 354–56 (1971) (finding no right to distribute obscene material for private use); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971) (finding no right to import obscene material for private use); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973) (finding no right to acquire obscene material for private use); Osborne v. Ohio, 495 U.S. 103, 109–111 (1990) (finding no right to possess child pornography in the home).

[10] 413 U.S. 49, 63–64 (1973).

[11] *Id.* at 64.

recognized, in sometimes disparate lines of cases, a right of personal privacy "deemed fundamental or implicit in the concept of ordered liberty."[12] Describing its pre-1973 precedents, the Court in *Roe v. Wade* stated that this guarantee of personal privacy encompasses "activities related to marriage, procreation, contraception, family relationships, and child rearing and education."[13] *Roe* itself recognized this privacy right, "founded in the Fourteenth Amendment's concept of personal liberty," to extend to the right to obtain an abortion—a recognition that the Court would later retreat from almost five decades later.[14] In *Carey v. Population Services International*, the Court further deemed the protected right of privacy to encompass "[t]he decision whether or not to beget or bear child" in striking down a state law that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[15]

Until 2003, *Bowers v. Hardwick* largely defined the outer limits of the right to privacy. In that case, the Court upheld a state law that criminalized sodomy and in doing so, rejected the suggestion that its prior privacy cases protecting "family, marriage, or procreation" extended protection to private consensual homosexual sodomy.[16] The Court also rejected the broader claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[17] In so concluding, the Court relied significantly on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[18] Finding that the privacy of the home does not protect all behavior from state regulation, the Court determined that it was "unwilling to start down [the] road" of immunizing voluntary sexual conduct between consenting adults.[19]

In 2003, however, the Court overruled *Bowers* in *Lawrence v. Texas*, relying again on the right of privacy.[20] Citing its privacy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals impermissibly "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[21] The Court concluded that the state law furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[22] Although the Court seemed to recognize that a state may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[23] it seemed to reject reliance on historical notions of

[12] Roe v. Wade, 410 U.S. 113, 152 (1973) (internal quotations omitted).

[13] *Id.* (internal citations omitted).

[14] *Id.* at 153–154. For a more detailed discussion of the evolution of the Court's analysis of the right to abortion, see Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine to Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine.

[15] 431 U.S. 678, 684–91 (1977).

[16] *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986).

[17] *Id.* at 191.

[18] *Id.* at 191–92.

[19] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.* at 195–96. Dissenting Justices Harry Blackmun and John Paul Stevens, on the other hand, suggested that these crimes are readily distinguishable. *See id.* at 209 (Blackmun, J., dissenting), 217–18 (Stevens, J., dissenting).

[20] Lawrence v. Texas, 539 U.S. 558, 564 (2003)

[21] *See id.* at 564–67.

[22] *Id.* at 578.

[23] *Id.* at 567.

morality as guides to what personal relationships are to be protected.[24] Consequently, the outer limits of this privacy right, as it relates to regulation of sexual activity, remain unclear.[25]

Amdt14.S1.6.4 Abortion

Amdt14.S1.6.4.1 Abortion, Roe v. Wade, and Pre-Dobbs Doctrine

Fourteenth Amendment, Section 1:

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

In 1973, the Court concluded in *Roe v. Wade* that the U.S. Constitution protects a woman's decision to terminate her pregnancy.[1] The Court's decision dramatically increased judicial oversight of legislation under the privacy line of cases, striking down aspects of abortion-related laws in numerous states, the District of Columbia, and the territories. In reaching its decision, the Court conducted a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on the procedure were of relatively recent vintage and thus lacked the historical foundation that might have preserved them from constitutional review.[2]

The *Roe* Court ruled that states may not categorically proscribe abortions by making their performance a crime.[3] The constitutional basis for the decision rested upon the conclusion that the right of privacy embraces a woman's decision to carry a pregnancy to term.[4] With regard to the scope of that privacy right, the Court stated that it includes "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and bears some extension to activities related to marriage, procreation, contraception, family relationships, child rearing, and education.[5] Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[6]

With respect to protecting the right to an abortion against state interference, the Court held that because the right of privacy is a fundamental right, only a "compelling state interest" could justify its limitation by a state.[7] Thus, while it recognized the legitimacy of a state interest in protecting maternal health and preserving a fetus's potential life, as well as the

[24] *See id.* at 577–78 (noting with approval Justice Stevens' dissenting opinion in *Bowers* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

[25] In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 n.17 (1977), for instance, a plurality of Justices noted that the Court has not considered the extent to which the government may regulate the sexual activities of minors.

[1] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022).

[2] *Id.* at 129–47.

[3] *Id.* at 164–65.

[4] *Id.* at 153.

[5] *Id.* at 152–53.

[6] *Id.* at 153.

[7] *Id.* at 155.

existence of a rational connection between these two interests and a state's abortion restrictions, the Court held these interests insufficient to justify an absolute ban on abortions.[8]

Instead, the Court emphasized the durational nature of pregnancy and found the state's interests in maternal health and fetal life to be sufficiently compelling at only certain stages of pregnancy to permit the regulation or prohibition of the procedure. Finding that an abortion is no more dangerous to maternal health than childbirth in the first trimester of pregnancy, the Court concluded that the compelling point for regulating abortion to further a state's interest in maternal health was at approximately the end of the first trimester.[9] Until that point, the abortion decision and its effectuation was to be left exclusively to the medical judgment of the pregnant woman's doctor in consultation with the patient.[10] After the end of the first trimester, however, the state could promote its interest in maternal health by regulating the abortion procedure in ways reasonably related to maternal health.[11]

The compelling point with respect to the state's other interest in potential life was at viability, which the Court described as the point at which the fetus is "potentially able to live outside the mother's womb."[12] Following viability, the state's interest permitted it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the woman.

In a companion case, *Doe v. Bolton*, the Court extended *Roe* by warning that just as states may not restrict abortion by making its performance a crime, they may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers.[13] In *Doe*, the Court struck down Georgia's requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision.[14]

Following *Roe*, as states adopted new abortion regulations, the Court settled questions involving a variety of related topics, including informed consent for the woman seeking an abortion, mandatory waiting periods before the procedure could be performed, and spousal consent requirements.[15] In 1983, in *City of Akron v. Akron Center for Reproductive Health*, the Court expressly reaffirmed *Roe* before invalidating several provisions of an Akron, Ohio abortion ordinance.[16] Acknowledging the Court's role in defining the limits of a state's authority to regulate abortion, the Court in *City of Akron* maintained that the doctrine of stare

[8] *Id.* at 164–65.

[9] *Id.* at 163.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 160. *See also id.* (identifying viability as "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks").

[13] 410 U.S. 179, 201 (1973).

[14] *Id.* at 193–200.

[15] *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 450 (1983) (invalidating Akron ordinance requiring 24-hour waiting period between signing of consent form and performance of abortion because city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period"), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979) (invalidating parental consent requirement for minors seeking abortions); Colautti v. Franklin, 439 U.S. 379 (1979) (finding Pennsylvania law imposing standard of care on abortion providers upon viability determination unconstitutionally vague); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (upholding Missouri informed consent requirement, but invalidating spousal consent requirement); Singleton v. Wulff, 428 U.S. 106 (1976) (finding standing for physicians to bring suit on behalf of patients seeking Medicaid-funded abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state law prohibiting attempted abortion by "any person" was not unconstitutional as applied to nonphysician).

[16] *City of Akron*, 462 U.S. at 419–20.

decisis "while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[17]

In 1986, the Court again reaffirmed *Roe* in *Thornburgh v. American College of Obstetricians and Gynecologists*.[18] Reviewing several provisions of Pennyslvania's Abortion Control Act, the Court observed that the constitutional principles that guided its decisions in *Roe* and *Doe v. Bolton* "still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[19]

In 1989, however, a plurality of the Court questioned the continued use of *Roe*'s trimester framework to evaluate abortion regulations. In *Webster v. Reproductive Health Services*, the Court upheld two Missouri abortion regulations: a restriction on the use of public employees and facilities for the performance of abortions; and a requirement that a physician ascertain a fetus's viability before performing an abortion, if the physician had reason to believe that a woman was twenty or more weeks pregnant.[20] Although the Court did not overrule *Roe* in *Webster*, a plurality of Justices indicated that it was willing to apply a less stringent standard of review to abortion regulations.[21] In separate concurring opinions, two Justices also criticized *Roe* and the trimester framework.[22]

In 1992, a plurality of the Court rejected *Roe*'s trimester framework in a case involving Pennsylvania's Abortion Control Act.[23] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality explained that "in its formulation [the framework] misconceives the pregnant woman's interest . . . and in practice it undervalues the State's interest in potential life[.]"[24] In its place, the plurality adopted a new "undue burden" standard, maintaining that this standard recognized the need to reconcile the government's interest in potential life with a woman's right to decide to terminate her pregnancy.[25] The plurality indicated that an undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[26]

In adopting the new undue burden standard, *Casey* nonetheless reaffirmed the essential holding of *Roe*, which the plurality described as having three parts.[27] First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state.[28] Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman's life or health.[29] Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.[30]

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[17] *Id.*

[18] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. 833.

[19] *Id.* at 759.

[20] 492 U.S. 490 (1989).

[21] *Id.* at 516–22.

[22] *Id.* at 522 (O'Connor, J., concurring in part and concurring in the judgment), 532 (Scalia, J., concurring in part and concurring in the judgment).

[23] *Casey*, 505 U.S. 833, *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022).

[24] *Id.* at 873.

[25] *Id.* at 876.

[26] *Id.* at 878.

[27] *Id.* at 846.

[28] *Id.*

[29] *Id.*

[30] *Id.*

Amdt14.S1.6.4.1
Abortion, Roe v. Wade, and Pre-Dobbs Doctrine

Following *Casey*, the Court applied the undue burden standard in two cases involving the so-called "partial-birth" abortion procedure.[31] In *Stenberg v. Carhart*, the Court concluded that a Nebraska statute that prohibited the performance of partial-birth abortions was unconstitutional because it failed to include an exception to protect the health of the mother and because the language defining the prohibited procedure was too vague. In *Gonzales v. Carhart*, the Court applied the undue burden standard to the federal Partial-Birth Abortion Ban Act of 2003.[32] Distinguishing the act from the Nebraska statute at issue in *Stenberg*, the Court concluded that the federal law did not impose an undue burden on a woman's ability to obtain an abortion and was not unconstitutionally vague.[33]

In *Gonzales*, the Court also concluded that the federal law was not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited.[34] Unlike the Nebraska statute, which prohibited the delivery of a "substantial portion" of the fetus, the federal law includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions.[35] The Court observed: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply."[36]

In 2016, the Court provided further guidance on applying the undue burden standard in *Whole Woman's Health v. Hellerstedt*.[37] In *Whole Woman's Health*, the Court invalidated two Texas requirements that applied to abortion providers and physicians who perform the procedure: a requirement that physicians who perform or induce abortions have admitting privileges at a hospital within thirty miles from the location where the abortion was performed or induced; and a requirement that abortion facilities satisfy the same standards as ambulatory surgical centers.[38] In applying the undue burden standard, the Court in *Whole Woman's Health* emphasized that reviewing courts must consider "the burdens a law imposes on abortion access together with the benefits those laws confer."[39] The Court also indicated that considerable weight should be given to the evidence and arguments presented in judicial proceedings when evaluating the constitutionality of abortion regulations.[40]

In 2020, the Court invalidated a Louisiana law that required physicians who performed abortions to have admitting privileges at a hospital within thirty miles of the location where the procedure was performed. In *June Medical Services v. Russo*, a majority of the Court concluded that the law imposed an undue burden on a woman's ability to obtain an abortion.[41] Justice Stephen Breyer authored an opinion, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, that relied heavily on *Whole Woman's Health*.[42] Justice Breyer maintained that the laws being reviewed in *June Medical Services* and *Whole Woman's Health* were "nearly identical," and that the Louisiana law "must consequently reach a similar

[31] Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007).

[32] *Gonzales*, 550 U.S. at 150.

[33] *Id.* at 168.

[34] *Id.* at 149.

[35] *See id.* at 148; *see also* Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999); 18 U.S.C. § 1531(b)(1)(A).

[36] *Gonzales*, 550 U.S. at 148.

[37] No. 15-274, slip op. at 21 (U.S. June 27, 2016).

[38] *Id.* at 1–2.

[39] *Id.* at 19–20.

[40] *Id.* at 20.

[41] No. 18-1323, slip op. at 3 (U.S. June 29, 2020).

[42] *Id.* at 1.

conclusion."[43] In a separate opinion, Chief Justice John Roberts concurred in the judgment, emphasizing that the legal doctrine of stare decisis required *June Medical Services* to be decided like *Whole Woman's Health*.[44]

Applying the undue burden standard in *June Medical Services*, Justice Breyer reiterated that the standard requires balancing an abortion regulation's benefits against any burdens it imposes.[45] The plurality maintained that the district court faithfully engaged in this balancing, concluding that the closure of abortion facilities and a reduction in the number of physicians performing abortions outweighed the fact that the admitting privileges requirement provided no significant health benefit.[46]

Concurring in the judgment, Chief Justice Roberts agreed that the Louisiana law and the Texas law at issue in *Whole Woman's Health* were nearly identical.[47] Although he dissented in *Whole Woman's Health* and indicated in his concurrence that the Texas case was wrongly decided, he nevertheless maintained that stare decisis required the invalidation of the Louisiana law.[48] Despite his concurrence in the judgment, however, Chief Justice Roberts questioned how the undue burden standard is now applied as a result of *Whole Woman's Health*.[49] Discussing the balancing of an abortion regulation's benefits and burdens, the Chief Justice contended that nothing in *Casey* suggested that courts should engage in this kind of weighing of factors.[50] According to the Chief Justice, *Casey* focused on the existence of a substantial obstacle as sufficient to invalidate an abortion regulation and did not "call for consideration of a regulation's benefits[.]"[51] Reviewing the burdens imposed by the Louisiana law, such as fewer abortion providers and facility closures, the Chief Justice agreed with the plurality that "the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law."[52] Nevertheless, the Chief Justice further observed that "the discussion of benefits in *Whole Woman's Health* was not necessary to its holding."[53]

Amdt14.S1.6.4.2 Restrictions on Abortion Funding

Fourteenth Amendment, Section 1:

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

In three related 1977 decisions, the Court ruled on whether Title XIX of the Social Security Act, which establishes the Medicaid program, or the Constitution requires the government to

[43] *Id.* at 40.
[44] *Id.* at 2 (Roberts, C.J., concurring in the judgment).
[45] *Id.* at 16–17.
[46] *Id.* at 17–38.
[47] *Id.* at 2 (Roberts, C.J., concurring in the judgment).
[48] *Id.* at 2–4.
[49] *Id.* at 6.
[50] *Id.*
[51] *Id.* at 11.
[52] *Id.*
[53] *Id.* at 12 n.3.

pay for nontherapeutic or elective abortions sought by indigent women. In *Beal v. Doe*, the Court held that nothing in the language or legislative history of the Medicaid statute requires a participating state to fund every medical procedure falling within delineated categories of medical care.[1] The Court determined that it was not inconsistent with the statute's goals to refuse to fund unnecessary medical services.[2] Nevertheless, the Court also indicated that the statute permits a state to include coverage for nontherapeutic abortions "if it so desires."[3]

In *Maher v. Roe*, the Court concluded that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses incident to nontherapeutic abortions simply because the state has made a policy choice to pay expenses incident to childbirth.[4] The Court determined that Connecticut's policy of favoring childbirth over abortion did not impinge on the right to abortion recognized in *Roe*.[5] Distinguishing the policy from the Texas law at issue in *Roe* and other abortion restrictions it previously invalidated, the Court explained that the policy "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[6]

Finally, in *Poelker v. Doe*, the Court upheld a St. Louis, Missouri regulation that denied indigent pregnant women nontherapeutic abortions at city-owned public hospitals.[7] Citing *Maher*, the Court explained that the constitutional question presented in *Poelker* was "identical in principle," and that the city's decision to provide publicly financed hospital services for childbirth, but not nontherapeutic abortions, was permissible.[8] *Poelker* addressed only the performance of abortions at public hospitals and did not consider the authority of private hospitals to prohibit abortion services.

The Court's decisions in *Beal*, *Maher*, and *Poelker* left unresolved the question whether the government could prohibit the use of federal or state funds for therapeutic or medically necessary abortions. In 1980, the Court upheld the Hyde Amendment, an annual appropriations provision that restricts the use of federal funds to pay for abortions provided through the Medicaid program.[9] The Court found that the Hyde Amendment did not violate the Due Process, the Equal Protection guarantees of the Fifth Amendment, or the Establishment Clause of the First Amendment.[10] The Court also recognized the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement.[11] In a companion case raising similar issues, the Court held that an Illinois statutory funding restriction comparable to the Hyde Amendment also did not violate the Equal Protection Clause.[12] As a result of the Court's decisions, neither the states nor the federal government have a statutory or constitutional obligation to fund all medically necessary abortions.

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[1] 432 U.S. 438 (1977).

[2] *Id.* at 444–45.

[3] *Id.* at 447.

[4] 432 U.S. 464 (1977).

[5] *Id.* at 474.

[6] *Id.*

[7] 432 U.S. 519 (1977) (per curiam).

[8] *Id.* at 521.

[9] Harris v. McRae, 448 U.S. 297 (1980). For further discussion on the Hyde Amendment, see Amdt5.7.6 Abortion and Substantive Due Process.

[10] *Harris*, 448 U.S. at 326.

[11] *Id.* at 310.

[12] *See* Williams v. Zbaraz, 448 U.S. 358 (1980).

Amdt14.S1.6.4.3 Abortion, Dobbs v. Jackson Women's Health Organization, and Post-Dobbs Doctrine

Fourteenth Amendment, Section 1:

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

In 2022, a majority of the Court overruled the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, determining that the Constitution does not confer a right to an abortion. In *Dobbs v. Jackson Women's Health Organization*, the Court maintained that it was returning the regulation of abortion to the people and their elected reprentatives.[1] Writing for the Court in *Dobbs*, Justice Samuel Alito described *Roe* as "egregiously wrong from the start" because the Constitution makes no reference to abortion and a right to the procedure is not implicitly protected by any constitutional provision.[2]

While the Court in *Roe* and *Casey* determined that a right of privacy derived from the Fourteenth Amendment's concept of personal liberty under the Due Process Clause was broad enough to encompass a right to abortion, the *Dobbs* Court characterized these earlier decisions as "remarkably loose in [their] treatment of the constitutional text"[3] and "hav[ing] enflamed debate and deepened division."[4] The majority explained that, in evaluating whether the Constitution confers a right to an abortion, the Due Process Clause can guarantee some rights not explicitly mentioned in the Constitution. It indicated, however, that substantive due process rights, like a right to abortion, may be found only when they are deeply rooted in the Nation's history and tradition, and are implicit in the concept of ordered liberty.

Reviewing common law and statutory restrictions on abortion before and after the Fourteenth Amendment's ratification, the majority maintained that the "inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."[5] The majority emphasized, for example, that abortion was prohibited in three-quarters of the states when the Fourteenth Amendment was adopted, and thirty states still prohibited the procedure when *Roe* was decided.[6] Thus, the Court held that the Fourteenth Amendment does not protect the right to an abortion.

The Court further considered whether the doctrine of stare decisis, which generally directs courts to adhere to precedent, should guide it to uphold *Roe* and *Casey*. Acknowledging that the doctrine promotes evenhanded decisionmaking and protects those who have relied on past decisions, the majority nevertheless observed that "in appropriate circumstances [it] must be willing to reconsider and, if necessary, overrule constitutional decisions."[7] The majority indicated that five factors, derived from its prior cases, strongly favored overruling *Roe* and *Casey*: the nature of their error (i.e., the Court's erroneous interpretation of the Constitution in those decisions); the quality of their reasoning (i.e., the Court's reasoning in *Roe* "stood on

[1] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (U.S. June 24, 2022).

[2] *Id.* at 6.

[3] *Id.* at 9.

[4] *Id.* at 6.

[5] *Id.* at 25.

[6] *Id.* at 23–24.

[7] *Id.* at 40.

exceptionally weak grounds"); the "workability" of the rules they imposed on the country (i.e., the unworkability of *Casey*'s undue burden standard for evaluating abortion regulations); their disruptive effect on other areas of the law (i.e., the prior decisions' distortion of other legal doctrines involving standing, severability, and other principles); and the absence of concrete reliance (i.e., abortions are generally unplanned and reproductive planning can be quickly adjusted).[8] In light of these factors, the majority concluded that, under traditional stare decisis factors, continued adherence to *Roe* and *Casey* was inappropriate. This conclusion, the majority observed, should not be affected by concerns that the Court was acting in response to social and political pressure.[9] The majority maintained that the Court cannot exceed the scope of its authority under the Constitution and cannot allow its decisions "to be affected by any extraneous influences such as concern about the public's reaction[.]"[10]

By overruling *Roe* and *Casey*, the *Dobbs* Court not only held that the Constitution does not guarantee a right to abortion, but also determined that abortion restrictions will not be subject to the viability and undue burden standards established by those decisions. If challenged, abortion restrictions will now be evaluated under rational basis review, a judicial review standard that is generally deferential to lawmakers.[11] The majority explained that under rational basis review, a law regulating abortion "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests."[12] The majority indicated that these interests may include protecting prenatal life, the mitigation of fetal pain, and preserving the medical profession's integrity.[13] Applying rational basis review in *Dobbs* to a Mississippi law that prohibits abortion once a fetus's gestational age is greater than fifteen weeks, the majority contended that these legitimate interests justify such a law.[14]

Amdt14.S1.6.5 Medical Care

Amdt14.S1.6.5.1 Right to Refuse Medical Treatment and Substantive Due Process

Fourteenth Amendment, Section 1:

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

In multiple decisions, the Supreme Court has recognized that the Due Process Clause subsumes a constitutionally protected right to refuse medical care.[1] The Court has maintained, however, that this right must be balanced against relevant state interests, including protection of public health, safety, and human life.[2] In *Jacobson v. Massachusetts*, the Court upheld a Massachusetts law allowing local public health officials to require vaccination

[8] *Id.* at 43–66.

[9] *Id.* at 66–67.

[10] *Id.* at 67.

[11] *Id.* at 77.

[12] *Id.*

[13] *Id.* at 78.

[14] *Id.*

[1] *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990). For a discussion of due process rights and physician-assisted death, see Amdt14.S1.6.5.2 Physician Assisted-Death and Substantive Due Process.

[2] *See generally Cruzan*, 497 U.S. at 279 (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

against smallpox.[3] While the petitioner in *Jacobson* argued that the compulsory vaccination law infringed upon his right "to care for his own body and health in such way as to him seems best," the Court explained that the state's interest in protecting communities against the spread of disease was "of paramount necessity."[4]

The Supreme Court has also addressed the scope of an incarcerated individual's right to reject antipsychotic medication.[5] For instance, in *Washington v. Harper*, the Court considered an inmate petitioner's constitutional challenge to a state prison policy that, under certain conditions, permitted involuntary psychotropic drug treatment for inmates with mental illness.[6] While acknowledging the petitioner's "significant liberty interest" in refusing these drugs under the Fourteenth Amendment's Due Process Clause, the Court's majority nevertheless concluded that the policy was constitutional.[7] Relying on a "standard of reasonableness" articulated in earlier cases involving prisoner rights, the Court explained that the policy conformed with substantive due process requirements, as the state had a legitimate interest in prison safety and security, and the state's forced medication policy was a rational means of advancing these penological interests.[8] The Court further held, in light of the requirements of a prison setting, the Due Process Clause "permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[9]

In *Cruzan v. Director, Missouri Department of Health*, the Court considered whether an incompetent individual has a constitutional right to decline lifesaving nutrition and hydration.[10] The case involved the substantive due process rights of a woman in a persistent vegetative state and her parents' request to terminate use of the feeding and hydration equipment that kept her alive.[11] At issue before the Court was whether it was constitutional for Missouri to require the family members to provide "clear and convincing evidence" of the woman's desire to withdraw life support before honoring the family's request.[12]

Although a majority of Supreme Court Justices signaled that the Due Process Clause protects a competent person's right to refuse life-sustaining medical interventions, the Court, in a 5-4 decision, upheld the state's imposition of evidentiary requirements under the

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[3] 197 U.S. 11, 35 (1905).

[4] *Id.* at 26–27. *See also* Zucht v. King, 260 U.S. 174 (1922) (local ordinance requiring vaccinations for schoolchildren held constitutional). Additionally, various federal, state, and private entities instituted Coronavirus Disease 2019 (COVID-19) vaccination requirements that have generated numerous legal challenges. For analysis of these requirements and related litigation, see Wen W. Shen, Cong. Rsch. Serv., R46745, State and Federal Authority to Mandate COVID-19 Vaccination (2022), https://crsreports.congress.gov/product/pdf/R/R46745.

[5] The Supreme Court has also examined the due process rights of patients with mental illnesses to refuse antipsychotic medications in the context of civil commitment. *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982).

[6] 494 U.S. 210 (1990).

[7] *Harper*, 494 U.S. at 221–22. *See also* Vitek v. Jones, 445 U.S. 480, 487–94 (1980) (prisoner's involuntary commitment to a mental illness hospital and mandatory behavior modification treatment implicated liberty interests under Fourteenth Amendment's Due Process Clause).

[8] *See Harper*, 494 U.S. at 223–27 (citing Turner v. Safley, 482 U.S. 78 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

[9] *Id*. at 227. Relying in part on the *Harper* decision, the Supreme Court has concluded that in limited circumstances, the Constitution permits a state government's forced administration of antipsychotic drugs to render a mentally ill criminal defendant competent to stand trial for serious criminal charges. *See* Sell v. United States, 539 U.S. 166 (2003); *Gomes v. United States*, 539 U.S. 939 (2003) (judgment vacated and case remanded to appellate court in light of *Sell*). *See also* Riggins v. Nevada, 504 U.S. 127 (1992).

[10] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

[11] *Id.* at 266–68.

[12] *Id.* at 277, 280.

circumstances presented in the case.[13] In its majority opinion, the Court emphasized the legitimacy of the state's interest in preserving human life and concluded that Missouri was not required to follow the family's judgment or "anyone but the patient" in making this health care treatment decision.[14]

Amdt14.S1.6.5.2 Physician Assisted-Death and Substantive Due Process

Fourteenth Amendment, Section 1:

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

The Supreme Court recognized in *Cruzan v. Missouri Department of Health* that the Due Process Clause includes the constitutionally protected right to refuse life-sustaining medical treatment, including nutrition and hydration.[1] While refusing medical interventions may ultimately lead to a patient's death, the Court unanimously held in a subsequent case, *Washington v. Glucksberg*, that this right does not extend to more active forms of medical intervention to assist terminally ill patients in ending their lives.[2]

In *Glucksberg*, terminally ill patients, physicians, and a nonprofit organization challenged a long-standing Washington state law that criminalized "knowingly caus[ing] or aid[ing] another person to attempt suicide."[3] The plaintiffs argued that the Supreme Court's decisions in *Cruzan* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* suggested that the Due Process clause broadly includes protections for "basic and intimate exercises of personal autonomy."[4] In reviewing this question, the Court began by "carefully formulating" the liberty interest in question.[5] Although the lower courts and litigants had variously defined the question as a "right to die," the Court provided a narrower characterization as whether the Due Process Clause's protection of liberty included a right to assistance in committing suicide.[6]

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[13] In *Cruzan*, the Court's majority opinion did not directly analyze the scope of an individual's liberty interest in rejecting life-sustaining treatment, but rather "assume[d]" that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id*. at 279. However, in concurring and dissenting opinions, a majority of the Justices declared that such a liberty interest exists. *See id.* at 287 (O'Connor, J., concurring) ("I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . and that the refusal of artificially delivered food and water is encompassed within that liberty interest."); *id.* at 302 (Brennan, Marshall, and Blackmun, JJ., dissenting) ("Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State."); *id.* at 331 (Stevens, J., dissenting) ("[A] competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment.").

[14] *Id.* at 280–82, 286.

[1] *See* 497 U.S. 261, 278–79 (1990). *See* Amdt14.S1.6.5.1 Right to Refuse Medical Treatment and Substantive Due Process.

[2] 521 U.S. 702 (1997). In the companion case of *Vacco v. Quill,* 521 U.S. 793 (1997), the Court also rejected an argument that a state that prohibited assisted suicide, but which allowed termination of medical treatment resulting in death, unreasonably discriminated against the terminally ill in violation of the Fourteenth Amendment's Equal Protection Clause.

[3] *Glucksberg*, 521 U.S. at 707.

[4] *Id.* at 724 (citing *Cruzan*, 497 U.S. at 278–79; *Casey*, 505 U.S. 833, 847 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (U.S. June 24, 2022)).

[5] *Id.* at 722.

[6] *Id.*

The Court next examined the country's history, legal traditions, and practices with respect to that narrowly defined right.[7] The Court first noted the long history of criminalizing both suicide and assistance in suicide as distinguishing this case from its decision in *Cruzan*, which had relied on the long history of the right to refuse medical treatment.[8] The Court also rejected the plaintiffs' reliance upon *Casey*, noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected.[9] While the Court's decision in *Glucksberg* would appear to preclude constitutional protection for medical interventions intended to cause death, the question of whether there is a protected right to palliative or pain-relieving care during the dying process may remain an open question.[10]

Amdt14.S1.6.5.3 Civil Commitment and Substantive Due Process

Fourteenth Amendment, Section 1:

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

The Supreme Court has recognized, under the Due Process Clause, certain substantive liberty rights of people with mental disabilities who are involuntarily committed to public institutions. While a state has a substantial interest in institutionalizing persons in need of care, both for the protection of such people themselves and for the protection of others, it generally cannot constitutionally confine "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[1]

Once committed, an individual also "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[2] In determining what is "reasonable," however, the Court instructs that "courts must show deference to the judgment exercised by a qualified professional," such that liability may be imposed "only when decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the

[7] *Id.* at 723–26.

[8] *Id.* at 723.

[9] *Id.* at 727–28.

[10] *Id.* at 737 (O'Connor, J., concurring) ("[T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives."). Since *Glucksberg*, the Court has not revisited the question of whether assisted suicide is protected under the Due Process Clause, but the Court has addressed the statutory question as to the interaction of the federal Controlled Substances Act with state laws authorizing medicated-assisted suicide. Gonzales v. Oregon, 546 U.S. 243 (2006). The Court has also cited *Glucksberg* in a decision upholding a federal partial-birth abortion ban for the proposition that the government has an interest in "protecting the integrity and ethics of the medical profession." Gonzalez v. Carhart, 550 U.S. 124, 157 (2007).

[1] O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). *See also* Jackson v. Indiana, 406 U.S. 715 (1972); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[2] Youngberg v. Romeo, 457 U.S. 307, 324 (1982). The Court in *Youngberg* noted that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 316 (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part).

decision on such a judgment."[3] The Court has also stated that due process requires that the conditions and duration of civil commitment bear "some reasonable relation" to the purpose for which a person is committed.[4]

States may have more latitude to civilly confine certain individuals predisposed to engage in specific criminal behaviors. In *Kansas v. Hendricks*, for instance, the Court upheld a Kansas law that authorized the state to civilly commit individuals likely to engage in "predatory acts of sexual violence" due to do a "mental abnormality" or a "personality disorder," thus permitting a defendant diagnosed as a pedophile to be civilly committed after his release from prison.[5] In *Kansas v. Crane*, the Court clarified that while civil commitment under the same law did not require a finding of total lack of control by the defendant, there must be "proof of serious difficulty in controlling behavior" to support the civil commitment.[6] The Constitution, the Court held, does not permit civil commitment of "the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination."[7] Such "lack of control" finding is necessary "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[8]

Amdt14.S1.7 Due Process Limits on State Action

Amdt14.S1.7.1 Personal Jurisdiction

Amdt14.S1.7.1.1 Overview of Personal Jurisdiction and Due Process

Fourteenth Amendment, Section 1:

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

"Personal jurisdiction" or in personam jurisdiction refers to a court's power over a person (or entity) who is a party to, or involved in, a case or controversy before the court, including its power to render judgments affecting that person's rights.[1] Prior to the states' ratification of the Fourteenth Amendment and the Supreme Court's 1877 decision in *Pennoyer v. Neff*, a nonresident who received an adverse judgment from one state court would often wait until the winning party sought to obtain enforcement of the judgment[2] in the nonresident's state before challenging the issuing court's exercise of personal jurisdiction over the nonresident.[3] State

[3] *Id.* at 322–23.

[4] Seling v. Young, 531 U.S. 250, 265 (2001). *See also* Foucha v. Louisiana, 504 U.S. 71, 79 (1992); Jackson v. Indiana, 406 U.S. 715. 738 (1972).

[5] 521 U.S. 346, 350 (1997).

[6] 534 U.S. 407, 412–13 (2002).

[7] *Id.* at 412 (emphasis in original).

[8] *Id.* at 413.

[1] *Personal Jurisdiction*, Black's Law Dictionary (10th ed. 2014).

[2] In this context, "enforcement" of a judgment referred to a court's action "to compel a person to comply with the terms of a judgment" of another state's courts after determining that the foreign state's judgment should be recognized as a judgment of the domestic court. *Enforcement*, Black's Law Dictionary, *supra* note 1.

[3] Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1270 (2017) ("States that wanted to exercise broad jurisdiction would do so, and would execute judgments within their borders on as much of the defendant's property as

(and, in some cases, federal)[4] courts considering whether such judgments were enforceable would typically resolve such jurisdictional challenges on the basis of general, customary law principles[5] that had been shaped by the rules for recognition of foreign judgments under international law.[6]

However, since the Supreme Court's decision in *Pennoyer*, the Court has interpreted the Due Process Clause of the Fourteenth Amendment[7] to limit the power of state courts to render judgments affecting the personal rights of defendants[8] who do not reside within the state's territory.[9] *Pennoyer* converted the issue of personal jurisdiction into a question of federal constitutional law, allowing a party to obtain direct review of a state court's judgment in federal court (i.e., review of the judgment on appeal) on the grounds that the state court lacked personal jurisdiction over the party.[10] Under the Supreme Court's interpretation of the

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they could find. These state judgments, unlike foreign ones, could claim the benefit of the Full Faith and Credit Clause and the 1790 Act. But these provisions were read to leave the law of personal jurisdiction alone. So when American courts were presented with the judgment of another tribunal, whether from Michigan or Mexico, they used the same approach to determining personal jurisdiction. The judgment was the product of a separate sovereign, which was expected to comply with international rules.").

[4] *Id.* at 1279 (noting that "federal courts did hear actions involving the recognition of other courts' judgments, giving them opportunities to comment on the general rules" in diversity cases or cases raising questions under federal statutes regulating judicial procedure). *See, e.g.*, Flower v. Parker, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823) (No. 4891) (Story, C.J.) (evaluating a Massachusetts state court's exercise of personal jurisdiction over a Louisiana defendant in a Massachusetts federal court case seeking the enforcement of the state court's judgment). A "diversity case" is one in which a federal court exercises "authority over a case involving parties who are citizens of different states and an amount in controversy greater than a statutory minimum." *Diversity Jurisdiction*, Black's Law Dictionary, *supra* note 1.

[5] "Customary law" refers to law "consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws." *Customary Law*, Black's Law Dictionary, *supra* note 1.

[6] Sachs, *supra* note 3, at 1270 ("The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits."). *See also* Hall v. Williams, 23 Mass. (6 Pick.) 232, 238 (1828) (stating that the "principles of the common law" applicable "to judgments of the tribunals of foreign countries" also applied "to the judgments of the courts of the several States when sought to be enforced by the judiciary power of any State other than that in which they were rendered").

[7] U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

[8] Although the bulk of the Supreme Court's jurisprudence concerns the constitutionality of courts' exercise of personal jurisdiction over *defendants*, the Court has addressed personal jurisdiction over *plaintiffs* in at least one case. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (upholding a Kansas trial court's assertion of personal jurisdiction over nonresident class-action plaintiffs based on the mailing of an "opt-out notice" to the plaintiffs even though their contacts with the forum might not have been sufficient to satisfy the demands of due process had they been defendants in a lawsuit).

[9] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.") (citing Kulko v. Superior Court, 436 U.S. 84, 91 (1978)). "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *Id.* As discussed elsewhere in the *Constitution Annotated*, see Amdt14.S1.5.4.3 Notice of Charge and Due Process, the Due Process Clause also requires that a defendant receive adequate notice that a lawsuit has been brought against him and have the opportunity to respond. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In addition to complying with the requirements of the Federal Constitution, state courts must also have authority under state law in order to exercise personal jurisdiction over a nonresident defendant. Oftentimes, states have enacted "long-arm" statutes that grant their courts jurisdiction over nonresidents. *See, e.g.*, Cal. Civ. Proc. Code § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); N.C. Gen. Stat. § 1-75.4 (specifying situations in which the exercise of jurisdiction comports with state law).

[10] Sachs, *supra* note 3, at 1253 ("The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional

Fourteenth Amendment, a state court that issued a judgment affecting a nonresident without jurisdiction had violated the constitutional rights of that person by depriving the individual of property without due process of law.[11]

Over the years, the Supreme Court has offered three main justifications for the constitutional constraints on a court's assertion of personal jurisdiction over nonresident persons and corporations. First, each state's status as a "co-equal sovereign" in a federal system of government implies at least some limits on the power of its courts to render judgments affecting the rights of entities outside of that state's boundaries.[12] Second, constitutional limits on personal jurisdiction attempt to address concerns about the unfairness of subjecting defendants to litigation in a distant or inconvenient forum.[13] Finally, constitutional limits on the exercise of personal jurisdiction recognize that the Due Process Clause protects defendants from being deprived of life, liberty, or property by a tribunal without lawful power.[14]

The Supreme Court's jurisprudence addressing the doctrine of personal jurisdiction as applied in state courts spans a period of American history that has witnessed a significant expansion of interstate and global commerce, as well as major technological advancements in transportation and communication.[15] These changes produced a fundamental shift in the Court's views concerning the doctrine.[16] Although the Court initially considered the defendant's physical presence within the forum state to be the touchstone of the exercise of

concern."). "Execution" of a judgment refers to judicial enforcement of a money judgment, often "by seizing and selling the judgment debtor's property." *Execution*, Black's Law Dictionary, *supra* note 1.

[11] Sachs, *supra* note 3, at 1253. "Due process" generally refers to the "conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." *Due Process*, Black's Law Dictionary, *supra* note 1.

[12] *See* Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 6 (U.S. June 19, 2017) ("As we have put it, restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'") (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)); *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the requirement that a defendant have minimum contacts with the forum "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *id.* at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

[13] *World-Wide Volkswagen*, 444 U.S. at 292 (stating that the requirement that a defendant have minimum contacts with the forum "protects the defendant against the burdens of litigating in a distant or inconvenient forum"); *Hanson*, 357 U.S. at 251 (acknowledging that limits on personal jurisdiction are, in part, "a guarantee of immunity from inconvenient or distant litigation"). The Supreme Court has stated that the doctrine of personal jurisdiction makes it easier for defendants to structure their conduct in a manner that will avoid subjecting them to lawsuits in a particular forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

[14] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.") (internal citations omitted); *Burger King*, 471 U.S. at 471–72 ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.") (citation and internal quotation marks omitted); Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (declaring that the restriction on state power to exercise personal jurisdiction over a nonresident is "ultimately a function of the individual liberty interest preserved by the Due Process Clause").

[15] *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.").

[16] *Id.*

personal jurisdiction over him or her,[17] it later rejected strict adherence to this rule in favor of a more flexible standard that examines a nonresident defendant's contacts with the forum state to determine whether those contacts make it reasonable to require him to respond to a lawsuit there.[18]

The Supreme Court's opinions in *International Shoe Co. v. Washington* and subsequent cases have established a two-part test for determining when a state court's exercise of personal jurisdiction over each nonresident defendant sued by a plaintiff comports with due process: (1) the defendant must have established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it must be reasonable to require the defendant to defend the lawsuit in the forum.[19] Since that fundamental shift, much of the Court's jurisprudence addressing the limits that the Constitution places on state courts' exercise of personal jurisdiction has addressed the quality and nature of the "minimum contacts" among the defendant, the forum, and litigation that the Constitution requires before a court may exercise jurisdiction over the defendant.[20] Questions over personal jurisdiction have become one of the most frequent constitutional issues resolved by lower federal courts,[21] and are the basis for a dismissal of complaints in a considerable number of cases lodged in both federal and state court.[22]

When determining whether a defendant has minimum contacts with the court in which the action is initially filed, the Court has distinguished the types of contacts sufficient for a court's exercise of "specific" personal jurisdiction over the defendant from those contacts sufficient for its exercise, alternatively, of "general" jurisdiction. A court's exercise of *specific* jurisdiction may be constitutional when the defendant: (1) "purposefully avails itself of the privilege of conducting activities" within the forum state; and (2) the defendant's contacts with the forum give rise to, or are related to, the plaintiff's claims.[23] By contrast, a court's exercise of *general* jurisdiction over a nonresident defendant for any claim—even if all the incidents underlying the claim occurred in a different state—may be constitutional when the defendant's activities in the forum state are so substantial that it is reasonable to require it to

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[17] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . [an] illegitimate assumption of power, and be resisted as mere abuse."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[18] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

[19] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citing *Int'l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co.*, 326 U.S. at 316)). *See also Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

[20] *See* discussion *infra* Amdt14.S1.7.1.4 Minimum Contact Requirements for Personal Jurisdiction.

[21] *See* Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. Rev. 1735, 1755 (2006) (describing the "constitutionality of exercising personal jurisdiction" as "probably the most common constitutional question that courts decide").

[22] *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 Tul. L. Rev. 1, 23–38 (1998) (noting in a study of nearly 1,000 cases addressing the issue personal jurisdiction decided by state supreme courts and federal appeals courts between and 1970 and 1994, including 148 products liability cases, that personal jurisdiction was a successful defense in nearly 41% of the cases in which the defense was raised).

[23] Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, No. 19-368, slip op. at 5–6 (U.S. March 25, 2021). *See also* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144–64 (1966)).

defend a lawsuit that did not arise out of its activities in the forum state and is unrelated to those activities.[24] In more recent years, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant "essentially at home" in the forum state.[25] The Court has clarified that, absent exceptional circumstances, a corporate defendant is "at home" when it is incorporated in the forum state or maintains its principal place of business there (e.g., the corporation is headquartered in the state).[26]

Although the Supreme Court has adopted a more flexible standard for evaluating a state court's assertion of personal jurisdiction, it has also confirmed that several traditional bases for the exercise of judicial power over a nonresident defendant for claims against him enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. These traditional bases include: a defendant who is domiciled in the forum;[27] a defendant who has consented to jurisdiction;[28] and a defendant who is a natural person (i.e., not a business or governmental entity) and is served with process while physically present within the forum.[29] The Court has also indicated

[24] *See Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *see also id.* at 416 (holding that a Texas court could not exercise general personal jurisdiction over a foreign corporation that did not have a place of business in Texas and had only limited contacts with the state involving in-state purchases and training trips); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 415, 445 (1952) (holding that an Ohio court could subject a Philippine mining corporation to personal jurisdiction even though the "cause of action sued upon did not arise in Ohio and d[id] not relate to the corporation's activities there" because of the corporation's substantial activities within the state, including "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery").

[25] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."). *See also* Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California).

[26] *Goodyear*, 564 U.S. at 924 (noting an individual's domicile and a corporation's place of incorporation or principal place of business as "paradigm" bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

[27] Milliken v. Meyer, 311 U.S. 457, 462–63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service . . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); Blackmer v. United States, 284 U.S. 421, 438 (1932) (holding that the United States retains in personam jurisdiction over its citizens living abroad). A person's "domicile" is generally the "place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Domicile*, Black's Law Dictionary, *supra* note 1. "Substituted service of process" refers to any "method of service allowed by law in place of personal service, such as service by mail." *Substituted Service*, Black's Law Dictionary, *supra* note 1.

[28] "Consent" may be express or implied. *See, e.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); Hess v. Pawloski, 274 U.S. 352, 355–56 (1927) (upholding a state court's exercise of personal jurisdiction over a nonresident defendant based on a theory of implied consent when the defendant drove a vehicle on a public highway in the state and was involved in an accident there). "Service of process" refers to the "formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation; the legal communication of a judicial process." *Service*, Black's Law Dictionary, *supra* note 1.

[29] Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote

that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.[30]

Although the Supreme Court has decided several cases addressing the Fourteenth Amendment's limits on state courts' exercise of personal jurisdiction, it has generally declined to resolve questions about the extent to which the Fifth Amendment[31] may place similar jurisdictional limitations on federal courts. For example, the Supreme Court has declined to rule on whether it is constitutional for Congress to authorize nationwide service of process so that any federal court may exercise personal jurisdiction over a foreign defendant who has, in the aggregate, substantial contacts with the United States.[32] Consequently, this essay focuses on the Court's cases addressing the Fourteenth Amendment, which imposes due process requirements on actions by *state* governments.[33] However, it is important to note that the Federal Rules of Civil Procedure give federal district courts power to assert personal jurisdiction over a defendant to the same extent that a state court in the state where the federal district court is located may assert that power, meaning the same Fourteenth Amendment limits on personal jurisdiction generally apply to federal courts.[34]

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in *Burnham*, Justice White, in a concurring opinion, argued that a particular basis for jurisdiction could not be constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 628 (White, J., concurring).

[30] Pennoyer v. Neff, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[31] U.S. Const. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.").

[32] Congress has provided for nationwide service of process in a handful of federal statutes. *See, e.g.*, 15 U.S.C. § 78aa (Securities Exchange Act of 1934);18 U.S.C. §§ 1961–1968 (Racketeer Influenced and Corrupt Organizations Act (RICO)). But federal courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons." Daimler AG v. Bauman, 571 U.S. 117, 125 (2014). This practice, which involves federal courts in analyzing the reach of a state's long-arm statute and the defendant's contacts with the state in which the court sits, stems from the Federal Rules of Civil Procedure. Fed. R. Civ. P. 4(k)(1)(A) (linking federal courts' power to assert personal jurisdiction over a defendant to service of process on the defendant according to the laws of the state in which the federal district court is located). *See, e.g.*, Wilson v. Belin, 20 F.3d 644, 646–47 (5th Cir. 1994) ("In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has such jurisdiction. The reach of this jurisdiction is delimited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the federal Constitution.") (citation omitted).

Although the Supreme Court has decided several cases addressing the Fourteenth Amendment's limits on state courts' exercise of personal jurisdiction, it has generally declined to resolve questions about the extent to which the Fifth Amendment, *see* U.S. Const. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."), may place similar jurisdictional limitations on federal courts. *See* Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 12 (U.S. June 19, 2017) ("In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (declining to consider whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 n. (1987) (plurality opinion) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits."). As a result, the majority of this essay focus on the limits imposed by the Fourteenth Amendment on the jurisdiction of state courts (and, through the Federal Rules of Civil Procedure, federal courts, as well).

[33] U.S. Const. amend XIV, § 1 ("[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law.") (emphasis added).

[34] *Supra* note 32.

Amdt14.S1.7.1.2 Personal Jurisdiction from Founding Era to 1945

Fourteenth Amendment, Section 1:

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

Prior to ratification of the Fourteenth Amendment and the Supreme Court's 1877 decision in *Pennoyer v. Neff*, a defendant that objected to the plaintiff's state court exercising personal jurisdiction over him would typically wait to object to such exercise of jurisdiction until the plaintiff sought to have the defendant's state court recognize and enforce the first court's judgment.[1] State (and, in some cases, federal)[2] courts considering whether such judgments were enforceable would resolve such jurisdictional challenges on the basis of general, customary law principles derived from English common law and international law addressing the recognition of foreign judgments rather than by applying the federal Constitution.[3] However, in *Pennoyer*, the Supreme Court stated that the Fourteenth Amendment's Due Process Clause imposes constitutional limits on state courts' exercise of personal jurisdiction over nonresident defendants.[4] *Pennoyer* converted the issue of personal jurisdiction into a question of federal constitutional law, allowing a party to obtain direct review of a state court's judgment in a federal court that was not bound to apply state statutes or judicial precedent when deciding whether the issuing court had personal jurisdiction over the parties.[5]

In *Pennoyer*, the Court indicated that, absent a defendant's consent, a state court's jurisdiction generally extends only to persons or property within its territory.[6] The Court grounded this "physical presence" approach in principles of federalism: each state of the union is a coequal and independent sovereign in the federal system, and thus possesses exclusive

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[1] Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1270 (2017).

[2] *Id.* at 1279.

[3] *Id.* ("The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits."). In the 1851 case *D'Arcy v. Ketchum*, decided prior to *Pennoyer*, in which an individual sought to enforce a New York judgment in a Louisiana federal court, the Supreme Court stated that "countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court," and that such proceedings are "deemed an illegitimate assumption of power, and resisted as mere abuse." 52 U.S. (11 How.) 165, 174 (1851).

[4] Pennoyer v. Neff, 95 U.S. 714 (1878) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

[5] Sachs, *supra* note 1, at 1253, 1288 ("The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern.").

[6] *Pennoyer*, 95 U.S. at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . [an] illegitimate assumption of power, and be resisted as mere abuse."); *id.* at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property [outside of] its territory."). The *Pennoyer* Court recognized that a tribunal had authority to exercise personal jurisdiction over a non-resident served with process while in the forum. *Id.* at 724 ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.") (internal citations and quotation marks omitted). *See also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person."); McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

authority over persons and property within its domain.[7] Although the Court's decision in *Pennoyer* addressed personal jurisdiction over natural persons or people, the Court's early jurisprudence following the 1877 case established that state courts could potentially exercise jurisdiction over foreign corporations doing business in the state because the law presumed that those corporations had implicitly consented to personal jurisdiction, or could be deemed "present" within the state, based on their in-state activities.[8]

The *Pennoyer* Court's "physical presence" test established the constitutional foundation for strict limits on state courts' authority to exercise in personam jurisdiction over a nonresident defendant—that is, to render judgments concerning that defendant's personal rights and obligations.[9] Thus, for example, service upon a defendant by publishing notice of the lawsuit in a newspaper circulating in the forum state was insufficient to confer jurisdiction on a court to adjudicate the personal liability of a defendant who had left the state and did not intend to return.[10] Nevertheless, even in the absence of a nonresident defendant's physical presence or consent, courts could still attain jurisdiction over the defendant indirectly through the attachment (i.e., seizure) of the defendant's property interests within the forum and the provision of notice to the defendant.[11] In particular, a state court could exercise in rem jurisdiction[12] over a nonresident defendant's property interest in the state in order to adjudicate all of the rights or claims in a piece of property.[13] It could also exercise quasi in rem jurisdiction[14] over a nonresident defendant by adjudicating a plaintiff's claim to the property in relation to the defendant or to satisfy the claims of its own citizens against the defendant personally.[15] However, judgments resting upon the exercise of in rem or quasi in rem jurisdiction would not personally bind the defendant to an extent greater than the value of the property.[16]

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[7] *Pennoyer*, 95 U.S. at 722 ("[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others . . . . [N]o tribunal established by [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions.").

[8] Shaffer v. Heitner, 433 U.S. 186, 201 (1977) ("[The *Pennoyer*] opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. This basis for in personam jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in a State could be deemed 'present' in the State, and so subject to service of process under the rule of *Pennoyer*.") (internal citations omitted). *See also, e.g.*, Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 586 (1914) ("This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such [manner] that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 408 (1856) ("Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts.").

[9] Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) ("A judgment in personam imposes a personal liability or obligation on one person in favor of another."); *Pennoyer*, 95 U.S. at 727.

[10] *McDonald*, 243 U.S. at 92 ("[I]t appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return.").

[11] *Pennoyer*, 95 U.S. at 723 ("But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property [outside of] it.").

[12] *In Rem Jurisdiction*, Black's Law Dictionary (10th ed. 2014) (defining "in rem jurisdiction" as a "court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it").

[13] *Hanson*, 357 U.S. at 246 n.12 ("A judgment in rem affects the interests of all persons in designated property.").

[14] *Quasi-in-rem Jurisdiction*, Black's Law Dictionary, *supra* note 12 (defining "quasi-in-rem jurisdiction" as jurisdiction "over a person but based on that person's interest in property located within the court's territory").

[15] *Hanson*, 357 U.S. at 246 n.12 ("A judgment quasi in rem affects the interests of particular persons in designated property."). *See also Pennoyer*, 95 U.S. at 723 ("Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."); *id.* at 728 ("[T]he jurisdiction of the court to inquire into and

Amdt14.S1.7.1.3 Modern Doctrine on Personal Jurisdiction

Fourteenth Amendment, Section 1:

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

Although *Pennoyer*'s physical presence test informed the Supreme Court's jurisprudence related to jurisdiction for several decades, a significant expansion of the U.S. economy in the mid-twentieth century altered that focus. As commerce and travel among the states and between the states and foreign countries increased,[1] corporations expanded the geographical scope of their activities.[2] A more interconnected, global economy meant that a corporation's activities had greater potential to cause harm in distant jurisdictions, but also meant that businesses could more easily defend lawsuits arising from that harm in distant fora.[3] Faced with these new realities, the Court reconsidered the nature of the due process limitations on the jurisdiction of state courts over non-resident individuals and corporations that conducted activities in the states.[4] In the 1945 case *International Shoe Co. v. Washington*, the Court

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determine [the defendant's] obligations at all is only incidental to its jurisdiction over the property."). For example, in *Harris v. Balk*, the Supreme Court held that a Maryland court had properly exercised quasi in rem jurisdiction over a North Carolina resident (Balk) who owed a debt to a Maryland resident (Epstein) because Epstein could attach the debt of a third party (Harris) that was owed to Balk while Harris was physically present in Maryland. 198 U.S. 215, 223 (1905). *Harris* was eventually overruled by *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See id.* at 216–17 (holding that a state court could not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test).

[16] *See Pennoyer*, 95 U.S. at 723–24 (stating that a judgment resting on in rem or quasi in rem jurisdiction binds the defendant only to the extent of the property's value). As discussed below, the Court subsequently held that a tribunal may not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections establish sufficient contacts between the defendant, forum, and litigation. Rush v. Savchuk, 444 U.S. 320, 328 (1980) ("We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action. The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.") (citing Shaffer v. Heitner, 433 U.S. 186, 209 (1977)). As a result, it appears that plaintiffs rely upon quasi in rem jurisdiction instead of in personam jurisdiction in some cases in which a state's "long-arm statute" does not provide for the exercise of in personam jurisdiction over the defendant. *See* Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 Brook. L. Rev. 1059, 1063 (1990) ("Courts have explained that the new theory of quasi in rem jurisdiction is necessary to fill gaps in the state's long arm statute.").

[1] *See Hanson*, 357 U.S. at 250–51 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome."); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957) (noting a "clearly discernible" trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents" that was "attributable to the fundamental transformation of our national economy over the years").

[2] *See supra* note 1.

[3] *See supra* note 1.

[4] *See supra* note 1. The Supreme Court has not drawn a bright line between its jurisprudence addressing persons and its cases addressing corporations. However, some commentators have argued that the Court's recent opinions have been more solicitous toward corporate defendants. *See, e.g.*, Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 Ohio St. L.J. 101, 107 (2015) ("[T]he Court has moved too far, too fast towards limiting the traditional powers of states to require nonresident

explained its rejection of a strict adherence to the physical presence test, holding that a state could authorize its courts to subject an out-of-state entity to in personam jurisdiction, consistent with due process, and thus require it to defend a lawsuit, if that entity had "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[5] The Court rested its holding in part on the notion that an entity conducting activities in a state benefits from the protections of state law, and thus should have to respond to legal complaints arising out of its actions in the forum even if it is not "physically present" in the state.[6]

Thus, the Supreme Court's opinions in *International Shoe* and subsequent cases have established a more flexible two-part test for determining when a court's exercise of personal jurisdiction over a nonresident defendant sued by a plaintiff comports with due process: (1) the defendant has established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it is reasonable to require the defendant to defend the lawsuit in the forum.[7]

Nevertheless, as noted, the Court has confirmed that several traditional bases for exercising judicial power over a nonresident defendant continue to enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. Specifically, the traditional bases for jurisdiction include if: (1) the defendant is domiciled in the forum state (e.g., a defendant who is a natural person intends to establish a permanent home in the forum or a corporation intends to

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corporations to answer lawsuits in their courts."); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For:* Goodyear, Daimler, *and the Evisceration of General Jurisdiction*, 64 Emory L.J. Online 2001, 2002 (2014) ("[T]he Court's decisions in these two cases leave a large gap in the appropriate scope of state adjudicatory jurisdiction, putting some plaintiffs at risk of being unable to bring a defendant to justice in an American court."). On the other hand, other commentators have defended the recent change in the Court's decisions, asserting that it will bring more clarity and cohesion to the doctrine of personal jurisdiction and reduce unfairness to defendants. *E.g.*, William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 Marq. L. Rev. 375, 378 (2016) ("Contrary to the weight of this body of scholarship on the 'at home' rule of *Goodyear* and *Daimler AG*, I argue that this new rule is a welcome change to general personal jurisdiction for two reasons. First, the 'at home' rule is clear. It provides an easy-to-apply rule that will minimize resources expended litigating an issue other than the merits of a case. Second, the 'at home' rule is more logically coherent because it promotes internal consistency in personal jurisdiction decisions. No matter which justification of personal jurisdiction one adopts from among the myriad justifications that the Supreme Court has offered, the 'at home' rule fits neatly within that framework."); Case Comment, *Personal Jurisdiction—General Jurisidiction—* Daimler AG v. Bauman, 128 Harv. L. Rev. 291, 316 (2014) ("Closer examination of *Daimler*, however, reveals that Justice Ginsburg is not operating from formalist or ideological conceptions of when jurisdiction ought to be exercised. Rather, she has adopted a different philosophical framework, drawn from the pioneering work of von Mehren and Trautman, that focuses fundamentally on fairness to both parties. Starting with her opinions in *Goodyear* and *Nicastro*, Justice Ginsburg has consistently applied this framework.").

[5] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). The Court deemed a corporation's "presence" in the forum state to result from those activities of the corporation or its agents in the state "which courts will deem to be sufficient to satisfy the demands of due process." *Id.* at 317. The Court wrote that the concept of constitutional due process did "not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319.

[6] *Id.* ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

[7] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citing *Int'l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'") (quoting *Int'l Shoe Co.*, 326 U.S. at 316). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

establish a permanent headquarters);[8] (2) the defendant has consented to jurisdiction;[9] or (3) a defendant who is a natural person is served with process while he is physically present—even temporarily—within the forum.[10] The Court has also indicated that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.[11]

Amdt14.S1.7.1.4 Minimum Contact Requirements for Personal Jurisdiction

Fourteenth Amendment, Section 1:

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

Since its 1945 decision in *International Shoe*, the Supreme Court has elaborated on the nature and quality of the minimum contacts that a defendant must have with the forum in order for a court to subject him or her to personal jurisdiction in that forum consistent with due process. When determining whether a defendant has minimum contacts with the forum, the Court has distinguished the types of contacts sufficient for a court's exercise of "specific" personal jurisdiction over the defendant from those contacts sufficient for its exercise, alternatively, of "general" jurisdiction.

A court's exercise of *specific* jurisdiction may be constitutional when the defendant: (1) "purposefully avails itself of the privilege of conducting activities" within the forum state; and

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[8] Milliken v. Meyer, 311 U.S. 457, 462–63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service . . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); Blackmer v. United States, 284 U.S. 421, 438 (1932) (holding that the United States retains in personam jurisdiction over its citizens living abroad) (citation omitted).

[9] "Consent" may be express or implied. *See, e.g.*, Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); Hess v. Pawloski, 274 U.S. 352, 355–56 (1927) (upholding service of process on a nonresident defendant under a state law providing that a person who drove a vehicle on a public highway in the state implicitly consented to the appointment of a state official as agent for service of process for lawsuits arising outside of accidents attending such operation). *See also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991) (holding that plaintiffs' notice and acceptance of a forum-selection clause in a contract for passage on a cruise ship constituted consent to the exercise of personal jurisdiction by Florida courts over the plaintiffs in a personal injury action); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (determining that a forum-selection clause in a contract that selected a foreign court for the resolution of disputes between the parties could not deprive a U.S. court of jurisdiction, but that the U.S. court should nonetheless enforce the clause by dismissing the case unless the clause was unreasonable, unfair, or unjust).

[10] Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote in *Burnham*, Justice White, in an opinion concurring in the judgment, argued that a particular basis for jurisdiction could not be constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 629 (White, J., concurring).

[11] Pennoyer v. Neff, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1977).

(2) the defendant's contacts with the forum give rise to, or are related to, the plaintiff's claims.[1] A defendant's contacts with the forum may "relate" to the plaintiff's claims even in the absence of a "strict causal relationship" between the contacts and claims.[2] However, when there is "no such connection [between the forum and the particular claims at issue], specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[3]

By contrast, a state court's exercise of *general* jurisdiction over a nonresident defendant for any claim—even if all the incidents underlying the claim occurred in a different state—may be constitutional when the defendant's activities in the forum state are so substantial that it is reasonable to require it to defend a lawsuit that did not arise out of its activities in the forum state and is unrelated to those activities.[4] Perhaps in order to ensure greater predictability for defendants attempting to discern where they may be subject to suits on claims arising anywhere in the world,[5] in more recent years, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant "essentially at home" in the forum state.[6] The Court has clarified that, absent exceptional circumstances, a corporate defendant is "at home" when it is incorporated in the forum state or maintains its principal place of business there.[7] Insubstantial in-state business, in and of itself, does not suffice to permit an assertion of jurisdiction over claims that are unrelated to any activity

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[1] Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, No. 19-368, slip op. at 5–6 (U.S. March 25, 2021). *See also* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

[2] *Ford Motor Co.*, slip op. at 8–9, 18 (concluding that Minnesota and Montana state courts could exercise specific personal jurisdiction over Ford Motor Company in product liability cases stemming from allegedly defective Ford automobiles involved in accidents in the forum states because Ford had "extensively promoted, sold, and serviced" the same vehicle models in the forum states, even if the particular vehicles involved in the accidents were designed, manufactured, and first sold in other states).

[3] Bristol-Myers Squibb Co. v. Superior Court, No. 16-466, slip op. at 7 (U.S. June 19, 2017) (concluding that the California Supreme Court erred in employing a "relaxed" approach to personal jurisdiction by holding that a state court could exercise *specific* jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had "extensive forum contacts" unrelated to the claims in question).

[4] *See Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *see also id.* at 416 (holding that a Texas court could not exercise general personal jurisdiction over a foreign corporation that did not have a place of business in Texas and had only limited contacts with the state involving in-state purchases and training trips); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 415, 445 (1952) (holding that an Ohio court could subject a Philippine mining corporation to personal jurisdiction even though the "cause of action sued upon did not arise in Ohio and d[id] not relate to the corporation's activities there" because of the corporation's substantial activities within the state, including "directors' meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery.").

[5] Daimler AG v. Bauman, 571 U.S. 117 (2014) ("If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'") (quoting *Burger King*, 471 U.S. at 472)).

[6] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 924 (2011) (holding that foreign subsidiaries of Goodyear USA lacked sufficient contacts with the state of North Carolina that would support the exercise of general personal jurisdiction over them because the subsidiaries were not incorporated in California and did not have their principal place of business there). *See also Daimler AG*, 571 U.S. at 139 (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California, because Daimler was not incorporated in California and did not have its principal place of business there).

[7] *Goodyear*, 564 U.S. at 924 (noting an individual's domicile and a corporation's place of incorporation or principal place of business as "paradigm" bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

occurring in a state.[8] For example, the Court in 2017 held in *BNSF Railway v. Tyrrell* that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not "so substantial" as compared to its activities throughout all of the jurisdictions in which it conducted business so as to render the corporation "at home" in the state.[9]

Although the Supreme Court has decided only a few cases that explore the scope of general personal jurisdiction since its opinion in *International Shoe*, leaving the bulk of such determinations to lower federal and state courts, it has decided several cases elaborating on the quality and nature of the defendant's contacts with the forum and litigation necessary for a court's exercise of specific jurisdiction over the defendant.[10] A common theme throughout many of these decisions is that "unilateral activity" in the forum state by a person who has some family, business, or other relationship with a nonresident defendant will not suffice to establish a defendant's minimum contacts with the forum.[11] In other words, jurisdiction is not proper merely because the defendant could have foreseen that a third party with which it has a family or business relationship (for example, a defendant's family member or customer of a defendant corporation) would have contacts with the forum.[12] Rather, the defendant must "purposefully avail" itself "of the privilege of conducting activities within the forum State," thus invoking the benefits and protections of its laws.[13] The defendant must have reasonably anticipated being haled into court there—a standard that potentially allows a defendant to predict where it will be subject to suit and plan the geographic scope of its activities or insure against the risk of being sued in a distant forum accordingly.[14] The Court has also emphasized that the minimum contacts inquiry should not focus on the location of the resulting injury to the plaintiff; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.[15]

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[8] *See* BNSF Ry. v. Tyrrell, No. 16-405, slip op. at 11–12 (U.S. May 30, 2017).

[9] *Id.*

[10] *Goodyear*, 564 U.S. at 924 ("Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving 'single or occasional acts' occurring or having their impact within the forum State."). The Supreme Court has not yet specifically addressed the extent to which Congress might intervene through the enactment of legislation to provide that certain activities of a foreign defendant constitute sufficient minimum contacts for the exercise of personal jurisdiction over a foreign defendant.

[11] Rep. of Arg. v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (holding that a foreign country defendant had minimum contacts with the United States when it unilaterally rescheduled the maturity dates of bonds it had issued because the bonds were denominated in U.S. dollars, the bonds were payable in New York, and the country had appointed a financial agent in that city); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) (holding that New York residents' car accident in Oklahoma involving a car they purchased in New York was insufficient by itself to establish contacts with Oklahoma of nonresident automobile retailer and wholesale distributor in products-liability action); Hanson v. Denckla, 357 U.S. 235, 253–54 (1958) (holding, in a case involving the validity of a trust agreement, that the settlor of a trust's exercise of her power of appointment in Florida was insufficient to establish nonresident trustees' contacts with, and purposeful availment of, that forum).

[12] *World-Wide Volkswagen Corp.*, 444 U.S. at 295 ("Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

[13] Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (holding that a New York resident sending his daughter to live with her mother in California, contrary to the requirements of a separation agreement, did not establish the defendant's minimum contacts with that state supporting the exercise of personal jurisdiction over him as he did not purposefully derive benefits from that activity).

[14] *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98 (offering the example of a state court properly asserting personal jurisdiction over a company "that delivers its products into the stream of commerce with the expectation that they will be purchased . . . in the forum State").

[15] Walden v. Fiore, 571 U.S. 277, 284–87 (2014) (concluding that a federal court in Nevada lacked personal jurisdiction over a federal law enforcement officer in a lawsuit stemming from an incident at an airport in Atlanta involving Nevada residents).

Since the Supreme Court decided *International Shoe* in 1945, many of its decisions on the minimum contacts test have addressed specific categories of contacts between the defendant and forum, such as the alleged tortious conduct of the defendant in the forum state; a contract between the defendant and an entity in the forum state; a business relationship between the defendant and a party in the forum state; and property interests of the defendant in the forum state. For example, in cases in which the plaintiff alleged that a nonresident had committed the tort of libel causing harm in the forum state, the Court upheld the exercise of specific personal jurisdiction over a defendant that intentionally targeted the state with publication of allegedly libelous material.[16] The Court determined that regularly publishing a widely circulated magazine with knowledge that harm could occur to the state's residents amounted to a sufficient contact between the defendant, the forum, and the litigation.[17] As a result, the Court has recognized that, provided there is a sufficient connection between the defendant and the forum, states have a "significant interest" in permitting their courts to exercise jurisdiction over defendants in order to redress harm that occurs within state boundaries.[18]

Particularly since the 1980s, there has been disagreement among the Supreme Court Justices, however, as to when a nonresident corporation whose product causes injury within the forum state has "purposefully availed" itself of the privilege of conducting business within the state, and should therefore be subject to personal jurisdiction in that state in a tort action for products liability. In the 1987 case *Asahi Metal Industry Co. v. Superior Court*, four Justices agreed that a nonresident defendant's awareness that a product it manufactured would end up in the forum state through its intentional placement of the product in the stream of commerce outside of the forum did not by itself constitute an act directed at the forum sufficient for specific personal jurisdiction.[19] Writing for a plurality of the Court, Justice Sandra Day O'Connor maintained that a tribunal lacked the authority to exercise personal jurisdiction over a defendant that had not performed additional actions in the forum state that demonstrated an intent to serve that state's market.[20] According to her plurality opinion, because the defendant did not have clear notice that it could be subject to suit in California, it

[16] Calder v. Jones, 465 U.S. 783, 788–91 (1984) (concluding that a California court had jurisdiction over a suit involving an alleged libelous article written and edited by defendants in Florida with calls to sources in California that allegedly caused harm to plaintiff California resident's reputation in that state because of the magazine's wide circulation in that state); Keeton v. Hustler Mag., Inc., 465 U.S. 770, 773–74 (1984) ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."). *See also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion) ("[I]n some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.").

[17] *E.g.*, *Keeton*, 465 U.S. at 773–74.

[18] *Id.* at 776 (noting that false publications in a state injure the subject of the false statements and mislead consumers residing in the state and declaring that "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State").

[19] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987) ("This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutions 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'"); *id.* at 112 (plurality opinion) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.").

[20] *See id.* at 110–13 ("Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence

would have been unfair to subject the defendant to suit there.[21] However, another four Justices would have held that the defendant's intentional placement of a product into the stream of commerce by itself was sufficient for personal jurisdiction because the defendant could foresee being sued in any state in which the product was regularly sold and marketed.[22] Those Justices would have grounded this result in the benefits that defendants derive from the regular retail sale of their products in the forum and the protections of state law.[23]

The Justices' disagreement over when a nonresident corporation whose product causes injury within the forum state has "purposefully availed" itself of the privilege of conducting business within the state, and should therefore be subject to personal jurisdiction in that state in a tort action for products liability, appears to remain unresolved after a 2011 case. In *J. McIntyre Machinery, Ltd. v. Nicastro*, a plurality of the Court indicated that a foreign manufacturer of a product cannot be subject to the jurisdiction of a state court based on its mere expectation that the products it manufactures in its home country and ships to an independent U.S. distributor might be distributed in the forum state.[24] Instead, according to the plurality written by Justice Anthony Kennedy and joined by Chief Justice John Roberts, Justice Antonin Scalia, and Justice Clarence Thomas, the defendant must have directly targeted the individual state with its goods, thereby "purposefully availing" itself of the privilege of conducting in-state business.[25] However, the plurality's view did not command a majority of the Court, and a narrower concurring opinion authored by Justice Stephen Breyer and joined by Justice Samuel Alito would have found jurisdiction lacking under any of the various tests for personal jurisdiction articulated in the Justices' opinions in *Asahi* because the shipment of products into, or their sale in, the forum state did not occur regularly, and there was no additional sales-related conduct (for example, marketing) by the defendant in the forum.[26]

In addition to addressing cases involving a defendant's alleged tortious conduct, the Supreme Court has also addressed minimum contacts in the context of out-of-state defendants reaching out to a forum state to establish a continuing business relationship in that state. For example, the Court upheld a California court's exercise of specific personal jurisdiction over a Texas mail order insurance company that had no office or agent in California because the Texas company mailed an offer of insurance to the plaintiff's son in California.[27] The son

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that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.") (footnote and internal citations omitted).

[21] *Id.*

[22] *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."). Justice John Paul Stevens authored a concurring opinion in which he maintained that the plurality's minimum contacts analysis was unnecessary but suggested that the Court should have included in its analysis an examination of the "volume," "value," and "hazardous character" of the products at issue to determine whether the defendant had purposefully availed itself of the forum. *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment).

[23] *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

[24] *Nicastro*, 564 U.S. at 882 (plurality opinion) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."). In *Nicastro*, a metal-shearing machine manufactured in England by a company incorporated there allegedly caused injury to a person in New Jersey. *Id.* at 878. The company that made the machine, J. McIntyre Machinery, had relied upon an independent U.S. company to distribute the machine in the United States. *Id.*

[25] *Id.*

[26] *Id.* at 889 (Breyer, J., concurring in the judgment).

[27] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221–22 (1957).

accepted the offer and continued to send the company premium payments through the mail to Texas from California until the son died in California.[28] The Court noted that the suit arose from a contract that had a "substantial connection" with California, holding that the state had a significant interest in providing redress for its residents in cases in which insurance companies refuse to pay claims.[29] Similarly, when a nonresident defendant establishes an office in a state to conduct business through agents in the state, he may have to answer a lawsuit related to those business activities when an agent is served in the forum, regardless of whether he consented to service of process through his agent.[30]

Another context in which the Supreme Court has addressed the minimum contacts test involves contractual disputes between the parties to a lawsuit. Thus, when a franchisor headquartered in Florida brought suit in a local federal court against Michigan franchisees for the alleged breach of a franchise agreement to make required payments in Florida, the Court held that specific jurisdiction over defendants was proper based on the specific circumstances surrounding the contractual relationship.[31] The Court stated that a contract between an out-of-state party and an individual in the forum state is insufficient by itself to establish personal jurisdiction if the contract lacks a substantial connection to the state as established by, among other things, an (1) examination of the parties' prior negotiations (for example, whether the defendant reached into the forum to negotiate the contract); (2) the terms of the contract (for example, where payments were to be made and which state's law was to govern); and (3) the course of dealing (for example, whether the defendant established a "substantial and continuing relationship" in the forum state).[32]

The Court has also opined on when a defendant's property interests in the forum may serve as a contact for purposes of personal jurisdiction. In *Shaffer v. Heitner*, the Supreme Court held that a state court could not exercise quasi in rem jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test.[33] Thus, a Delaware court could not subject nonresident officers and directors of a Delaware corporation to personal jurisdiction for the alleged breach of duties to the corporation based solely on the court's attachment of their stock and stock options in the corporation.[34] The Court noted that jurisdiction over property must in fact have a direct effect on the interests of the defendant in that property and therefore affect its personal rights.[35] However, the Court also noted that in some cases, such as cases establishing title to real property, ownership of the property itself may establish sufficient contacts among the defendant, forum, and litigation.[36]

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[28] *Id.*

[29] *Id.* at 223.

[30] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 625, 628 (1935).

[31] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464, 479 (1985).

[32] *Id.* at 478–87.

[33] Shaffer v. Heitner, 433 U.S. 186, 189, 216–17 (1977).

[34] *Id.* at 189–92, 216–17.

[35] *Id.* at 207, 212 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.").

[36] *Id.* at 207–08.

Amdt14.S1.7.1.5 Reasonableness Test for Personal Jurisdiction

Fourteenth Amendment, Section 1:

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

Even if a nonresident defendant has minimum contacts with the forum, the Supreme Court has, at times, considered whether a state court's exercise of personal jurisdiction over him would comport with due process by examining the reasonableness of the exercise of jurisdiction.[1] In *International Shoe* and its subsequent opinions, the Court has established a multi-factor test that seeks to ensure that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[2] The Court has subsequently clarified that in applying this test to evaluate the reasonableness of the exercise of jurisdiction in light of the defendant's contacts with the forum and litigation, it will examine several factors, including: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; (5) and the "shared interest of the several States in furthering fundamental substantive social policies."[3]

Although the Supreme Court has addressed the reasonableness prong of the *International Shoe* test for personal jurisdiction only in *Asahi* and *Daimler*, it has provided some guidance as to when courts may deem it reasonable to subject a defendant to suit. Thus, the Justices have, for example, suggested that courts should remain cautious about exercising personal jurisdiction over corporations domiciled abroad, particularly when most of the conduct at issue occurred overseas.[4] Courts may therefore evaluate the risks that subjecting a foreign corporation to suit in the United States for overseas conduct would have on international relations between the United States and its trading partners.[5] In a case involving the exercise of personal jurisdiction over a foreign corporation, moreover, the policies of other nations are relevant and must be carefully considered.[6]

In addition, when considering the burden on the defendant of litigating the case in the forum state, the Court may consider it a heavy burden for a company domiciled abroad to travel from its foreign headquarters to have a dispute with another foreign corporation litigated in U.S. courts.[7] This concern may stem in part from the notion that the interests of the plaintiff and forum are minimal when the claim is based on overseas transactions, the plaintiff

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[1] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors.").

[2] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations and internal quotation marks omitted).

[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (citation omitted).

[4] *Asahi*, 480 U.S. at 114.

[5] Daimler AG v. Bauman, 571 U.S. 117, 142 (2014) ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands.").

[6] *Asahi*, 480 U.S. at 115–16.

[7] *Id.* at 114.

is not a resident of the United States, and the allegedly tortious conduct could be deterred by subjecting companies over which the court has lawful judicial power to suit.[8]

Amdt14.S1.7.2 State Taxation

Amdt14.S1.7.2.1 State Taxing Power

Fourteenth Amendment, Section 1:

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

It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the states.[1] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[2] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[3] Nor can the constitutionality of taxation be made to depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[4]

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[5] However, modern notions of public purpose have expanded to the point where the limitation has little practical import.[6] Whether a use is public or private, although ultimately a judicial question, "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[7]

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[8] *Id.* at 114–15 (noting that the lawsuit involved an indemnification claim brought by a Taiwanese tire manufacturer against a Japanese valve assembly manufacturer).

[1] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

[2] Fox v. Standard Oil Co., 294 U.S. 87, 99 (1935).

[3] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); Chapman v. Zobelein, 237 U.S. 135 (1915); Alaska Fish Co. v. Smith, 255 U.S. 44 (1921); Magnano Co. v. Hamilton, 292 U.S. 40 (1934); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[4] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). A taxpayer, therefore, cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. Dane v. Jackson, 256 U.S. 589 (1921).

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

[6] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flour mill system, homebuilding projects, Carmichael v. Southern Coal & Coke Co., 300 U.S. 495 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

[7] In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. *Carmichael*, 301 U.S. at 518. *Cf.* Usery v. Turner Elkhorn Mining

Amdt14.S1.7.2.1
State Taxing Power

The authority of states to tax income is "universally recognized."[8] Years ago the Court explained that "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits."[9] Also, a tax on income is not constitutionally suspect because it is retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld,[10] and there are also situations in which courts have upheld retroactive application to the preceding year or two.[11]

A state also has broad tax authority over wills and inheritance. A state may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent,[12] although such tax must be consistent with other due process considerations.[13] Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the state in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[14] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[15]

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the Due Process Clause merely because the city has entered the power business in competition with such companies.[16] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[17]

Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[8] New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937).

[9] 300 U.S. at 313. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[10] *See, e.g.*, Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323 (1874); United States v. Hudson, 299 U.S. 498 (1937); United States v. Darusmont, 449 U.S. 292 (1981).

[11] Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature's first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Because "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract," the Court explained, "its retroactive imposition does not necessarily infringe due process." *Id.* at 146–47.

[12] Stebbins v. Riley, 268 U.S. 137, 140, 141 (1925).

[13] When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).

[14] Cahen v. Brewster, 203 U.S. 543 (1906).

[15] Keeney v. New York, 222 U.S. 525 (1912).

[16] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).

[17] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).

States have significant discretion in how to value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.[18] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[19]

A state also has wide discretion in how to apportion real property tax burdens. Thus, a state may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.[20] Or, where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included.[21]

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad violates due process,[22] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[23] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[24] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefited directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.[25] Finally, a state may levy an assessment for special benefits resulting from an improvement already made[26] and may validate an assessment previously held void for want of authority.[27]

Amdt14.S1.7.2.2 State Jurisdiction to Tax

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[18] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[19] Paddell v. City of New York, 211 U.S. 446 (1908).

[20] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

[21] Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefited by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).

[22] Road Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).

[23] Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).

[24] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).

[25] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).

[26] Wagner v. Baltimore, 239 U.S. 207 (1915).

[27] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

The Court's opinions in these cases have often discussed Due Process and Dormant Commerce Clause issues as if they were indistinguishable.[1] A later decision, *Quill Corp. v. North Dakota*,[2] however, used a two-tier analysis that found sufficient contact to satisfy Due Process but not Dormant Commerce clause requirements. In *Quill*,[3] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. In 2018, the Court, however, reversed course in *South Dakota v. Wayfair*, overturning *Quill*'s Commerce Clause holding and upholding a South Dakota law that required certain large retailers that lacked a physical presence in the state to collect and remit sales taxes from retail sales to South Dakota residents.[4] In so holding, the *Wayfair* Court concluded that while the Due Process and Commerce Clause standards "may not be identical or coterminous," they are "closely related," and there are "significant parallels" between the two standards.[5]

Amdt14.S1.7.2.3 Real Property and Tangible Personalty

Fourteenth Amendment, Section 1:

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

Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a state could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action

[1] For discussion of the relationship between the taxation of interstate commerce and the Dormant Commerce Clause, *see* ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause to ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[2] 504 U.S. 298 (1992).

[3] 504 U.S. 298 (1992).

[4] 138 S. Ct. 2080, 2099 (2018).

[5] *Id.* at 2093.

has been defended by a court."[1] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

A state may tax tangible property located within its borders (either directly through an ad valorem tax or indirectly through death taxes) irrespective of the residence of the owner.[2] By the same token, if tangible personal property makes only occasional incursions into other states, its permanent situs remains in the state of origin, and, subject to certain exceptions, is taxable only by the latter.[3] The ancient maxim, *mobilia sequuntur personam*, which originated when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." The tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner."[4]

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary state, the latter has no jurisdiction to tax it.[5] Further, vessels that merely touch briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all.[6] Thus, where airplanes are continually in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.[7]

Conversely, a nondomiciliary state, although it may not tax property belonging to a foreign corporation that has never come within its borders, may levy a tax on movables that are regularly and habitually used and employed in that state. Thus, although the fact that cars are loaded and reloaded at a refinery in a state outside the owner's domicile does not fix the situs of the entire fleet in that state, the state may nevertheless tax the number of cars that on the

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[1] Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[2] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).

[3] New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).

[4] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[5] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in *Central R.R. v. Pennsylvania,* 370 U.S. 607, 619–20 (1962), had his "doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines. . . . And in the first case [Railroad v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause . . . was even mentioned." He also maintained that Justice Oliver Wendell Holmes shared this view in *Union Transit Co. v. Kentucky*, 199 U.S. at 211.

[6] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one state, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[7] Noting that an entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary state, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary state to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other state was deemed able to accord the same protection and benefits as the taxing state in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other states, the Court declared that the "taxability of any part of this fleet by any other state, than Minnesota, in view of the taxability of the entire fleet by that state, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

average are found to be present within its borders.[8] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.[9] Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.[10]

Amdt14.S1.7.2.4 Intangible Personalty

Fourteenth Amendment, Section 1:

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

To determine whether a state may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the state of the commercial situs and of the issuing corporation's domicile, or the state of the owner's domicile and that of the commercial situs.[1]

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the state of the debtor's residence;[2] (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;[3] (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;[4] (4) deposits of a resident in a bank in another state, where he carries on a business and from which these

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

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

[10] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

[1] Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 Mo. L. Rev. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 Tex. L. Rev. 196, 314–15 (1940).

[2] Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

[3] Savings Society v. Multnomah County, 169 U.S. 421 (1898).

[4] Bristol v. Washington County, 177 U.S. 133, 141 (1900).

deposits are derived, but belonging absolutely to him and not used in the business;[5] (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;[6] (6) membership by a resident in a stock exchange located in another state;[7] (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;[8] (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;[9] (9) shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;[10] (10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state;[11] (11) the transfer within the taxing state by one nonresident to another of stock certificates issued by a foreign corporation;[12] and (12) promissory notes executed by a domestic corporation, although payable to banks in other states.[13]

The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing state, but made and payable and secured by property in a second state and owned by a resident of a third state;[14] (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[15]

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the

[5] These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the state where the business is carried on. Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

[6] Rogers v. Hennepin County, 240 U.S. 184 (1916).

[7] Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

[8] Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."

[9] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the state, notwithstanding that ownership of the stock may also be a taxable subject in another state.

[10] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

[11] The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

[12] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907).

[13] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing state.

[14] Buck v. Beach, 206 U.S. 392 (1907).

[15] Senior v. Braden, 295 U.S. 422 (1935).

beneficiary had neither control nor possession, apart from the receipt of income therefrom.[16] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another state in respect of intangible property located in the latter state, at least where it does not appear that the trustee is exposed to the danger of other ad valorem taxes in another state.[17] The first case, *Brooke v. Norfolk*,[18] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is *Safe Deposit & Trust Co. v. Virginia*,[19] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control. Likewise, the more recent case of *North Carolina Department of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, which saw the Court invalidating a state tax imposed on trust income of an in-state beneficiary, appears to be limited to its facts, where the beneficiaries (1) had not received any trust income, (2) had no right to demand that income, and (3) were uncertain to ever receive that income.[20]

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a nondomiciliary state in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing state.[21] On the other hand, when the foreign corporation transacts only interstate commerce within a state, any excise tax on such excess is void, irrespective of the amount of the tax.[22]

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary state only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered," the presumption persists that intangible property is taxable by the state of origin.[23]

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the taxing state but located in another state awaiting sale,

[16] Brooke v. City of Norfolk, 277 U.S. 27 (1928).

[17] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).

[18] 277 U.S. 27 (1928).

[19] 280 U.S. 83 (1929).

[20] *See* N.C. Dept. of Revenue v. Kimberly Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213, 2221 (2019).

[21] Adams Express Co. v. Ohio, 165 U.S. 194 (1897).

[22] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary state, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another state and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[23] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice John Harlan Stone in *Curry v. McCanless,* 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.

deprives the corporation of its property without due process of law.[24] Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.[25]

Amdt14.S1.7.2.5 Transfer (Inheritance, Estate, Gift) Taxes

Fourteenth Amendment, Section 1:

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

As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent.[1] But whatever may be the justification of their power to levy such taxes, since 1905 the states have consistently found themselves restricted by the rule in *Union Transit Co. v. Kentucky*,[2] which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual situs outside the state.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one state ,of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the situs (but nondomiciliary) state, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[3] the domiciliary state of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. It took cognizance of the fact that the state in which these intangibles had their situs had also taxed the trust.[4]

On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary state was held insufficient to support a tax by that state on the succession to shares of stock in that corporation owned by a nonresident decedent.[5] Also against the trend

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[24] Delaware, L. & W.P.R.R. v. Pennsylvania, 198 U.S. 341 (1905).

[25] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[1] Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).

[2] 199 U.S. 194 (1905) (property taxes). The rule was subsequently reiterated in 1925 in *Frick v. Pennsylvania,* 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers' Trust Co. v. Schnader, 293 U.S. 112 (1934). In *State Tax Comm'n v. Aldrich,* 316 U.S. 174, 185 (1942), however, Justice Jackson, in dissent, asserted that a reconsideration of this principle had become timely.

[3] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was *Wachovia Bank & Trust Co. v. Doughton,* 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter state. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in *Graves v. Schmidlapp,* 315 U.S. 657 (1942).

[4] Levy of an inheritance tax by a nondomiciliary state was also sustained on similar grounds in *Wheeler v. New York,* 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

[5] Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

was *Blodgett v. Silberman*,[6] in which the Court defeated collection of a transfer tax by the domiciliary state by treating coins and bank notes deposited by a decedent in a safe deposit box in another state as tangible property.[7]

In the course of about two years following the Depression, the Court handed down a group of four decisions that placed the stamp of disapproval upon multiple transfer taxes and—by inference—other multiple taxation of intangibles.[8] The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile."[9] Thus, the Court proceeded to deny the right of nondomiciliary states to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the Due Process Clause.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*, the Court announced a departure from "[t]he doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state . . . ."[10] Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains . . . . [However], the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax . . . ."[11]

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both."[12]

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[6] 277 U.S. 1 (1928).

[7] The Court conceded, however, that the domiciliary state could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

[8] First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Farmers Loan Co. v. Minnesota, 280 U.S. 204 (1930).

[9] First National Bank v. Maine, 284 U.S. 312, 330–31 (1932).

[10] 307 U.S. 357, 363 (1939).

[11] 307 U.S. at 366, 367, 368.

[12] 307 U.S. at 372. These statements represented a belated adoption of the views advanced by Chief Justice John Harlan Stone in dissenting or concurring opinions that he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many states as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary state would invariably qualify

On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*,[13] sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the state, but on the fact that the owner was a resident of Oregon. In *Graves v. Elliott*,[14] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[15]

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more states find that the decedent died domiciled within its borders. In such cases, contesting states may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*,[16] the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other states. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several states, so that the latter were confronted with a prospective inability to collect.

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as a state competent to tax as would a nondomiciliary state, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

[13] 308 U.S. 313 (1939).

[14] 307 U.S. 383 (1939).

[15] 307 U.S. at 386. Consistent application of the principle enunciated in *Curry v. McCanless* is also discernible in two later cases in which the Court sustained the right of a domiciliary state to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy." Graves v. Schmidlapp, 315 U.S. 657, 661 (1942). In this case, an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted the statement in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 429 (1819), that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." 315 U.S. at 660. Again, in *Central Hanover Bank Co. v. Kelly,* 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

[16] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in *Worcester County Co. v. Riley,* 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two states as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct state of domicile. In *California v. Texas,* 437 U.S. 601 (1978), a case on all points with *Texas v. Florida*, the Court denied leave to file an original action to adjudicate a dispute between the two states about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County*, Cory v. White, 457 U.S. 85 (1982), and then permitted an original action to proceed, California v. Texas, 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor *Texas v. Florida* was any longer viable.

Amdt14.S1.7.2.6 Corporate Privilege Taxes

Fourteenth Amendment, Section 1:

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

A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the state, because the tax is levied not on property but on the privilege of doing business in corporate form.[1] However, a state cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void,[2] even though there is a maximum fee,[3] unless the tax is apportioned based on property interests in the taxing state.[4] On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.[5]

A municipal license tax imposed on a foreign corporation for goods sold within and without the state, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the Due Process Clause.[6] But a state lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing state, even if the equipment is later installed in the taxing state. Unless the activities that are the subject of the tax are carried on within its territorial limits, a state is not competent to impose such a privilege tax.[7]

Amdt14.S1.7.2.7 Individual Income Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

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

[2] Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Looney v. Crane Co., 245 U.S. 178 (1917); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918).

[3] Cudahy Co. v. Hinkle, 278 U.S. 460 (1929).

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

[5] Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937).

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

[7] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A state may tax annually the entire net income of resident individuals from whatever source received,[1] as jurisdiction is founded upon the rights and privileges incident to domicile. A state may also tax the portion of a nonresident's net income that derives from property owned by him within its borders, and from any business, trade, or profession carried on by him within its borders.[2] This state power is based upon the state's dominion over the property he owns, or over activity from which the income derives, and from the obligation to contribute to the support of a government that secures the collection of such income. Accordingly, a state may tax residents on income from rents of land located outside the state; from interest on bonds physically outside the state and secured by mortgage upon lands physically outside the state;[3] and from a trust created and administered in another state and not directly taxable to the trustee.[4] Further, the fact that another state has lawfully taxed identical income in the hands of trustees operating in that state does not necessarily destroy a domiciliary state's right to tax the receipt of income by a resident beneficiary.[5]

Amdt14.S1.7.2.8 Corporate Income Taxes and Foreign Corporations

Fourteenth Amendment, Section 1:

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

A tax based on the income of a foreign corporation may be determined by allocating to the state a proportion of the total,[1] unless the income attributed to the state is out of all appropriate proportion to the business transacted in the state.[2] Thus, a franchise tax on a foreign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.[3] Because the privilege granted by a

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[1] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[2] Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[3] New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[4] Maguire v. Trefy, 253 U.S. 12 (1920).

[5] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business in a state, the state may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York *ex rel.* Whitney v. Graves, 299 U.S. 366 (1937).

[1] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm'n, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the states to use apportionment formulae to allocate to each state for taxing purposes a fraction of the income earned by an integrated business conducted in several states as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a state's formulary apportionment taxes extraterritorial income improperly. *Moorman Mfg. Co. v. Bair*, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[2] Evidence may be submitted that tends to show that a state has applied a method that, although fair on its face, operates so as to reach profits that are in no sense attributable to transactions within its jurisdiction.Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

[3] Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

state to a foreign corporation of carrying on business supports a tax by that state, it followed that a Wisconsin privilege dividend tax could be applied to a Delaware corporation despite its having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.[4]

Amdt14.S1.7.2.9 Insurance Company Taxes

Fourteenth Amendment, Section 1:

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

A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the state does not deprive the company of property without due process,[1] but such a tax is invalid if the company has withdrawn all its agents from the state and has ceased to do business there, merely continuing to receive the renewal premiums at its home office.[2] Also violating due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, where the firm obtained the coverage of property within the state from an unlicensed out-of-state insurer that consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[3] However, a tax may be imposed upon the privilege of entering and engaging in business in a state, even if the tax is a percentage of the "annual premiums to be paid throughout the life of the policies issued." Under this kind of tax, a state may continue to collect even after the company's withdrawal from the state.[4]

A state may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third state to insure customers of the automobile sales corporation against loss of cars purchased through the automobile sales corporation, insofar as the cars go into the possession of a purchaser within the taxing state.[5] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other states who are not authorized to do business in the taxing state, cannot constitutionally

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[4] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice John Roberts, along with Chief Justice Charles Evans Hughes and Justices James McReynolds and Stanley Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many states does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also* Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).

[1] Equitable Life Society v. Pennsylvania, 238 U.S. 143 (1915).

[2] Provident Savings Ass'n v. Kentucky, 239 U.S. 103 (1915).

[3] State Bd. of Ins. v. Todd Shipyards, 370 U.S. 451 (1962).

[4] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).

[5] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).

be subjected to a 5% tax on the amount of premiums paid for such coverage.[6] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums on such contracts in Connecticut, and was liable in Connecticut for payment of losses claimed under such contracts, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of California residents. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that state.[7]

Amdt14.S1.7.3 Void for Vagueness

Fourteenth Amendment, Section 1:

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

The Supreme Court has invalidated both federal and state criminal statutes that lack sufficient definiteness or specificity as "void for vagueness." Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[1] A statute may also be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement or so broadly as to threaten constitutionally protected activity.

With respect to state and local actions, the Supreme Court has, for instance, voided for vagueness a state criminal law that subjects a "gangster" to fine or imprisonment, where neither common law nor the statute gave the words "gang" or "gangster" definite meaning;[2] an ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose";[3] and an ordinance that punished, among others, "persons wandering or strolling around from place without any lawful purpose or object."[4]

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[6] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).

[7] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S. 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the state of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.

[1] Musser v. Utah, 333 U.S. 95, 97 (1948).

[2] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[3] City of Chicago v. Morales, 527 U.S. 41 (1999).

[4] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). For more discussion of the void for vagueness doctrine, see Amdt5.8.1 Overview of Void for Vagueness Doctrine.

Amdt14.S1.8 Equal Protection

Amdt14.S1.8.1 Race-Based Classifications Generally

Amdt14.S1.8.1.1 Overview of Race-Based Classifications

Fourteenth Amendment, Section 1:

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

When the government legislates or acts on the basis of a "suspect" classification, the Court sets aside the traditional standard of equal protection review and exercises a heightened standard of review referred to as "strict scrutiny."[1] Paradigmatic of "suspect" categories is classification by race. Under the strict scrutiny standard, the government must demonstrate a compelling interest; usually little or no presumption favoring the classification is to be expected from courts. In addition, the government must demonstrate that its use or reliance on a racial classification is narrowly tailored to further that compelling interest.[2] Both prongs of the Court's strict scrutiny standard involve the case-by-case analysis of multiple factors.

Before settling on strict scrutiny for evaluating racial classifications for equal protection purposes, the Supreme Court's jurisprudence on racial classifications went through significant change over the years. In its 1944 decision *Korematsu v. United States*,[3] for example, the Court adjudicated the wartime forced removal of Japanese-Americans from the West Coast. In that case, the Court said that because government action targeted only a single ethnic-racial group it was "immediately suspect" and subject to "rigid scrutiny."[4] In the context of striking down state laws prohibiting interracial marriage or cohabitation in the late 1960s, the Court stated in its 1967 decision *Loving v. Virginia* that racial classifications "bear a far heavier burden of justification" than other classifications and that these state laws were invalid because no "overriding statutory purpose"[5] was shown and they were not necessary to some "legitimate overriding purpose."[6]

Meanwhile, not all racial classifications harm a particular group, and the Justices debated which standard to apply to racial classifications motivated by a "benign" interest to help or assist a particular racial group. The Court ultimately concluded in its 1995 decision *Adarand Constructors v. Pena*, that one standard—strict scrutiny—applies to evaluate all racial

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[1] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[2] *See, e.g.,* Fisher v. Univ. of Tex., 570 U.S. 297, 309–12 (2013).

[3] 323 U.S. 214, 216 (1944), *overruled by* Trump v. Hawaii, No. 17-965, slip op. at 38 (U.S. June 26, 2018). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.

[4] *Korematsu*, 323 U.S. at 216.

[5] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964)

[6] Loving v. Virginia, 388 U.S. 1, 11 (1967). In *Lee v. Washington*, 390 U.S. 333 (1968), the Court said that preservation of discipline and order in a jail might justify the use of racial classifications if shown to be necessary. *Accord* Johnson v. California, 543 U.S. 499, 512 (2005).

classifications.[7] Thus, government actions that use a racial classification to remedy or ameliorate conditions resulting from intentional discrimination must also undergo strict scrutiny.[8]

Amdt14.S1.8.1.2 Equal Protection and Rational Basis Review Generally

Fourteenth Amendment, Section 1:

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

Every draft leading up to the final version of Section 1 of the Fourteenth Amendment contained a guarantee of equal protection of the laws.[1] The Amendment's sponsors aimed to provide a firm constitutional basis for already-enacted civil rights legislation[2] and to ensure that equal protection could not be repealed by a simple majority in a future Congress.[3] There were, however, conflicting interpretations of the phrase "equal protection" among sponsors and supporters, and the legislative history does little to clarify whether any sort of consensus was accomplished, and if so, what it was.[4] Although the Court early recognized that African Americans were the primary intended beneficiaries of the new constitutional protections thus adopted,[5] the Amendment's language is not limited to any one racial or other group. Though efforts to argue for an expansive interpretation met with little initial success,[6] the equal protection standard ultimately came to apply to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties with regard to differential treatment of persons and classes.

While the traditional standard of review for equal protection challenges to government classifications developed largely, though not entirely, in the context of economic regulation,[7] it

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[7] 515 U.S. 200, 227 (1995).

[8] *Adarand*, 515 U.S. at 226; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[1] The story is recounted in Joseph B. James, The Framing of the Fourteenth Amendment (1956). *See also* The Journal of the Joint Committee of Fifteen on Reconstruction (Benjamin B. Kendrick ed., 1914). The floor debates are collected in 1 Statutory History of the United States: Civil Rights 181 (Bernard Schwartz ed., 1970).

[2] Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (now in part 42 U.S.C. §§ 1981, 1982). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[3] Much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36 (1894); 35 Stat. 1088 (1909). *See* Robert K. Carr, Federal Protection of Civil Rights: Quest for a Sword 45–46 (1947).

[4] Jacobus tenBroek, Equal Under Law (rev. ed., 1965); John P. Frank & Robert F. Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 Colum. L. Rev. 131 (1950); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); *see also* the essays collected in Howard J. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism (1968). In calling for reargument in *Brown v. Board of Education*, the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. 347 U.S. 483, 489–90 (1954).

[5] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

[6] In *Buck v. Bell*, Justice Oliver Wendell Holmes characterized the Equal Protection Clause as "the usual last resort of constitutional arguments." 274 U.S. 200, 208 (1927).

[7] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

appears in many other contexts as well,[8] including so-called "class-of-one" challenges to the government's alleged mistreatment of an individual.[9] The mere fact of classification will not void legislation,[10] because, in exercising its powers, a legislature has considerable discretion in recognizing differences between and among persons and situations.[11] The Court has observed: "[S]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."[12]

To determine whether a classification is permissible or invidious courts must first identify the characteristic used to classify.[13] For most classifications that do not involve an inherently suspect characteristic (such as sex or race) or a fundamental right (such as a personal constitutional right), the Court applies rational basis review.[14] This standard generally differentiates between permissible and impermissible classifications by asking whether "the statute is rationally related to a legitimate state interest."[15] Applying a presumption that legislation is valid, the Court has held that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude."[16] Recognizing that a classification may be overinclusive or underinclusive and pass rational basis review, the Court has stated: "If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."[17]

Amdt14.S1.8.1.3 Marriage and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[8] *See, e.g.,* Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

[9] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 595 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," *id.* at 598 (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. *Id.* at 599, 607.

[10] Atchison, T. & Santa Fe R.R. v. Matthews, 174 U.S. 96, 106 (1899). From the same period, see also Orient Ins. Co. v. Daggs, 172 U.S. 557 (1899); Bachtel v. Wilson, 204 U.S. 36 (1907); Watson v. Maryland, 218 U.S. 173 (1910). For later cases, see Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190, 210 n.23 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Schilb v. Kuebel, 404 U.S. 357 (1971); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[11] Barrett v. Indiana, 229 U.S. 26 (1913).

[12] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[13] City of Cleburne. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–42 (1985), *superseded by statute*, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1620 (codified at 42 U.S.C. § 3604).

[14] *Id.* at 440.

[15] *Id.* (holding disability status is not a suspect classification).

[16] *Id.*

[17] City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989) (internal quotation marks omitted).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,[1] as are statutes that penalize interracial cohabitation.[2] Nor may a court deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[3]

Amdt14.S1.8.1.4 Judicial System and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

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

Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[2] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[3]

Amdt14.S1.8.1.5 Public Designation and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

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

It is unconstitutional to designate candidates on the ballot by race,[1] and apparently, any sort of designation by race on public records is suspect, although not necessarily unlawful.[2]

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[1] Loving v. Virginia, 388 U.S. 1 (1967).

[2] McLaughlin v. Florida, 379 U.S. 184 (1964).

[3] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1] Johnson v. Virginia, 373 U.S. 61 (1963).

[2] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[3] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[1] Anderson v. Martin, 375 U.S. 399 (1964).

[2] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of White and Black citizens in voting, tax, and property records).

Amdt14.S1.8.1.6 Public Accommodations and Facially Non-Neutral Laws

Fourteenth Amendment, Section 1:

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

Whether discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[1] Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.[2]

Amdt14.S1.8.1.7 Political Process Doctrine

Fourteenth Amendment, Section 1:

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

The Court has also analyzed equal protection challenges to voter referenda approving restrictions or prohibitions on methods of addressing racial segregation.[1] In such cases, the Court must consider if a measure that changes how desegregation is implemented "distorts the political process for racial reasons."[2] In a 1982 case, *Washington v. Seattle School District*, the Court addressed circumstances in which Washington voters, following the Seattle school board's implementation of a mandatory busing program to reduce the racial isolation of minority students, approved an initiative banning school boards from assigning students to any but the nearest or next nearest school offering the students' course of study. The voter initiative included many exceptions that allowed the school board to assign students beyond nearby schools for various reasons, but notably had no exception that allowed the school board to bus students for desegregation purposes.[3] That same year, the Court addressed a California case, in which California state courts had interpreted the California constitution to require school systems to eliminate both de jure and de facto segregation. In that case, *Crawford v. Los Angeles Board of Education*, voters approved an initiative that prohibited state courts from

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[1] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[2] Title II, 78 Stat. 243, 42 U.S.C. §§ 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, *see* the opinions in *Bell v. Maryland,* 378 U.S. 226 (1964).

[1] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Crawford v. Bd. of Educ. of L.A., 458 U.S. 527 (1982). The decisions were in essence an application of *Hunter v. Erickson*, 393 U.S. 385 (1969).

[2] *Crawford*, 458 U.S. at 541. Justice Harry Blackmun characterized, as violating the political process doctrine, "classifications that threaten the ability of minorities to involve themselves in the process of self-government," including "reallocat[ing] decisionmaking authority." 458 U.S. at 546 (Blackmun, J., concurring).

[3] *Washington*, 458 U.S. at 462–63. *See also id.* at 471 (noting the district court's finding that "the text of the initiative was carefully tailored to interfere only with desegregative busing.").

ordering busing unless the school segregation violated the Fourteenth Amendment, and a federal judge would have power to order busing under Supreme Court precedent.[4]

By a 5-4 margin, the Court held that the Washington measure was unconstitutional, but upheld the California measure with near unanimity of result if not of reasoning. The Court held that the Washington measure was unconstitutional because it imposed a different and more severe burden on school boards to address racial desegregation through busing than it imposed on any other educational policy.[5] While local school boards could make education policy on a range of matters, they required state level approval to bus students for desegregation purposes.[6] By imposing these greater burdens on school boards, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[7]

By contrast, the Court found no such racially discriminatory differences[8] or motive in the California measure. There, the Court described the voter initiative as a simple repeal of a desegregation remedy that the federal Constitution did not require.[9] "It would be paradoxical," the Court observed, "to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[10] Having previously gone beyond the requirements of the federal Constitution, the Court concluded that the state was free to "pull back" to a standard that conformed to federal requirements.[11] In addition, the lower court found no evidence indicating that voters were motivated by a discriminatory purpose in enacting the measure.[12] "In sum," the Court stated, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[13] Concurring in the result, Justice Harry Blackmun, joined by Justice William Brennan, distinguished the California measure because it merely repealed "the right to invoke a judicial busing remedy."[14] Because

[4] *Crawford*, 458 U.S. at 535–40 (1982).

[5] *Washington*, 458 U.S. at 474–81. *See id.* at 474 ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests.").

[6] *Id.* at 480 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'") (citation omitted).

[7] *Washington*, 458 U.S. at 470–82 (1982). Justice Harry Blackmun wrote the opinion of the Court, which Justices William Brennan, Byron White, Thurgood Marshall, and John Paul Stevens joined. Justices Lewis Powell, William Rehnquist, Sandra Day O'Connor, and Chief Justice Warren Burger dissented, essentially arguing that because the state was ultimately entirely responsible for all educational decisions, its choice to take back power it had delegated was permissible. *Id.* at 488. The Court reviewed an arguably analogous referendum measure (a state constitutional amendment) in *Romer v. Evans*, but declined to extend the political process doctrine beyond the context of race. 517 U.S. 620, 627 (1996). The provision barred state and local entities from applying antidiscrimination protections based on sexual orientation. The state supreme court concluded that the measure infringed on the rights of gays and lesbians to participate in the political process. While the United States Supreme Court found an equal protection violation because the law "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies," it did not rely on the political process doctrine. *See Romer*, 517 U.S. at 627, 640 n.1 (Scalia, J., dissenting) (stating that the majority "implicitly rejects" the rationale that the amendment denied equal participation "in the political process").

[8] *Crawford*, 458 U.S. at 536–37.

[9] *Id.* at 539, 542.

[10] *Id.* at 535.

[11] *Id.* at 542.

[12] *Id.* at 545.

[13] *Id.* at 539.

[14] *Id.* at 546 (Blackmun, J., concurring).

legislatures, and not courts, create laws, in his view the measure did not reallocate decision making authority in constitutionally meaningful way.[15]

In its 2014 *Schuette v. Coalition to Defend Affirmative Action* decision,[16] the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by the state's voters, to prohibit admissions preferences at state universities based on race, color, ethnicity, national origin, or sex.[17] Six Justices agreed that the Michigan amendment did not violate the Equal Protection Clause, but *Schuette* produced no majority opinion on the legal rationale for that conclusion.[18] A three-Justice plurality of the *Schuette* Court construed its earlier precedent to invalidate state voter initiatives on equal protection grounds only where the state action "had the serious risk, if not purpose, of causing specific injuries on account of race."[19] Finding no similar risks of injury with regard to the Michigan amendment and no similar allegations of past discrimination in the Michigan university system,[20] the plurality ultimately concluded there was no basis to set aside the state amendment.[21] The plurality opinion questioned and rejected aspects of the Court's analysis in *Washington v. Seattle School District*,[22] while two other Justices argued that that decision, and *Hunter v. Erickson*, 393 U.S. 385 (1969), should be overturned in their entirety.[23]

Amdt14.S1.8.1.8 Peremptory Challenges

Fourteenth Amendment, Section 1:

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

Following its 1880 *Strauder v. West Virginia* decision that a law that discriminates in selecting jurors based on their color violates the Fourteenth Amendment's Equal Protection Clause,[1] the Court recognized that excluding a defendant's racial or ethnic group from the

[15] *Id.*

[16] 572 U.S. 291 (2014).

[17] *Id.* at 299.

[18] Justice Anthony Kennedy wrote the plurality opinion, which Chief Justice John Roberts and Justice Samuel Alito joined. Justice Antonin Scalia authored an opinion concurring in the judgment, which Justice Clarence Thomas joined. *Id.* at 316 (Scalia, J., concurring in judgment). Justice Stephen Breyer also wrote an opinion concurring in the judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Stephen Breyer noted that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring that the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) individual school administrations, rather than elected officials, had adopted the underlying racial preference policy. *Id.* at 336 (Breyer, J., concurring in judgment). Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, dissented. *Id.* at 341, 357–58 (Sotomayor, J., dissenting). Justice Elena Kagan recused herself.

[19] *Id.* at 305.

[20] *Id.* at 310.

[21] *Id.* at 314.

[22] *Id.* at 307–10.

[23] *Id.* at 322 (Scalia, J., concurring in judgment).

[1] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte* Virginia, 100 U.S. 339 (1880), *superseded by statute,* 42 U.S.C. § 1981. In *Hernandez v. Texas,* 347 U.S. 475 (1954), the Court found jury discrimination against

grand jury[2] that indicts them or the petit jury[3] that tries them, or from both,[4] denies the defendant equal protection of the laws and requires reversing the conviction or dismissing the indictment.[5] Even if the defendant's race differs from that of the excluded jurors, the Court has held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.[6] Indeed, people categorically excluded from jury service may seek affirmative relief to outlaw discrimination in the procedures a jurisdiction uses to call and qualify jurors, as the Court has held that "[d]efendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection."[7] The Court has further noted that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[8]

A plaintiff can make out a prima facie case of deliberate and systematic exclusion by showing that no Black citizens have served on juries for a period of years[9] or that the number of Black jurors who served was grossly disproportionate to the percentage of Black citizens eligible for jury service.[10] Once this prima facie showing has been made, the Court has held that the burden is upon the jurisdiction to prove that it had not practiced discrimination and testimony by jury selection official that they did not discriminate is not sufficient.[11] Although the Court, in cases with great racial disparities, has voided certain practices that facilitated discrimination,[12] it has not outlawed discretionary jury selection pursuant to general standards of educational attainment and character that can be administered fairly.[13]

Mexican-Americans to be a denial of equal protection, a ruling it reiterated in *Castaneda v. Partida,* 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[2] Bush v. Kentucky, 107 U.S. 110 (1883), *superseded by statute as stated in* Georgia v. Rachel, 384 U.S. 780 (1966); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[3] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[4] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[5] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. *Cassell*, 339 U.S. 282; Alexander v. Louisiana, 405 U.S. 625; Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

[6] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in *Taylor v. Louisiana*, involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board. 419 U.S. 522 (1975).

[7] Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970)

[8] *Id.*; Turner v. Fouche, 396 U.S. 346 (1970).

[9] *Norris*, 294 U.S. 587; *Patton*, 332 U.S. 463; Hill v. Texas, 316 U.S. 400 (1942).

[10] Pierre v. Louisiana, 306 U.S. 354 (1939); *Cassell*, 339 U.S. 282; Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); *Alexander*, 405 U.S. 625. For a discussion of statistical proof, see Castaneda v. Partida, 430 U.S. 482 (1977).

[11] *Norris*, 294 U.S. 587; *Whitus*, 385 U.S. 545; Sims v. Georgia, 389 U.S. 404 (1967); *Fouche*, 396 U.S. at 360–361.

[12] Avery v. Georgia, 345 U.S. 559 (1953) (names of White and Black citizens listed on differently colored paper for drawing for jury duty); *Whitus*, 385 U.S. 545 (jurors selected from county tax books, in which names of African Americans were marked with a "c").

[13] *Carter*, 396 U.S. at 331–37, and cases cited.

Similarly, the Court declined to rule that African Americans must be included on all-White jury commissions that administer jury selection laws in some states.[14]

In its 1965 *Swain v. Alabama* decision,[15] the Court examined a circumstance where African Americans regularly appeared on jury venires but no African American had actually served on a petite jury in fifteen years.[16] The reason no Black jurors served in defendant's case, the Court found, was that attorneys used peremptory challenges—which allow them to remove a certain number of potential jurors without justification—to eliminate potential African American jurors.[17] Nevertheless, the Court refused to set aside the conviction. The Court held the prosecution could use peremptory challenges to exclude African Americans in this particular case, regardless of motive, but indicated that consistent use of such challenges to remove African Americans across many cases would violate equal protection.[18] Because the record did not show that the prosecution was solely responsible for African Americans' absence from the jury and suggested the defense requested some exclusions, the Court rejected the defendant's claims.[19]

In *Batson v. Kentucky*, however, the Court overruled *Swain*'s holding as to the evidentiary standard, ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial."[20] To rebut this showing, the Court explained, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[21] The Court further stated: "Although the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[22] After such a rebuttal, the Court noted: "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the

[14] *Carter*, 396 U.S. at 340–41.

[15] 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

[16] *Id.* at 205, 223.

[17] *Id.* at 210.

[18] *Id.* at 223.

[19] *Id.* at 224.

[20] *Batson*, 476 U.S. at 96. A prima facie case of purposeful discrimination can be established by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93–94. A state, however, cannot require that a defendant prove a prima facie case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[21] *Batson*, 476 U.S. at 98. The principles were applied in *Trevino v. Texas*, holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. 503 U.S. 562 (1992). In *Hernandez v. New York*, a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. 500 U.S. 352 (1991).

[22] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." *Id.* at 337–38. Justice Stephen Breyer, joined by Justice David Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider Batson's test and the peremptory challenge system as a whole." *Id.* at 344.

strike.'"[23] The Court also noted deference due to the trial court's determination of discriminatory intent, commenting: "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."[24]

Notably, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[25] Indeed, in post-*Batson* review, the Court has closely reviewed transcripts of jurors' pretrial voir dire questioning, applying a "comparative juror analysis."[26] In this analysis, the Court considers the minority jurors the prosecution struck and the reasons it gave for each strike at the *Batson* hearing before trial.[27] Then the Court will see if there were similar, White jurors the prosecution did not strike. Inconsistencies could show that the alleged race-neutral reasons for striking minority jurors are pretextual.[28] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[29] and by a defendant in a criminal case,[30] as peremptory challenges always encompass state action, and cannot be considered mere private conduct.[31]

Discrimination in selecting grand jury foremen presents a closer question, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court "assume[d] without deciding" that a judge's discrimination in selecting foremen for state grand juries would violate equal protection in a system in which the foreman served as a thirteenth voting juror and exercised significant powers.[32] The Court did not reach

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[23] *Rice*, 546 U.S. at 338 (citations omitted). *See also* Snyder v. Louisiana, 522 U.S. 472, 485 (2008) (citation omitted) ("[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a Batson case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution.").

To rule on a *Batson* objection based on a prospective juror's demeanor during voir dire, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror's demeanor. Thaler v. Haynes, 559 U.S. 43 (2010).

[24] Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal habeas review. Felkner v. Jackson, 562 U.S. 594, 598 (2011) (per curiam) (citation omitted).

[25] *See, e.g.*, Flowers v. Mississippi, No. 17-9572, slip op. at 2–3 (U.S. June 21, 2019) (reasoning that "[f]our critical facts" when "taken together" established the trial court's "clear error" in concluding that the state's exercise of a peremptory strike was not "motivated in substantial part by discriminatory intent": (1) the state's use of "peremptory challenges to strike 41 of the 42 black prospective jurors" over the course of the defendant's six trials; (2) the state's exercise of "peremptory strikes against five of the six black prospective jurors" at the sixth trial; (3) the "dramatically disparate questioning of black and white prospective jurors"; and (4) the state's use of a peremptory strike against one black prospective juror who was "similarly situated to white prospective jurors who were not struck" (internal quotation marks omitted)); Foster v. Chatman, 578 U.S. 488, 499–511 (2016) (applying the three-step process set forth in *Batson* to allow a death row inmate to pursue an appeal on the grounds that the state court's conclusion that the defendant had not shown purposeful discrimination during voir dire was clearly erroneous given that the prosecution's justifications for striking Black jurors, while seeming "reasonable enough," had "no grounding in fact," were contradicted by the record, and had shifted over time); *Snyder*, 552 U.S. at 483 (finding the prosecution's race-neutral explanation for its peremptory challenge of a Black juror to be implausible, and that this "implausibility" was "reinforced by the prosecutor's acceptance of white jurors" whom the prosecution could have challenged for the same reasons that it claimed to have challenged the Black juror); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (finding discrimination in the use of peremptory strikes based on various factors, including the high ratio of African Americans struck from the venire panel, some of whom were struck on grounds that "appeared equally on point as to some white jurors who served").

[26] *Miller-El*, 545 U.S. at 241.

[27] *Id.*

[28] *Id. See also Flowers*, slip op. at 17–18.

[29] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[30] Georgia v. McCollum, 505 U.S. 42 (1992).

[31] *Edmonson*, 500 U.S. at 622.

[32] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

the same result, however, in a decision on a due process challenge to the federal system, where the foreman's responsibilities were "essentially clerical" and where the judge chose the foreman from among the members of an already chosen jury.[33]

In its 1987 decision *McCleskey v. Kemp*[34] the Court rejected an equal protection claim based on statistical evidence of systemic racial discrimination in sentencing, declining to extend the jury selection rules. The defendant, a Black man who received a death sentence after being convicted for murdering a White victim, presented a statistical study showing that defendants charged with murdering White people were more than four times likely to receive a death sentence in the state than defendants charged with killing Black people.[35] The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, relying on statistical proof of discrimination is less appropriate.[36] The Court stated: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[37] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination because jurors deciding sentencing issues may not be required to testify to their motives unlike attorneys selecting jurors.[38]

Amdt14.S1.8.2 Segregation in Education

Amdt14.S1.8.2.1 Brown v. Board of Education

Fourteenth Amendment, Section 1:

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

Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[1] but the Court in *Plessy v. Ferguson*[2] adopted a principle first propounded in litigation attacking racial segregation in the schools of

[33] Hobby v. United States, 468 U.S. 339 (1984). In this limited context where injury to the defendant is largely conjectural, the Court seemingly revived the same class rule, holding that a White defendant challenging excluding Black people and women from being a grand jury foreperson on due process grounds could not rely on equal protection principles protecting Black defendants from "the injuries of stigmatization and prejudice" associated with discrimination. *Id.* at 347.

[34] 481 U.S. 279 (1987). The decision was 5-4. Justice Lewis Powell's opinion for the Court was joined by Chief Justice William Rehnquist and Justices Byron White, Sandra Day O'Connor, and Antonin Scalia. Justices William Brennan, Harry Blackmun, John Paul Stevens, and Thurgood Marshall dissented.

[35] *Id.* at 320 (Brennan, J., dissenting).

[36] *Id.* at 294. Dissenting Justices William Brennan, Harry Blackmun and John Paul Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. *Id.* at 340, 347–48, 366.

[37] *Id.* at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or the nature of the offense. The Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. *Id.* at 296.

[38] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. *Id.* at 296 n.17.

[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880).

[2] 163 U.S. 537 (1896).

Boston, Massachusetts.[3] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power."[4] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."[5]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African Americans and sent to school with them rather than with white students,[6] and it upheld the refusal of an injunction to require a school board to close a White high school until it opened a high school for African Americans.[7] And no violation of the Equal Protection Clause was found when a state law prohibited a private college from teaching White and Black students together.[8]

In 1938, the Court began to move away from "separate but equal." It held that a state that operated a law school open to White students only violated a Black applicant's right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.[9] When Texas established a law school for African Americans after the plaintiff had applied and been denied admission to the school maintained for Whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the White school necessarily meant that the separate school was unequal.[10] Equally objectionable was the fact that when Oklahoma admitted an African American law student to its only law school it required him to remain physically separate from the other students.[11]

"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[12] which involved challenges to segregation per se in the schools of four states in which the lower courts

[3] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[4] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 552, 559.

[5] 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice John Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped black students with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 552, 559.

[6] Gong Lum v. Rice, 275 U.S. 78 (1927).

[7] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[8] Berea College v. Kentucky, 211 U.S. 45 (1908).

[9] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[10] Sweatt v. Painter, 339 U.S. 629 (1950).

[11] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[12] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in *Bolling v. Sharpe,* 347 U.S. 497 (1954).

had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867. . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the Equal Protection Clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[13]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." In any event, however, the lower courts were to require compliance "with all deliberate speed."[14]

Amdt14.S1.8.2.2 Aftermath of Brown v. Board of Education

Fourteenth Amendment, Section 1:

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

Following its decisions in *Brown I* and *II*, the Supreme Court addressed numerous states' and localities' refusals to comply with its mandates. Four years after *Brown I*, for example, the Court in *Cooper v. Aaron* described various actions taken by Arkansas state authorities, including amending the state constitution to direct the Arkansas state legislature to "oppose" the Supreme Court's *Brown* decisions.[1] The issue before the Court in *Cooper* concerned the first stage of an Arkansas local school board's desegregation plan—admitting nine Black students to a high school of over 2,000 students in Little Rock, Arkansas.[2] The Governor had

[13] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

[14] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1] Cooper v. Aaron, 358 U.S. 1, 8–9 (1958). *See also id.* at 4 ("As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. . . . Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*").

[2] *Id.* at 9. *See also id.* at 8 ("While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment.").

ordered the Arkansas National Guard to block their attendance,[3] and after the Guard withdrew under court order, the President of the United States sent federal troops to facilitate the admission of the nine students in late September of 1957.[4] Following these actions, the local school board petitioned to postpone all further steps to desegregate and withdraw the Black students already admitted to the high school,[5] pointing to the continued public hostility which the school board alleged had been provoked by other state authorities.[6] A unanimous Supreme Court affirmed the lower court's denial of that petition,[7] stating: "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature."[8]

While racial segregation in public education is commonly associated with K-12 schools, numerous public institutions of higher education—such as public colleges, law schools, and doctoral programs—had White-only admissions policies that barred Black students from matriculating solely because of their race.[9] After *Brown*, the Court weighed in on circumstances like those in *Cooper v. Aaron* in the higher education context as well, this time involving the state legislature and Governor of Mississippi's efforts to block the admission of the first Black student to the University of Mississippi.[10] Ultimately, the University admitted the student, James Meredith, upon federal court order, under the escort of United States Marshals.[11]

In addition to cases involving public confrontation by state authorities, the Supreme Court, in the early 1960s,[12] also ruled on various other state and local practices designed to

[3] *Id.* at 9–11.

[4] *Id.* at 12.

[5] *Id.* at 12–13.

[6] *Id.* at 12 ("Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible.").

[7] *Id.* at 14.

[8] *Id.* at 16.

[9] *See generally*, *e.g.*, United States v. Fordice, 505 U.S. 717, 721 (1992) (discussing the historical background of Mississippi's public higher education system; stating that "Mississippi launched its public university system in 1848 by establishing . . . an institution dedicated to the higher education exclusively of white persons"); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632 (1948) (analyzing an equal protection claim concerning a Black student who was "concededly qualified" for admission to Oklahoma's only public law school, but had been denied admission "solely because of her color"); Knight v. Alabama, 14 F.3d 1534, 1538 (11th Cir. 1994) ("In very broad terms, for more than a century following its admission to the Union in 1819, Alabama denied blacks all access to college-level public higher education and did so for the purpose of maintaining the social, economic, and political subordination of black people in the state. . . . Following Reconstruction, blacks were excluded from the universities attended by whites, relegated instead only to vastly inferior institutions that did not even begin to offer college-level courses until required to do so by a 1938 Supreme Court decision."). For more information, see Christine J. Back & JD S. Hsin, Cong. Rsch. Serv., R45481, "Affirmative Action" and Equal Protection in Higher Education (2019), https://crsreports.congress.gov/product/pdf/R/R45481.

[10] *See* United States v. Barnett, 376 U.S. 681, 683–86 (1964).

[11] *See id.* at 686. For further discussion, see also Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962) (per curiam) and Meredith v. Fair, 313 F.2d 534 (5th Cir. 1962) (per curiam), *cert. denied in both cases*, 372 U.S. 916 (1963).

[12] Around this time, the Court repeatedly expressed concern over delays in racial desegregation. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 382 U.S. 103, 105 (1965) (stating that "more than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed,'" and "[d]elays in desegregating school systems are no longer tolerable.") (citations omitted); Watson v. City of Memphis, 373 U.S. 526, 529–33 (1963) (reversing lower court judgment inviting city to submit "a plan calling for an even longer delay in effecting desegregation"; observing that it "is now more than 9 years since" the Court's *Brown* decision and stating that "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions").

evade or delay school desegregation, such as school closings[13] and minority transfer plans.[14] Numerous jurisdictions also adopted "pupil placement laws," which automatically reassigned students to the segregated school they had previously attended, unless a state entity changed that assignment at its discretion.[15] While some lower courts had held that parents and students could not challenge such practices in federal court unless they had exhausted state law procedures,[16] the Supreme Court rejected such arguments.[17] "The right alleged," the Court explained, "is as plainly federal in origin and nature as those vindicated in *Brown v. Board of Education*," and not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed."[18]

Various jurisdictions also implemented "freedom of choice" plans[19] which generally provided that each child in a school district could choose which school to attend each year. In its

[13] In *Griffin v. Prince Edward County School Board*, the Court addressed a Virginia county's closing its public schools in 1959, in response to a federal court's desegregation order. 377 U.S. 218, 222–23 (1964). A private foundation was formed to operate private schools exclusively for White children in the county, and the state and county enacted tuition grants for children to attend private schools and tax concessions for those who made financial contributions to private schools. *Id.* at 223–24. Discussing these state actions, the Court observed that the segregated schools "although designated as private, are beneficiaries of county and state support." *Id.* at 230–31. The evidence, the Court concluded, "could not be clearer" that the public school closure and private school operations put in place were "to ensure, through measures taken by the county and the State, that white and colored children . . . would not, under any circumstances, go to the same school." *Id.* at 231. The Court concluded that enjoining the state and county from paying tuition grants and giving tax credits was "appropriate and necessary" while public schools remained closed and further stated that the district court could require state authorities to levy taxes to raise funds adequate for reopening and maintaining a desegregated school system, "if necessary to prevent further racial discrimination." *Id.* at 232–33. The lower court could also issue an order to reopen schools "if required to assure these petitioners that their constitutional rights will no longer be denied them." *Id.* at 233–34. "The time for mere 'deliberate speed' has run out." *Id.* at 234. On other school closing legislation, see Bush v. Orleans Parish Sch. Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

[14] In *Goss v. Knoxville Bd. of Educ.*, the Court addressed the transfer plans of two Tennessee localities that allowed students to transfer from a school where they would be in the racial minority to a school where they would be in the racial majority. 373 U.S. 683, 684–87 (1963). "Here," the Court observed, "the right of transfer . . . is a one-way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation." *Id.* at 687. The Court further noted that race was the only factor for the transfer, with no "provision whereby a student might with equal facility transfer from a segregated to a desegregated school," which "underscores the purely racial character and purpose of the transfer provisions. We hold that the transfer plans promote discrimination and are therefore invalid." *Id.* at 688. *See also* Monroe v. Bd. of Com'rs of Jackson, 391 U.S. 450, 458 (1968) (holding that a "free transfer" plan "does not meet respondent's 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'") (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968). A grade-a-year plan was implicitly disapproved in *Calhoun v. Latimer,* 377 U.S. 263 (1964), *vacating and remanding* 321 F.2d 302 (5th Cir. 1963).

[15] *See Green*, 391 U.S. at 433 (describing Virginia's Pupil Placement Act, which had divested local school boards of the authority to assign children to schools, and automatically reassigned children to the school they had previously attended unless a state board, upon a student's application, assigned them to another school at its discretion). *See also*, *e.g.*, Northcross v. Bd. of Educ. of Memphis, 302 F.2d 818, 820–21, 823 (6th Cir. 1962) (describing the Tennessee Pupil Assignment Law, enacted in 1957, which among other things, assigned "all children who had previously been enrolled in the schools to the same schools that they had attended under the constitutional and statutory separate racial system" until graduation, unless both parents requested a transfer); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95, 98 (4th Cir. 1959); Gibson v. Bd. of Pub. Instruction, 272 F.2d 763, 765–66 (5th Cir. 1959).

[16] *See*, *e.g.*, Covington v. Edwards, 264 F.2d 780, 781–83 (4th Cir. 1959) (affirming the dismissal of the plaintiffs' desegregation claims because they had failed to exhaust the state law's administrative procedures for seeking review and remedy relating to school assignments), *cert. denied*, 361 U.S. 840 (1959); Parham v. Dove, 271 F.2d 132, 137–39 (8th Cir. 1959) (concluding that the plaintiffs were required, among other things, to exhaust state law procedures for challenging racially segregating school assignments before filing suit in federal court).

[17] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668, 669–71, 674 (1963) (where plaintiffs brought a legal challenge under 42 U.S.C. § 1983 alleging intentional racial segregation in Illinois public schools, rejecting the argument that plaintiffs were required to exhaust administrative remedies under an Illinois statute before filing suit in federal court).

[18] *Id.* at 674.

[19] *See generally* United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 878 (5th Cir. 1966) (describing the actions of school boards located throughout the Fifth Circuit Court of Appeals and stating that school boards first failed to take action "that might be considered a move toward integration," then adopted Pupil Placement Laws "likely

1968 decision *Green v. School Board of New Kent County*,[20] the Court addressed whether a Virginia county school district's "freedom of choice" plan was sufficient to satisfy the mandate of *Brown II*.[21] The county's two schools—one formerly designated only for White students and the other for Black students[22]—remained segregated by race through 1964.[23] Under the county's 1965 "freedom of choice" plan, each student chose between those two schools each year, and if no choice was made, students were assigned to the school previously attended.[24] The school board argued that its plan satisfied its constitutional obligations, and asserted that for the Court to rule otherwise would read the Fourteenth Amendment to require "compulsory integration."[25] The Court rejected that argument as "ignor[ing] the thrust of *Brown II*," which requires "the dismantling of well-entrenched dual systems."[26] *Brown II*, the Court stated, "clearly charged [public entities] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[27] Emphasizing the county's "deliberate perpetuation" of a racially segregated school system well after its *Brown* decisions,[28] the Court concluded that the county's plan "cannot be accepted as a sufficient step" to transition to a unitary school system[29] and held that a "freedom of choice" plan "is not an end in itself" in the context dismantling a dual school system.[30] In the three years under the county's plan, the Court further observed that the system remained racially segregated and "burden[ed] children and their parents with a responsibility which *Brown II* placed squarely on the School Board."[31] The Court ordered the Board to create a new plan and "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."[32] The Court in other cases further held that school desegregation encompassed not only eliminating dual systems as they relate to student assignments, but also the merging of faculty,[33] staff, and services into one system.[34]

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to lead to no more than a little token desegregation," and stating that "[n]ow they turn to freedom of choice plans," which "as now administered, necessarily promotes resegregation"). Other lower courts had first approved such plans, subject to the reservation that they be fairly administered. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 345 F.2d 310 (4th Cir. 1965), *rev'd on other grounds*, 382 U.S. 103 (1965); Bowman v. Cnty. Sch. Bd., 382 F.2d 326 (4th Cir. 1967), *vacated*, 391 U.S. 430 (1968).

[20] 391 U.S. 430 (1968).

[21] *Id.* at 431–32.

[22] *Id.* at 432.

[23] *Id.* at 433.

[24] *Id.* at 434.

[25] *Id.* at 437.

[26] *Id.*

[27] *Id.* at 435–38.

[28] *Id.* at 438.

[29] *Id.* at 441.

[30] *Id.* at 440.

[31] *Id.* at 441–42.

[32] *Id.* at 442. *See also* Raney v. Bd. of Educ. of Gould Sch. Dist., 391 U.S. 443, 444–48 (1968) (addressing a "freedom of choice" plan and holding that it was inadequate to convert the state-imposed segregated school system into a "unitary, nonracial school system").

[33] Bradley v. Sch. Bd. of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order establishing a minimum racial ratio for faculty and staff so that at each school in the district had a substantially similar ratio of Black and White teachers and staff).

[34] More generally, the enactment of Title VI of the Civil Rights Act of 1964 and enforcement of that statute by the U.S. Department of Health, Education, and Welfare (HEW) also influenced the analysis of federal courts. *See*, *e.g.*, Davis v. Bd. of Sch. Comm'rs, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965). HEW's guidelines were also references for state and local officials.

Amdt14.S1.8.2.3 Implementing School Desegregation

Fourteenth Amendment, Section 1:

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

Following its 1968 decision *Green v. County School Board of New Kent County*,[1] the Court continued to encounter school districts' refusals to comply with its *Brown* decisions.[2] In another case involving the forty-third largest school system in the United States at the time, the Court thus undertook to define "in more precise terms" the duty of school authorities and federal courts to implement "*Brown I* and the mandate to eliminate dual systems and establish unitary systems at once."[3] Observing that lower courts "have struggled in hundreds of cases with a multitude and variety of problems" to implement its directives,[4] the Court in its 1971 decision *Swann v. Charlotte-Mecklenburg Board of Education* sought to address "with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause."[5]

In *Charlotte-Mecklenburg*, the Court stated that the "first remedial responsibility of school authorities is to eliminate invidious racial distinctions"—not only in student assignment, but also in other areas such as transportation, faculty and staff, extracurricular activities, building maintenance and equipment.[6] The Court emphasized that apart from the racial composition of a school's student body, if it is "possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities," such features were indicative that a school district had failed to satisfy its constitutional obligations to dismantle its dual system and continued to deprive Black students of their rights to equal protection.[7] Although "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law,"[8] where a proposed desegregation plan "contemplates the continued existence" of such schools, school authorities must "satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."[9]

When school authorities fail in their obligations to dismantle state-sponsored racial segregation, the Court has held that a district court has "broad power to fashion a remedy that

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[1] 391 U.S. 430 (1968).

[2] *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971) (observing that "the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities"). *See, e.g.,* Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam) ("The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court.").

[3] *Charlotte-Mecklenburg*, 402 U.S. at 6.

[4] *Id.*

[5] *Id.* at 18.

[6] *Id.*

[7] *Id.* (stating that "a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown" where such racial identifiability remains).

[8] *Id.* at 26.

[9] *Id.*

will assure a unitary school system,"[10] with "the nature of the violation determin[ing] the scope of the remedy."[11] For "a system that has been deliberately constructed and maintained to enforce racial segregation," the Court explained, a court may, and sometimes must, order race-based student assignments to desegregate.[12] As the Court elaborated in a subsequent case, *McDaniel v. Barresi*,[13] "steps will almost invariably require that students be assigned 'differently because of their race'" in this remedial context, as "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."[14]

The Court in *Charlotte-Mecklenburg* specifically laid out several methods for undoing dual systems, such as set ratios for redistributing faculty and students to desegregated schools,[15] the race-conscious redrawing of school districts and attendance zones,[16] considering desegregation in new school construction,[17] and transporting students through busing.[18] Considering faculty reassignments, the Court rejected arguments "that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation"[19] and upheld a district court order setting a minimum ratio of Black to White faculty assigned to each school.[20] The Court similarly upheld a court-ordered minimum ratio of Black to White students in various schools, describing the district court's use of ratios in that case as "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement."[21] The Court also emphasized that the district court's remedy came after the local authorities had undisputedly continued their dual school system at least fifteen years after the Court's *Brown* decision,[22] and "had totally defaulted" in presenting "an acceptable [desegregation] plan."[23] If the district court, however, had required, "as a matter of substantive constitutional right, any particular degree of racial balance or mixing," the Court observed that it would have reversed such an

[10] *Id.* at 16.

[11] *Id.*

[12] *See id.* at 28. *Contra* the Court's decision in *Bazemore v. Friday*, in which the Court held that the adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy. 478 U.S. 385 (1986) (per curiam). There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. *Id.* at 408 (White, J., concurring opinion endorsed by the Court's per curiam opinion).

[13] 402 U.S. 39 (1971).

[14] *Id*. at 41. *See also* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.").

[15] *Charlotte-Mecklenburg*, 402 U.S at 18–20, 22–25.

[16] *Id.* at 27–29.

[17] *Id.* at 20–21.

[18] *Id.* at 29–31.

[19] *Id.* at 19–20.

[20] *Id.*

[21] *Id.* at 25.

[22] *Id.* at 24–25 ("As the voluminous record in this case shows, the predicate for the District Court's use of the 71%–29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969").

[23] *Id.* at 24.

order, as the constitutional requirement to dismantle dual systems "does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[24]

The Court in *Charlotte-Mecklenburg* also held that courts and school authorities not only may, but sometimes must, alter attendance boundaries and group or pair noncontiguous school attendance zones to desegregate dual systems and undo past official action.[25] Describing the "gerrymandering of school districts and attendance zones" as "one of the principal tools" to break up a dual system, the Court acknowledged that while the zones "are neither compact nor contiguous," such "awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."[26] Transporting students to and from school through busing is also a permissible tool of educational and desegregation policy, particularly in circumstances such as those in *Swann* where assigning children "to the school nearest their home . . . would not produce an effective dismantling of the dual system."[27] Discussing specific features of the busing plan ordered by the district court in *Swann*, the Court upheld the lower court's remedial decree, stating that "[d]esegregation plans cannot be limited to the walk-in school." [28] More generally, the Court stated that when valid objections are raised to transporting students, such as when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process," lower courts must "weigh the soundness of any transportation plan" in light of various factors including other features of the desegregation plan at issue.[29]

Finally, the Court stated, neither "school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."[30]

Amdt14.S1.8.2.4 Scope of Remedial Desegregation Orders and Ending Court Supervision

Fourteenth Amendment, Section 1:

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

Following *Swann v. Charlotte-Mecklenburg Board of Education*, the Court addressed other legal challenges to district court desegregation orders, and continued to affirm the broad authority of federal courts to order remedial actions[1] while also modifying or reversing court

[24] *Id.*

[25] *Id.* at 27–28.

[26] *Id.*

[27] *Id.* at 30.

[28] *Id.*

[29] *Id.* at 30–31.

[30] *Id.* at 32.

[1] 402 U.S. 1 (1971). Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional

orders that it found were unwarranted or excessive given the evidence at issue.[2] In *Milliken v. Bradley*,[3] for example, the Court set aside a court-ordered desegregation plan spanning the city of Detroit and fifty-three adjacent suburban school districts. The Court held that such a broad remedy could only be implemented to cure an interdistrict constitutional violation if state officials and officials in those suburban school districts were responsible, at least in part, for the segregation between the districts, through either discriminatory actions affecting the larger Detroit area or constitutional violations within one of the school districts that had produced a substantial segregative effect in another district.[4] The Court in *Milliken* found the evidence insufficient to support an interdistrict remedy in that case.[5] The Court stated: "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy".[6]

Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for de jure, or state-sanctioned, racial separation in public schools across the country. Among these remedial methods, busing created a great amount of controversy, though the Court in *Charlotte-Mecklenburg* sanctioned it as a permissible desegregation tool.[7] Around that time, Congress enacted several provisions, either permanent statutes or annual appropriations limits, attempting to restrict the power of federal courts and administrative agencies to order or to require busing, but these proved largely ineffectual.[8] Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none were enacted.[9]

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violation.'"); Milliken v. Bradley, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."). *See also* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power.").

[2] *See*, *e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–36 (1976) (holding that the district court had exceeded its authority when it required local authorities to readjust, indefinitely, its student attendance zones every year to avoid the creation of a majority of any minority in any public school in the city, "though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible" and the local authorities had already instituted a race-neutral student assignment plan). In *Hills*, the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities." 425 U.S. at 293. In other places, the Court stressed the absence of interdistrict violations and in still others paired the two reasons. *Id.* at 294, 296. In *Spallone v. United States*, the Court held that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. 493 U.S. 265 (1990). Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[3] 418 U.S. 717 (1974).

[4] *Id.* at 745.

[5] *Id.* While the Court found the evidence insufficient to support an interdistrict remedy, the four dissenters contended, among other things, that pervasive state involvement warranted an interdistrict order; that only an interdistrict order would fulfill the State's obligation to establish a unitary system; and that the Court's decision "cripple[d] the ability of the judiciary" to effectively desegregate large metropolitan areas. *Id.* at 762–81 (White, Douglas, Brennan, and Marshall, JJ., dissenting).

[6] *Id.* at 745. More generally, in a series of cases, the Court disallowed disparate impact analysis in constitutional interpretation and adopted an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), *superseded by statute,* Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). This principle applies in the school context. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[7] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971).

[8] *E.g.*, Civil Rights Act of 1964 § 407(a), 78 Stat. 248 (codified at 42 U.S.C. § 2000c-6), construed to cover only de facto segregation in *Charlotte-Mecklenburg*, 402 U.S. at 17–18; Education Amendments of 1972, § 803, 86 Stat. 372 (codified at 20 U.S.C. § 1653) (expired), interpreted in Drummond v. Acree, 409 U.S. 1228 (1972) (Powell, J., in chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1758), *see especially* § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976), and United States v. Tex. Educ. Agency, 532 F.2d 380, 394 n.18 (5th Cir. 1976),

Amdt14.S1.8.2.4
Scope of Remedial Desegregation Orders and Ending Court Supervision

With many desegregation decrees in operation across the country, the Court also considered how a school district must comply to free itself of continuing court supervision. In a 1991 case involving Oklahoma City public schools, the Court in *Oklahoma City Board of Education v. Dowell*[10] stated that a desegregation decree may be lifted upon a showing that the purposes of the litigation have been "fully achieved"—that is, that the school district has been operating "in compliance with the commands of the Equal Protection Clause" "for a reasonable period of time," and that it is "unlikely" to return to its former violations.[11] The Court instructed that a lower court assessing whether to lift a desegregation order "should look not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extra-curricular activities and facilities.'"[12] On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [de jure] discrimination had been eliminated to the extent practicable."[13]

The Court also held that a federal court may incrementally withdraw its supervision over a school district upon a showing of compliance in particular areas of the system, such as student assignment and physical facilities, while retaining jurisdiction over other areas in which the system had not demonstrated full compliance. In its 1992 decision *Freeman v. Pitts*,[14] the Court stated that a federal court "has the discretion to order an incremental or partial withdrawal of its supervision and control,"[15] and may "relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[16]

Amdt14.S1.8.2.5 Remaining Vestiges of Unconstitutional Racial Segregation

Fourteenth Amendment, Section 1:

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

Public institutions of higher education were also segregated by race, and the Court addressed desegregation efforts in that context as well. In its 1992 decision *United States v.*

vacated on other grounds sub nom. Austin Indep. Sch. Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 208, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460 (codified at 42 U.S.C. § 2000d), upheld against facial attack in *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

[9] *See, e.g.*, *14th Amendment and School Busing: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982); and *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982).

[10] 498 U.S. 237 (1991).

[11] *Id*. at 247–48 (stating that "a finding by the District Court that [a school district] was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved"; also referring to a school board's compliance with a desegregation order "for a reasonable period of time" before dissolving the desegregation order). *See also id.* at 248.

[12] *Id.* at 250 (quoting Green v. Cnty. Sch. Bd., 391 U.S. 439, 435 (1968)).

[13] *Dowell*, 498 U.S. at 249–50.

[14] 503 U.S. 467 (1992).

[15] *Id.* at 489.

[16] *Id.* at 490–91.

Fordice,[1] the Court determined that Mississippi had not, by adopting race-neutral admissions policies, eliminated all vestiges of its prior de jure, racially segregated higher education system.[2] The Court held that the Equal Protection Clause requires that a state, to the extent practicable and consistent with sound educational practices, must eradicate policies and practices that are traceable to its dual system and that continue to have segregative effects.[3] The Court identified several surviving aspects of Mississippi's prior dual system that were constitutionally suspect and that had to be justified or eliminated, including the widespread duplication of programs throughout the public university system, which was a remnant of the dual "separate-but-equal" system; institutional mission classifications that made three formerly White-only schools and no formerly Black-only schools the flagship "comprehensive" universities with the most expansive academic offerings; and the retention and operation of all eight schools rather than the possible merger of some.[4]

Amdt14.S1.8.3 Segregation in Other Contexts

Amdt14.S1.8.3.1 Overview of Segregation in Other Contexts

Fourteenth Amendment, Section 1:

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

While school desegregation cases are perhaps the best known examples of the Supreme Court's treatment of racial segregation under the Equal Protection Clause, the Court has struck down forced separation based on race in many other contexts. Indeed, the Court struck down several segregation laws before its landmark 1954 decision in *Brown v. Board of Education*, which effectively brought to a close the "separate but equal" precedent the Court had established in its 1896 decision *Plessy v. Ferguson*.[1] In most of these racial segregation cases, the parties disputed whether various levels of state involvement in private discrimination amounted to state action.

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[1] 505 U.S. 717 (1992).

[2] *Id.* at 729 ("We do not agree with the Court of Appeals or the District Court . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."). *See also id.* at 733 (stating that "there are several surviving aspects of Mississippi's prior dual system which are constitutionally suspect; for even though such policies may be race neutral on their face, they substantially restrict a person's choice of which institution to enter, and they contribute to the racial identifiability of the eight public universities. Mississippi must justify these policies or eliminate them.").

[3] *Id.* at 729–31.

[4] *Id.* at 733–42. For further discussion, see Christine J. Back & JD S. Hsin, Cong. Rsch. Serv., R45481, "Affirmative Action" and Equal Protection in Higher Education (2019), https://crsreports.congress.gov/product/pdf/R/R45481.

[1] While *Brown v. Board of Education,* 347 U.S. 483 (1954), is frequently described as having overruled *Plessy v. Ferguson,* 163 U.S. 537 (1896), *Brown*'s language is more limited, providing only that "We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 495. In *Brown*, the Court distinguished potentially conflicting case law as not addressing *Brown*'s ultimate holding, stating: "[I]n Cumming v. County Board of Education, 175 U.S. 528 (1899), and Gong Lum v. Rice, 275 U.S. 78 (1927), the validity of the doctrine [of 'separate but equal' in public education] itself was not challenged." *Id.* at 491. Instead, the Court addressed *Plessy* expressly in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), recognizing *Brown*'s significance for *Plessy*. The *Bob Jones* Court stated: "But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson*, 163 U.S. 537 (1896); racial segregation in primary and secondary education prevailed in many parts of the country. . . . This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), signalled an

Amdt14.S1.8.3.2 Housing and Segregation

Fourteenth Amendment, Section 1:

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

In the housing context, the Court addressed legal challenges to city ordinances, private covenants, and state constitutional amendments that imposed various racial restrictions. In 1917, for example, the Court in *Buchanan v. Warley*[1] invalidated an ordinance that prohibited "colored people" from occupying houses in blocks where the greater number of houses were occupied by any "white person," and prohibited "white people" from living on blocks where the greater number of houses were occupied by "colored people." The Court declined to apply *Plessy v. Ferguson* because, in *Buchanan*, the statute barred the plaintiff landowner from living on his property.[2] While it had approved the doctrine of "separate but equal" treatment of racial minorities in transportation and education, the Court said, the Fourteenth Amendment would not allow the state to interfere with property rights based on race.[3] In 1948, the Court extended *Buchanan* to invalidate restrictive covenants—private title conditions that barred property transfer based on race. The Court held that although these private arrangements did not themselves violate the Equal Protection Clause, the judicial enforcement of them, either by injunctive relief or through damage actions, did.[4]

In its 1967 case, *Reitman v. Mulkey*,[5] the Court again considered potential state involvement in private housing discrimination. It reviewed the referendum passage of a California state constitutional amendment that repealed a "fair housing" law and declared that a property seller could turn away any buyer for any reason. The Court held the amendment unconstitutional, pointing out that it aimed to repeal anti-discrimination measures and "intended to authorize, and does authorize, racial discrimination in the housing market."[6] The Court acknowledged it had no "infallible test" for determining when state involvement in private discrimination was unconstitutional.[7] But, deferring to the state supreme court decision invalidating the amendment, it agreed that this provision effectively immunized private discrimination. "Those practicing racial discriminations need no longer rely solely on their personal choice," the Court noted. "They could now invoke express constitutional authority . . ."[8] In contrast, the Court, in its 1971 decision *James v. Valtierra*, held that a California constitutional requirement singling out low-rent housing projects for

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end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. An unbroken line of cases following *Brown* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones*, 461 U.S. at 592–93.

[1] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

[2] *Buchanan*, 245 U.S. at 73, 79.

[3] *Id.* at 79–81.

[4] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[5] 387 U.S. 369 (1967).

[6] *Id.* at 381.

[7] *Id.* at 378.

[8] *Id.* at 377.

special referendum approval did not violate the Equal Protection Clause.[9] The Court did not see the measure as drawing any racial distinctions, ruling that it was race-neutral in its terms and not racially motivated.[10] The Court has also held that provision of publicly assisted housing must be nondiscriminatory, ordering the federal Department of Housing and Urban Development to remedy segregative practices.[11]

Amdt14.S1.8.3.3 Transportation and Segregation

Fourteenth Amendment, Section 1:

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

In 1896, the Supreme Court endorsed the "separate but equal" doctrine in the transportation context in *Plessy v. Ferguson*,[1] but after the Court dismissed the doctrine's applicability in education in *Brown v. Board of Education*, the Court revisited the doctrine in transportation.[2] Even before *Brown*, the Court had found that a state statute that permitted carriers to provide sleeping and dining cars for White persons only violated equal protection;[3] held that a carrier's provision of unequal, or nonexistent, first class accommodations to Black travelers violated the Interstate Commerce Act;[4] and voided state-required segregation on interstate carriers as a burden on commerce.[5] In 1960, the Court in *Boynton v. Virginia* overturned a trespass conviction of an interstate Black bus passenger who had refused to leave a restaurant.[6] The Court determined that the restaurant, essential to the facilities devoted to interstate commerce, fell under the Interstate Commerce Act.

Amdt14.S1.8.3.4 Public Facilities and Segregation

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[9] 402 U.S. 137 (1971).

[10] *Id.* at 141.

[11] Hills v. Gautreaux, 425 U.S. 284, 297 (1976). Meanwhile, apart from legal challenges based on the Equal Protection Clause, two federal statutes prohibit private racial discrimination in the sale or rental of housing. Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 82 Stat. 73, 42 U.S.C. §§ 3601 et seq. The Fair Housing Act, as construed by the Court, reaches some actions that, while not made with discriminatory intent, have a disparate impact based on race. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc., 576 U.S. 519 (2015).

[1] Plessy v. Ferguson, 163 U.S. 537 (1896).

[2] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). In *Bailey v. Patterson*, the Court stated: "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. This question is no longer open; it is foreclosed as a litigable issue." 369 U.S. 31, 33 (1962).

[3] McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151 (1914). The Court did not enjoin the state statute, however, concluding that plaintiffs lacked standing. *Id.*

[4] Mitchell v. United States, 313 U.S. 80 (1941); *see also* Henderson v. United States, 339 U.S. 816 (1950) (holding railroad's segregation policies violated the Interstate Commerce Act.

[5] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

[6] 364 U.S. 454 (1960).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Beginning in the 1950s, the Court also struck down the segregation of publicly provided or supported facilities and functions, summarily vacating and remanding a long series of cases for reconsideration under *Brown*.[1] In 1963, the Court held segregated courtroom seating a "manifest violation" of equal protection.[2] That same year, the Court held that neither expense nor potential public unrest warranted granting Memphis more time for "gradual desegregation" of its parks.[3] It also held that a municipality could not operate a racially segregated park, even though a private party, in bequeathing the park to the city, had imposed a Whites-only rule.[4] As the Court saw it, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[5] Such was the case with the park, which the city maintained even after private trustees were appointed.[6] Rather than desegregate the park, however, the Court ruled that a state court could hold that the trust had failed and hand the park over to the decedent's heirs.[7] Similarly, the Court held in 1971 that a municipality under court order to desegregate its publicly owned swimming pools could comply by closing the pools instead, so long as it completely stopped operating them.[8]

Amdt14.S1.8.3.5 Private Businesses and Segregation

Fourteenth Amendment, Section 1:

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

While the Constitution does not reach private discrimination, the Court will act if "to some significant extent the State in any of its manifestations has been found to have become involved in it."[1] After *Brown*, the Court decided several cases finding state participation in

[1] *E.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[2] Johnson v. Virginia, 373 U.S. 61, 62 (1963).

[3] Watson v. City of Memphis, 373 U.S. 526, 528, 535, 539 (1963). The Court declined to hold that delays tolerated in post-*Brown* school desegregation authorized delays in other public services. *Id.*

[4] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee. *Id.*

[5] *Id.* at 299.

[6] *Id.* at 301.

[7] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in carrying out the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the Equal Protection Clause. *Id.*

[8] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that there was no unlawful discrimination because both White and Black citizens were deprived of the use of the pools. *Id.*

[1] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

segregating private businesses. Thus, the Court reversed trespass convictions for Black boys and girls who sat at a "Whites only" lunch counter, given that a city ordinance required separate dining facilities.[2] Extending this holding, the Court reversed convictions of patrons who refused a manager's instructions to leave a "Whites only" restaurant, noting that the Florida state board of health required racially separate toilet facilities in restaurants.[3] Even though Florida did not explicitly bar integrated dining spaces, the Court held that the segregation regulations "embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together."[4] This degree of state involvement violated equal protection. So did New Orleans city officials' statements, even with no ordinance or regulation, that they would not tolerate "sit-in demonstrations."[5] Based on this official endorsement of local segregation customs, the Court overturned convictions for Black patrons who refused a manager's order to leave a segregated lunch counter.[6] The Court also found state action, and a constitutional violation, when a Delaware restaurant leasing city property refused to serve a Black patron.[7] The Court held that the state, "[b]y its inaction" in permitting discriminatory uses of its property, "has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."[8]

Amdt14.S1.8.4 Facially Non-Neutral Laws Benefiting Racial Minorities

Amdt14.S1.8.4.1 Early Doctrine on Appropriate Scrutiny

Fourteenth Amendment, Section 1:

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

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of "reverse discrimination," in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class.[1] Although the Court had previously accepted the use of suspect criteria such as race to

[2] Peterson v. City of Greenville, 373 U.S. 244, 247 (1963).

[3] Robinson v. Florida, 378 U.S. 153, 156 (1964).

[4] *Id.* at 156.

[5] Lombard v. Louisiana, 373 U.S. 267, 270 (1963).

[6] *Id.* at 273–74.

[7] Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961).

[8] *Id.* at 725.

[1] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that White people were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. *Id.* at 280 n.8. In *United Steelworkers v. Weber,* 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

formulate remedies for specific instances of past discrimination[2] and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination,[3] it was not until the late 1970s that the Court gave plenary review to programs that expressly used race as the primary consideration for awarding a public benefit.[4]

In *United Jewish Organizations v. Carey*,[5] New York State had drawn a plan that consciously used racial criteria to create districts with "nonwhite" populations in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhite citizens. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.[6]

Justice Byron White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice Byron White argued that compliance with the Act necessarily required states to be race conscious in the drawing of lines so as not to dilute minority voting strength. Justice Byron White noted that this requirement was not dependent upon a showing of past discrimination and that the states retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[7]

Second, Justice Byron White wrote that, irrespective of what the Voting Rights Act may have required, what the state had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to White citizens or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength, because as a class White citizens would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[8]

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[2] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[3] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[4] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in *DeFunis v. Odegaard,* 416 U.S. 312 (1974), but the Court did not reach the merits.

[5] 430 U.S. 144 (1977). Chief Justice Warren Burger dissented, *id.* at 180, and Justice Thurgood Marshall did not participate.

[6] For a detailed discussion of the use of racial considerations in apportionment and districting by the states, see Amendment 14: Section 1: Rights Guaranteed: Fundamental Interests: The Political Process: Apportionment and Districting.

[7] 430 U.S. at 155–65. Joining this part of the opinion were Justices William Brennan, Harry Blackmun, and John Paul Stevens.

[8] 430 U.S. at 165–68. Joining this part of the opinion were Justices John Paul Stevens and William Rehnquist. In a separate opinion, Justice William Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. *Id.* at 168. Justices Potter

It was anticipated that *Regents of the University of California v. Bakke*[9] would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In *Bakke*, the Davis campus medical school admitted 100 students each year. Of these slots, the school set aside sixteen of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other eighty-four places. Twice denied admission, Bakke sued, arguing that had the sixteen positions not been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.[10]

Four Justices, in an opinion by Justice William Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications, however, could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[11]

Justice Lewis Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[12] Justice Lewis Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.[13]

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the

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Stewart and Lewis Powell concurred, agreeing with Justice Byron White that there was no showing of a purpose on the legislature's part to discriminate against White voters and that the effect of the plan was insufficient to invalidate it. *Id.* at 179.

[9] 438 U.S. 265 (1978).

[10] Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. *See* 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Stevens, Stewart, and Rehnquist, JJ., and Burger, C.J.). The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the Equal Protection Clause proscribed. 438 U.S. at 284–87 (Powell, J.,), 328–55 (Brennan, White, Marshall, and Blackmun, JJ.). They thus reached the constitutional issue.

[11] 438 U.S. at 355–79 (Brennan, White, Marshall, and Blackmun, JJ.). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359.

[12] 438 U.S. at 287–320.

[13] *See* 438 U.S. at 319–20 (Powell, J.).

result in *Bakke*. In *Fullilove v. Klutznick*,[14] the Court, still lacking a majority opinion, upheld a federal statute requiring that at least 10% of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Thurgood Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[15]

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these findings need not be extensive nor express and may be collected in many ways.[16] Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination.[17] But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.[18]

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans.[19] As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to Section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[20] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In

[14] 448 U.S. 448 (1980). Justice Stewart Potter, joined by Justice William Rehnquist, dissented in one opinion, *id.* at 522, while Justice John Paul Stevens dissented in another. *Id.* at 532.

[15] 448 U.S. at 517.

[16] Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled, but that they have some such power seems evident. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in Section 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[17] 448 U.S. at 484–85, 489 (Burger, C.J.), 513–15 (Powell, J.).

[18] 448 U.S. at 484–89 (Burger, C.J.), 514–15 (Powell, J.), 520–21 (Marshall, J.).

[19] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency). The constitutionality of the agency's plan was not challenged. *See id.* at 620 n.2.

[20] 476 U.S. 267 (1986).

United States v. Paradise,[21] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice Byron White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[22] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[23]

Amdt14.S1.8.4.2 Modern Doctrine on Appropriate Scrutiny

Fourteenth Amendment, Section 1:

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

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[1] the Court invalidated a minority set-aside requirement that holders of construction contracts with the City subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the City's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC*[2] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[3]

In *Croson*, the Court ruled that the City had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the

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[21] 480 U.S. 149 (1987).

[22] 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved.476 U.S. at 274–76 (opinion of Powell, J., joined by Burger, C.J., and by Rehnquist and O'Connor, JJ.).

[23] 480 U.S. at 182–83 (opinion of Brennan, J., joined by Marshall, Blackmun, and Powell, JJ.). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (Brennan, J.), *id.* at 189 (Stevens, J.).

[1] 488 U.S. 469 (1989). *Croson* was decided by a 6-3 vote. The portions of Justice Sandra Day O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice William Rehnquist and by Justices Byron White, John Paul Stevens, and Anthony Kennedy. The latter two Justices joined only part of Justice Sandra Day O'Connor's opinion; each added a separate concurring opinion. Justice Antonin Scalia concurred separately; Justices Thurgood Marshall, William Brennan, and Harry Blackmun dissented.

[2] 497 U.S. 547 (1990). This was a 5-4 decision, Justice William Brennan's opinion of the Court being joined by Justices Byron White, Thurgood Marshall, Harry Blackmun, and John Paul Stevens. Justice Sandra Day O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Antonin Scalia and Anthony Kennedy, and Justice Anthony Kennedy added a separate dissenting opinion joined by Justice Antonin Scalia.

[3] 497 U.S. at 564–65.

number of minorities qualified to undertake the particular task."[4] The Court also said that because the ordinance defined "minority group members" to include "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," this expansive definition "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-Black racial minorities in the Richmond construction industry.[5] It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[6]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction."[7]

Metro Broadcasting was noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to Section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.[8] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena*[9] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore,

[4] 488 U.S. at 501–02.

[5] 488 U.S. at 506.

[6] 488 U.S. at 508.

[7] 497 U.S. at 600. Justice Sandra Day O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" *Id.* at 607 (quoting *Fullilove*, 448 U.S. at 473).

[8] 497 U.S. at 563 & n.11. For the dissenting views of Justice Sandra Day O'Connor *see id.* at 606–07. *See also Croson*, 488 U.S. at 504 (opinion of Court).

[9] 515 U.S. 200 (1995). This was a 5-4 decision. Justice Sandra Day O'Connor's opinion for Court was joined by Chief Justice William Rehnquist, and by Justices Anthony Kennedy, Clarence Thomas, and—to the extent not inconsistent with his own concurring opinion—Antonin Scalia. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer dissented.

that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed."[10]

By applying strict scrutiny, the Court was in essence affirming Justice Lewis Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Lewis Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Lewis Powell's line of reasoning in the cases of *Grutter v. Bollinger*[11] and *Gratz v. Bollinger*.[12]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (for example, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (for example, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." Although, the policy did not limit the seeking of diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[13]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[14] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.[15]

The law school's admission policy in *Grutter*, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was

[10] 515 U.S. at 227 (emphasis original).

[11] 539 U.S. 306 (2003).

[12] 539 U.S. 244 (2003).

[13] 539 U.S. at 316.

[14] 539 U.S. at 335.

[15] *Grutter*, 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 298 (2013) (citation omitted). In its 2013 decision in *Fisher*, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in *Fisher* addressing the Texas program directly. *See* Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198 (2016).

that an applicant would be entitled to twenty points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[16]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Lewis Powell's decision in *Bakke*. Although Justice Lewis Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[17] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing twenty points to every applicant from an "underrepresented minority" group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity.[18]

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin's (UT's) use of "scores" based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP).[19] The Court itself suggested that the "sui generis" nature of the UT program,[20] coupled with the "fact that this case has been litigated on a somewhat artificial basis" because the record lacked information about the impact of Texas's TTPP,[21] may limit the decision's value for "prospective guidance."[22] Nonetheless, certain language in the Court's decision, along with its application of the three "controlling factors" set forth in the Court's 2013 decision in *Fisher*,[23] seem likely to have some influence, as they represent the Court's most recent jurisprudence on whether and when institutions of higher education may take race into consideration in their admission decisions. Specifically, the 2016 *Fisher* decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university's "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances"[24] and emphasized that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy

[16] 539 U.S. at 272–73.

[17] 438 U.S. at 317.

[18] 438 U.S. at 284–85.

[19] *Fisher II*, 136 S. Ct. at 2206.

[20] *Id.* at 2208.

[21] *Id.* at 2209.

[22] *Id.*

[23] Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 298 (2013). The first of these principles is that strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Id.* at 309. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an "academic judgment" to which "some, but not complete, judicial deference is proper." *Id.* at 310. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests "about as well" and "at tolerable administrative expense." *Id.* at 312.

[24] *Fisher II*, 136 S. Ct. at 2209–10.

without refinement."[25] Nonetheless, while citing these constraints, the 2016 *Fisher* decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state's compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.[26] The Court further concurred with UT's view that the alleged "critical mass" of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,[27] and that UT had found other means of promoting student-body diversity were unworkable.[28] In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a "reasoned, principled explanation" of the university's interests and its efforts to achieve those interests in a manner that was no broader than necessary.[29] The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy once the university has provided sufficient support for its approach.[30]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[31] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[32] As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

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[25] *Id.*

[26] *Id.* at 2210–11. On the other hand, the Court emphasized that the university cannot claim educational benefits in "diversity writ large." *Id.* at 2211. "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id.* The Court also noted that the asserted goals of UT's affirmative action program "mirror" those approved in earlier cases (for example, ending stereotypes and promoting cross-racial understanding). *Id.* at 2211.

[27] *Id.* at 2211–13. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately 75% of the incoming class is admitted under the 10% plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. *Id.* at 2212.

[28] *Id.* at 2212–14.

[29] *Id.* at 2211 ("Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record").

[30] *Id.* at 2211–12.

[31] 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[32] In Seattle, students could choose among ten high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall White/non-White racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's Black enrollment to fall below 15% or exceed 50%. *Id.* at 2749.

In an opinion by Chief Justice John Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[33] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Anthony Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,[34] suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[35] As Justice Anthony Anthony Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice John Roberts' opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[36]

Amdt14.S1.8.5 Facially Neutral Laws Implicating Racial Minorities

Fourteenth Amendment, Section 1:

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

A classification made expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or whether a person was born out of wedlock triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1] But when it is contended that a law, which is

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[33] 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." *Id.* at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

[34] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Anthony Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

[35] 127 S. Ct. at 2760–61. Some other means suggested by Justice Anthony Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[36] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'").

[1] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). A law may be unconstitutional even if it does not facially discriminate on the basis of race, if it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." Washington v. Seattle School Dist., 458 U.S. 457, 470 (1982).

in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the Equal Protection Clause, a much more difficult case is presented.

In *Washington v. Davis*, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.[2] For a time, in reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation, lower courts had questioned this proposition.[3] Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate number of Black applicants, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.[4] Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.[5] These cases were disapproved in *Davis*, but the Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true

[2] 426 U.S. 229, 242 (1976) ("[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. *Id.* at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *See also* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4-H Clubs is permissible, given wholly voluntary nature of membership).

[3] The principal case was *Palmer v. Thompson,* 403 U.S. 217 (1971), in which a 5-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, *id.* at 224–26, but it also drew the conclusion (and the *Davis* Court read it as actually deciding) that, because the pools were closed for everyone, not just Black residents, there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

[4] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[5] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between de facto and de jure segregation. In *Cisneros v. Corpus Christi Indep. School Dist.,* 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "de facto and de jure nomenclature" to be "meaningless." After the distinction was reiterated in *Keyes v. Denver School District,* 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decision-maker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded for reconsideration in light of* Washington v. Davis, 426 U.S. 229 (1976), *modified and adhered to*, 564 F.2d 162, *reh. denied*, 579 F.2d 910 (5th Cir. 1977–78), *cert denied*, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in *Massachusetts Personnel Adm'r v. Feeney,* 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 464–65 (1979).

that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[6]

The application of *Davis* in the following Terms led to both elucidation and not a little confusion. Looking to a challenged zoning decision of a local board that had a harsher impact upon Black and low-income persons than upon others, the Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*[7] explained in some detail how inquiry into motivation would work. First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing "a discriminatory purpose" among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive.[8] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case.[9] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decision-makers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."[10] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender-based; too many men are non-veterans to permit such a conclusion, and some women are veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . .

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[6] *Washington v. Davis*, 426 U.S. at 242 (1976).

[7] 429 U.S. 252 (1977).

[8] 429 U.S. at 265–66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor White people would also be disenfranchised thereby).

[9] *Arlington Heights*, 429 U.S. at 266.

[10] *Arlington Heights*, 429 U.S. at 267–68.

It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[11]

Moreover, in *City of Mobile v. Bolden*[12] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to separately evaluate each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against Black and Hispanic citizens by listing and weighing a series of factors which in totality showed invidious discrimination, but the Court did not consider whether its ruling was premised on discriminatory purpose or adverse impact.[13] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[14] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[15] But, contemporaneously with Congress's statutory rejection of the *Mobile* plurality standards,[16] the Court, in *Rogers v. Lodge*,[17] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence"[18] that is more reminiscent of pre-*Washington v. Davis* cases than of the more recent decisions.

Rogers v. Lodge was also a multimember electoral district case brought under the Equal Protection Clause[19] and the Fifteenth Amendment. The fact that the system operated to cancel

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[11] Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the Equal Protection Clause. *But compare* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), *and* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[12] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the Equal Protection Clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context.

[13] *White v. Regester,* 412 U.S. 755 (1973), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice Byron White, the author of *Register*, dissented in *Mobile*, 446 U.S. at 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Harry Blackmun, *id.* at 80, and Justices William Brennan and Thurgood Marshall, agreed with him as alternate holdings, *id.* at 94, 103.

[14] 446 U.S. at 65–74.

[15] 446 U.S. at 73–74. The principal formulation of the test was in *Zimmer v. McKeithen,* 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[16] By the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), *see* S. Rep. No. 417, 97th Congress, 2d Sess. 27–28 (1982), Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote, and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[17] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice Byron White and joined by Chief Justice Warren Burger and Justices William Brennan, Thurgood Marshall, Harry Blackmun, and Sandra Day O'Connor. Justices Lewis Powell and William Rehnquist dissented, *id.* at 628, as did Justice John Paul Stevens. *Id.* at 631.

[18] 458 U.S. at 618–22 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S. 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. *Id.* at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

[19] The Court confirmed the *Mobile* analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U.S. at 619 n.6.

out or dilute the votes of black citizens, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[20] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no Black person had ever been elected in the county, in which Black citizens were a majority of the population but a minority of registered voters, was "important evidence of purposeful exclusion."[21] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of Black citizens from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the Black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the Black population as being both a result of past discrimination and a barrier to Black citizens' access to voting power.[22] As for the district court's application of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[23] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that the plaintiff's showing that 79% of the county's population was Spanish-surnamed, whereas jurors selected in recent years ranged from 39% to 50% Spanish-surnamed, was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[24] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights*, which was regularized and open to inspection.[25] Thus, jury cases are likely to continue to be special cases and, in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

In *Department of Homeland Security v. Regents of the University of California*, a four-Justice plurality rejected an equal protection challenge to the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program.[26] The DACA program offered "immigration relief" in the form of "favorable treatment" for

[20] 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

[21] 458 U.S. at 623–24.

[22] 458 U.S. at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of Black citizens, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[23] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-4, Justice Harry Blackmun writing the opinion of the Court and Chief Justice Warren Burger and Justices Potter Stewart, Lewis Powell, and William Rehnquist dissenting. *Id.* at 504–07.

[24] 430 U.S. at 493–94. This had been recognized in *Washington v. Davis,* 426 U.S. 229, 241 (1976), and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 266 n.13 (1977).

[25] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

[26] 140 S. Ct. 1891, 1915 (2020) (plurality opinion). A majority of the Court held that the Department's decision to rescind DACA was "arbitrary and capricious" under the Administrative Procedure Act and remanded the case so the Department could "consider the problem anew." *Id.* at 1914, 1916 (majority opinion). Four Justices who dissented from this aspect of the Court's decision concurred in the judgment rejecting the equal protection claim. *Id.* at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1935–36 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

certain people who arrived in the United States as children.[27] The plaintiffs argued that the rescission decision violated equal protection guarantees because it was motivated by impermissible animus, "evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission," which included shifting positions about whether to continue the program; "and (3) pre- and post-election statements by President Trump" that were critical of Latinos.[28] With respect to the first factor, the plurality found that this disparate impact was "expected" based on the fact that "Latinos make up a large share of the unauthorized alien population."[29] On the second factor, the plurality said the Administration's "decision to reevaluate DACA . . . was a natural response" to new concerns about the program's legality.[30] And finally, the plurality concluded that the President's statements, "remote in time and made in unrelated contexts," were not probative of other Executive officials' decision to rescind the program.[31]

Amdt14.S1.8.6 Voting Rights

Amdt14.S1.8.6.1 Voting Rights Generally

Fourteenth Amendment, Section 1:

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

The Supreme Court's equal protection jurisprudence as applied to voting laws has most prominently been developed in the context of redistricting. The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons, which is known as the *equality standard* or the principle of *one person, one vote*.[1] In 1964, the Court interpreted provisions of the Constitution stating that Representatives are to be chosen "by the People of the several States"[2] and "apportioned among the several States . . . according to their respective Numbers"[3] to require that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[4] Later that year, the Court extended the equality standard to apply to state legislative redistricting under the Equal Protection Clause, requiring all participants in

[27] *Id.* at 1901 (majority opinion).

[28] *Id.* at 1915 (plurality opinion).

[29] *Id.* at 1915–16.

[30] *Id.* at 1916.

[31] *Id.*

[1] *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) (holding that the conception of political equality means one person, one vote).

[2] U.S. Const. art. I, § 2, cl. 1. *See* ArtI.S2.C1.1 Congressional Districting.

[3] U.S. Const. amend. XIV, § 2. cl. 1.

[4] Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

an election "to have an equal vote."[5] In a series of rulings since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among electoral districts is required.[6]

The issue of partisan gerrymandering, which is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[7] has been litigated before the Supreme Court over the last three decades. In 1986, the Court ruled that partisan gerrymandering in state legislative redistricting was justiciable under the Equal Protection Clause, but a majority of the Justices could not agree on a test for ascertaining a violation.[8] In 2019, the Court held that there were no judicially "discernible and manageable standards" for ascertaining violations.[9]

While the denial of the franchise on the basis of race or color violates the Fifteenth Amendment, election laws that treat voters differently based on race can also violate the guarantee of equal protection under the Fourteenth Amendment.[10] Hence, under certain circumstances, redistricting maps that dilute and weaken Black and other minority voting strength may be held unconstitutional.[11] Much of the Supreme Court's redistricting jurisprudence has been prompted by disputes concerning the interplay between the requirements of the Voting Rights Act (VRA) and the constitutional standards of equal protection.[12] That is, under certain circumstances, the VRA may require the creation of one or more majority-minority districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[13] A *majority-minority district* is one in which a racial or language minority group comprises a voting majority.[14] The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.[15] However,

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[5] Reynolds v. Simms, 377 U.S. 533, 557–58 (1964). *See also* Connor v. Johnson, 402 U.S. 690 (1971); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972); White v. Weiser, 412 U.S. 783 (1973).

[6] *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[7] Ariz. State Leg. v. Ariz. Independent Redistricting Comm'n, 576 U.S. 787, 791 (2015).

[8] Davis v. Bandemer, 478 U.S. 109 (1986).

[9] Rucho v. Common Cause, No. 18–422, slip op. at 20 (2019). *See* Amdt14.S1.8.6.3 Partisan Gerrymandering. *See also* North Carolina v. Covington, No. 17–1364, slip op. at 9–10 (2018) (per curiam) ("[S]tate legislatures have primary jurisdiction over legislative reapportionment and a legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law. A district court is 'not free . . . to disregard the political program of' a state legislature on other bases.").

[10] *See, e.g.,* Hunt v. Cromartie, 526 U.S. 541 (1999); Hunter v. Underwood, 471 U.S. 222 (1985); Richardson v. Ramirez, 418 U.S. 24 (1974); Wright v. Rockefeller, 376 U.S. 52 (1964).

[11] *See, e.g.,* Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (finding that, if proven, appellants' claim that a city-wide redistricting map will discriminate based on race will constitute a violation of the Fourteenth and Fifteenth Amendments to the Constitution); *see also* Rogers v. Lodge, 458 U.S. 613 (1982); City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980); Wise v. Lipscomb, 437 U.S. 535 (1978); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).

[12] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Equal Protection Clause of the Constitution. *See* Shaw v. Reno, 509 U.S. 630, 639–52 (1993) (*Shaw I*). *See* Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

[13] 52 U.S.C. §§ 10301, 10303(f). *See also* Upham v. Seamon, 456 U.S. 37, 41 (1982) (per curiam) (emphasizing that the drawing of legislative districts "is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so") (internal quotation marks omitted).

[14] *See* Bartlett v. Strickland, 556 U.S. 1, 13 (2009).

[15] *See* Thornburg v Gingles, 478 U.S. 30, 46–47 (1986).

congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the Constitution.[16] According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is to be applied.[17] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[18] These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries.[19]

The Supreme Court has applied principles of equal protection to various types of requirements for voting and elections. According to the Supreme Court, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . absent of course the discrimination which the Constitution condemns."[20] For example, in examining voter qualification laws, the Court invalidated excessive durational residency requirements[21] and poll tax requirements,[22] but upheld a requirement that voters present government-issued photo identification.[23] With regard to ballot access requirements, which establish prerequisites for a candidate's name to appear on the ballot, the Court determined that if the requirements impose only "reasonable, nondiscriminatory restrictions" on ballot access, they will trigger a "less exacting review," but if the requirements are considered to be "severe," they "must be be narrowly tailored and advance a compelling state interest."[24]

According to the Supreme Court, once a geographical unit is established from which a representative is elected, the Equal Protection Clause requires all who vote in the election "to have an equal vote."[25] In the 2000 presidential election contest, the Court determined that the Florida Supreme Court violated the Equal Protection Clause by not identifying and mandating uniform standards among counties for counting ballots.[26] Once the right to vote is granted equally, the state cannot later, by "arbitrary and disparate treatment, value one person's vote

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[16] Miller v. Johnson, 515 U.S. 900, 912–15 (1995). *See also* Cooper v. Harris, No. 15–1262, slip op. (2017) (holding that two congressional districts constituted unconstitutional racial gerrymanders).

[17] *See id.* at 916; *see also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[18] *Miller*, 515 U.S. at 916.

[19] *See, e.g., Shaw I*, 509 U.S. at 641 ("Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering.") *See also* North Carolina v. Covington, No. 17–1364, slip op. (2018) (per curiam).

[20] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959). *See also* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Hill v. Stone, 421 U.S. 289, 297 (1975); Kramer v. Union Free School Dist., 395 U.S. 621, 626–28 (1969).

[21] *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

[22] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

[23] *See* Crawford v. Marion Co. Election Bd., 553 U.S. 181, 198 (2008) (plurality opinion) (distinguishing photo identification requirement from a poll tax or fee and determining that the photo identification requirement did not constitute a substantial burden). *See* Amdt14.S1.8.6.2 Voter Qualifications.

[24] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997). *See also* Hadnott v. Amos, 394 U.S. 358 (1971). See Amdt14.S1.8.6.7 Ballot Access.

[25] Gray v. Sanders, 372 U.S. 368, 379 (1963). *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[26] *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.").

over that of another," the Court announced.[27] However, the Court limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[28]

Amdt14.S1.8.6.2 Voter Qualifications

Fourteenth Amendment, Section 1:

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

The Supreme Court has determined that, under the Fourteenth Amendment's Equal Protection Clause, states may require a duration of residency as a qualification to vote, but such requirements will be held unconstitutional unless the state can show that the requirement is necessary to serve a compelling interest.[1] According to the Court in *Dunn v. Blumstein*, "[t]his exacting test" applies because the right to vote is "a fundamental political right . . . preservative of all rights," and because a "durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel."[2] While acknowledging that states have "a legitimate and compelling interest" in preventing fraud by voters, in *Dunn*, the Court determined that a one-year residency requirement in a state and a three-month residency requirement in a county was not necessary to further "a compelling governmental interest."[3] In contrast, the Court in *Marston v. Lewis* upheld a fifty-day durational residency and voter registration requirement, determining that the law was necessary to serve "the State's important interest in accurate voter lists."[4]

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[27] *Id.* at 104–05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. at 665).

[28] *Id.* at 109.

[1] *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

[2] *Id.* at 336, 338. *See also* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," but not addressing its constitutionality).

[3] *Dunn*, 405 U.S. at 360. The Court observed that with the Voting Rights Act Amendments of 1970, 84 Stat. 316, codified at 52 U.S.C. § 10502, "Congress outlawed state durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before such elections." *Dunn*, 405 U.S. at 344.

[4] 410 U.S. 679, 681 (1973). Among other things, the Court observed that the state had shown that the fifty-day residency requirement was needed because voter registration in the state was conducted by volunteer workers who made statistically significant errors requiring additional time for correction. *See id.* at 680–81. *See also* Burns v. Fortson, 410 U.S. 686, 686–87 (1973) (affirming a district court ruling that upheld a fifty-day voter registration deadline "to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud"); Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a requirement that voters enroll in their political party of choice thirty days prior to the general election to be eligible to vote in the next party primary, reasoning that the law did not impose a prohibition upon voting); Rodriguez v. Popular Dem. Party, 457 U.S. 1, 14 (1982) (upholding statute authorizing an incumbent legislator's political party to designate, upon the legislator's death or resignation, a successor in office until the next general election, determining that the Constitution does not mandate how legislative vacancies are to be filled); Fortson v. Morris, 385 U.S. 231 (1966) (holding that legislature could select governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Bd. of Elections, 387 U.S. 105, 111 (1967) (upholding appointment, rather than election, of county school board). *But see* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (invalidating a prohibition on a individual voting in a party primary if the individual voted in another party's primary within the prior twenty-three months); Tashjian v. Repub. Party of Conn., 479 U.S. 208, 229 (1986) (invalidating a "closed primary" system, finding insufficient justification for a state preventing a political party from allowing independents to vote in its primary).

In a landmark case, *Harper v. Virginia State Board of Elections*, the Supreme Court in 1966 held that restricting voting qualifications to those citizens who had paid a poll tax constituted invidious discrimination under the Fourteenth Amendment Equal Protection Clause.[5] While underscoring that states have the limited power to establish qualifications for voting, the Court observed that "[w]ealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process."[6] Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,[7] and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds[8] or general obligation bonds.[9] By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification."[10] The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden."[11]

The Court has also evaluated challenges under the Equal Protection Clause to voter qualification laws in other contexts. For instance, the Court has determined that a state that exercised general criminal, taxing, and other jurisdiction over residents of a federal enclave within the state could not treat these persons as nonresidents for voting purposes because the residents of the enclave "have a stake equal to that of other" "residents of the state."[12] In that vein, the Court invalidated a state constitutional provision prohibiting any member of the military, who entered military service outside the state, from establishing a voting residence within the state during the duration of their military service because it imposed an "invidious discrimination in violation of the Fourteenth Amendment."[13] Although the Court acknowledged the "special problems" presented to the state "in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes," the Court determined that the constitutional provision "goes beyond such rules."[14] With regard to prisoners, in a case applying rational basis scrutiny, the Court held that the failure of a state to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were

[5] *See* 383 U.S. 663, 670 (1966) (overruling Breedlove v. Suttles, 302 U.S. 277 (1937) and Butler v. Thompson, 341 U.S. 937 (1951)).

[6] *Id.* at 668.

[7] *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969).

[8] *See* Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

[9] *See* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). *See also* Hill v. Stone, 421 U.S. 289, 300–01 (1975) (invalidating restrictions on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district).

[10] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).

[11] *Id.* at 198.

[12] Evans v. Cornman, 398 U.S. 419, 426 (1970).

[13] Carrington v. Rash, 380 U.S. 89, 96 (1965).

[14] *Id. But see* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719, 734–35 (1973) (upholding a voter qualification permitting only landowners to vote in a water storage district election because the landowners "were to bear the entire burden of the district's costs"). *Id.* at 731; Associated Enters. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (upholding a voter qualification limiting the franchise to property owners in the creation and maintenance of a watershed improvement district); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 734–35 (1973) (upholding a voter qualification limiting the franchise to landowners, reasoning that a water storage district was a specialized and limited form to which its general franchise rulings did not apply); Ball v. James, 451 U.S. 355, 371 (1981) (upholding a voter qualification limiting the franchise to landowners in a water reclamation district), *but cf.* Quinn v. Millsap, 491 U.S. 95, 109 (1989) (invalidating a state constitutional provision requiring that members of a "board of freeholders," which considered the reorganization of local governments, be landowners, reasoning that the board had a mandate "far more encompassing" than land use issues, as its recommendations "affect[ ] all citizens . . . regardless of land ownership."

available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.[15] Subsequently, however, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences.[16]

Amdt14.S1.8.6.3 Partisan Gerrymandering

Fourteenth Amendment, Section 1:

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

Partisan political gerrymandering, "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power,"[1] is an issue that has vexed the federal courts for more than three decades.[2] Prior to the 1960s, the Supreme Court had determined that challenges to redistricting plans presented nonjusticiable political questions that were most appropriately addressed by the political branches of government, not the judiciary.[3] In 1962, the Supreme Court held in the landmark ruling of *Baker v. Carr* that a constitutional challenge to a redistricting plan is justiciable, identifying factors for determining when a case presents a nonjusticiable political question, including "a lack of [a] judicially discoverable and manageable standard[ ] for resolving it."[4] In the years that followed, while invalidating redistricting maps on equal protection grounds for other reasons—inequality of population among districts[5] or racial gerrymanding[6]—the Court did not nullify a map based on a determination of partisan gerrymandering.[7]

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[15] *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969); *see also* Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974) (holding that California's constitutional provisions disenfranchising convicted felons who have completed their sentences and paroles did not violate the Equal Protection Clause); *but see* Goosby v. Osser, 409 U.S. 512 (1973) (determining that *McDonald* does not preclude a challenge to an absolute prohibition on voting).

[16] *See* O'Brien v. Skinner, 414 U.S. 524 (1974). *See also* Am. Party of Texas v. White, 415 U.S. 767, 794–95 (1974), Hunter v. Underwood, 471 U.S. 222, 225 (1985) (holding that Alabama's constitutional provision disenfranchising persons convicted of crimes involving moral turpitude violated equal protection).

[1] Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015).

[2] *See* Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973) (upholding a redistricting plan, acknowledging it was drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties and stating "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States"); WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965) (three-judge court), *aff'd,* 382 U.S. 4 (1965); Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967) (three-judge court).

[3] *See, e.g.,* Colegrove v. Green, 328 U.S. 549, 552 (1946) (characterizing the case, which involved state legislative districting, as one that presents the Court with "what is beyond its competence to grant" because the issue is "of a peculiarly political nature and therefore not meet for judicial determination.")

[4] 369 U.S. 186, 217 (1962).

[5] *See* Amdt14.S1.8.6.4 Equality Standard and Vote Dilution.

[6] *See* Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering.

[7] *See, e.g., Gaffney*, 412 U.S. at 752 (rejecting an argument that a redistricting map violated equal protection principles "because it attempted to reflect the relative strength of the parties in locating and defining election districts").

In the 1986 case of *Davis v. Bandemer*, the Court ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause.[8] Although the vote was 6-3 in favor of justiciability, a majority of the Justices could not agree on the proper test for determining whether the particular gerrymandering in this case was unconstitutional and reversed the lower court's holding of unconstitutionality by a vote of 7-2.[9] Hence, as a result of *Bandemer*, the Court left open the possibility that claims of unconstitutional partisan gerrymandering could be judicially reviewable, but did not ascertain a discernible and manageable standard for adjudicating such claims.[10]

Similarly, following *Bandemer*, the Supreme Court could not reach a consensus for several years on the proper test for adjudicating claims of unconstitutional partisan gerrymandering. First, in the 2004 ruling, *Vieth v. Jubelirer*, a four-Justice plurality would have overturned *Bandemer* to hold that "political gerrymandering claims are nonjusticiable."[11] Justice Anthony Kennedy, casting the deciding vote and concurring in the Court's judgment, agreed that the challengers before the Court had not yet articulated "comprehensive and neutral principles for drawing electoral boundaries" or any rules that would properly "limit and confine judicial intervention."[12] Nonetheless, Justice Anthony Kennedy held out hope that in some future case, the Court could find "some limited and precise rationale" to adjudicate other partisan gerrymandering claims, thereby leaving *Bandemer* intact.[13] In 2006, in *League of United Latin American Citizens v. Perry*, a splintered Court again failed to adopt a standard for adjudicating political gerrymandering claims, but did not overrule *Bandemer* by deciding such claims were nonjusticiable.[14] Likewise, in 2018, the Court considered claims of partisan gerrymandering, but ultimately issued narrow rulings on procedural grounds specific to those cases.[15]

Ultimately, in the 2019 case, *Rucho v. Common Cause*, the Supreme Court held that there were no judicially "discernible and manageable standards" by which courts could adjudicate claims of unconstitutional partisan gerrymandering, thereby implicitly overruling

[8] 478 U.S. 109 (1986). The vote on justiciability was 6-3, with Justice Byron White's opinion for the Court joined by Justices William Brennan, Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. This represented an apparent change of view by three of the majority Justices, who just two years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Brennan, J., joined by White and Marshall, J., dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[9] Only Justices Lewis Powell and John Paul Stevens viewed the Indiana redistricting plan as void; Justice Byron White, joined by Justices William Brennan, Thurgood Marshall, and Harry Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice Sandra Day O'Connor, joined by Chief Justice Warren Burger and Justice William Rehnquist, would have ruled that partisan gerrymandering is a nonjusticiable political question not susceptible to manageable judicial standards.

[10] *See Bandemer*, 478 U.S. at 127 (agreeing with the district court in this case that to establish an equal protection violation, plaintiffs needed "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

[11] 541 U.S. 267, 281 (2004).

[12] *Id.* at 306–07.

[13] *Id.* at 306.

[14] 548 U.S. 399, 414 (2006) (declining to "revisit [the *Bandemer*] justiciability holding"); *see also id.* at 417 (Kennedy, J.) (rejecting proposed test for adjudicating partisan gerrymandering claims); *id.* at 492 (Roberts, J., concurring in part) (agreeing that proposed test was not a reliable standard for adjudicating partisan gerrymandering claims); *id.* at 512 (Scalia, J., dissenting) (arguing that claims of unconstitutional partisan gerrymandering are nonjusticiable).

[15] *See* Gill v. Whitford, No. 16-1161, slip op. at 21 (U.S. June 18, 2018) (ruling that to establish standing to sue upon a claim of unconstitutional partisan gerrymandering on the basis of vote dilution, challengers must allege injuries to their interests as voters in individual districts); Benisek v. Lamone, No. 17-333, slip op. at 5 (U.S. June 18, 2018) (per curiam) (holding that a district court did not abuse its discretion by denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander).

Bandemer.[16] According to the Court, the federal courts "are not equipped to apportion political power as a matter of fairness" and "it is not even clear what fairness looks like in this context."[17] As a result of *Rucho*, claims of unconstitutional partisan gerrymandering are not subject to federal court review because they present nonjusticiable political questions.[18] Writing for the Court, Chief Justice John Roberts acknowledged that excessive partisan gerrymandering "reasonably seem[s] unjust," stressing that the ruling "does not condone" it, but reiterated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[19]

Amdt14.S1.8.6.4 Equality Standard and Vote Dilution

Fourteenth Amendment, Section 1:

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

The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons.[1] This requirement is referred to as the "equality standard" or the principle of "one person, one vote."[2] In 1964, the Court in *Wesberry v. Sanders*[3] interpreted provisions of the Constitution stating that Representatives are to be chosen "by the People of the several States"[4] and "apportioned among the several States . . . according to their respective Numbers"[5] to require that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[6] Later in 1964, the Court in *Reynolds v. Sims*[7] extended the equality standard to apply to state legislative redistricting under the Equal Protection Clause, requiring all participants in an election "to have an equal vote."[8]

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[16] Rucho v. Common Cause, No. 18-422, slip op. at 20 (U.S. June 27, 2019).

[17] *Id.* at 17.

[18] *See id.* at 30 ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."). *Id.*

[19] *Id.* at 32–33.

[1] Prior to the 1960s, the Supreme Court determined that constitutional challenges to redistricting plans presented nonjusticiable political questions that were most appropriately addressed by the political branches of government. *See, e.g.,* Colegrove v. Green, 328 U.S. 549, 552 (1946) (characterizing the dispute as presenting the Court with "what is beyond its competence to grant" because the issue is "of a peculiarly political nature and therefore not meet for judicial determination."); Smiley v. Holm, 285 U.S. 355 (1932); Wood v. Broom, 287 U.S. 1 (1932); *Green*, 328 U.S. 549, Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); and Hartsfield v. Sloan, 357 U.S. 916 (1958). In 1962, the Court held such challenges justiciable. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[2] *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) (holding that the conception of political equality means one person, one vote).

[3] 376 U.S. 1 (1964).

[4] U.S. Const. art. I, § 2, cl. 1. *See* ArtI.S2.C1.1 Congressional Districting.

[5] U.S. Const. amend. XIV, § 2. cl. 1.

[6] *Wesberry*, 376 U.S. at 7–8.

[7] 377 U.S. 533 (1964).

[8] *Id.* at 557–58. *See also* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Donis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth

In a series of rulings since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among electoral districts is required.[9] Ideal or precise equality is the average population that each district would contain if a state population were evenly distributed across all districts; and the total or "maximum population deviation" refers to the percentage difference from the ideal population between the most populated district and the least populated district in a redistricting map.[10] In 1967, the Court announced that while "[*d*]*e minimis* deviations are unavoidable, . . . variations of 30% among [state legislative] senate districts and 40% among [state legislative] house districts can hardly be deemed *de minimis*," emphasizing that none of the Court's prior case law has approved of such large differences.[11] By contrast, evaluating the principle of equal protection in the context of a county governing body, the Court approved of a population disparity among districts of 11.9% because of a "long tradition of overlapping functions and dual personnel" in the county government and because the map did not intrinsically contain "bias tending to favor particular political interests or geographic areas."[12]

Nine years after deciding *Reynolds v. Sims*, the Court continued to clarify the population equality requirement. Underscoring that less deviation from precise population equality is permissible for congressional districts than is permissible for state legislative districts, in 1973, the Court upheld a state legislative redistricting map that contained a total population percentage deviation of 16.4%.[13] The Court reached its decision by determiing, in part, that the challenged map "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions."[14] In 1975, in holding that a 20% population deviation did not comport with standards of equal protection, the Court observed that a deviation of such "magnitude" cannot be constitutionally permissible without "significant state policies or other

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Gen. Assembly of Colorado, 377 U.S. 713, 736 (1964) (holding that "[a]n individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.").

[9] *See also* Sailors v. Bd. of Educ. of the Cnty. of Kent, 387 U.S. 105, 111 (1967) (holding that, as a threshold issue, the Equal Protection Clause did not apply to a state law whereby residents elected local school boards, which in turn, through delegates, appointed members to county school boards without regard to the population represented because the county school board members were not elected and the board functions were nonlegislative); Avery v. Midland Cnty., 390 U.S. 474, 481 (1968) (holding that when a state delegates lawmaking power to a local government, providing for election by districts, the districts are subject to the principle of equal protection because there is "little difference . . . between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties."); Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) (holding that whenever a state chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts are subject to the principle of equal protection). In *Hadley*, the Court acknowledged distinguishable cases "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups" that the principle of equal protection does not apply. *Id.* at 56. *See, e.g.,* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enters. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981); in the context of judicial districts, *see, e.g.,* Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *aff'd,* 409 U.S. 1095 (1973) (per curiam).

[10] *See, e.g.,* Brown v. Thomson, 462 U.S. 835, 842–43 (1983). *See also, e.g.,* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a Connecticut legislative redistricting plan with a total maximum population deviation of 7.83%). *But see* Cox v. Larios, 542 U.S. 947 (2004) (upholding the invalidation of a state legislative redistricting plan with a total maximum population deviation of 9.98%).

[11] Swann v. Adams, 385 U.S. 440, 444 (1967). *See also* Connor v. Williams, 404 U.S. 549, 550 (1972) (distinguishing between the standards of population equality applicable to state legislative districts and congressional districts); Kilgarlin v. Hill, 386 U.S. 120 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

[12] Abate v. Mundt, 403 U.S. 182, 187 (1971). *But see* Bd. of Estimate of N.Y. v. Morris, 489 U.S. 688 (1989) (invalidating a redistricting map providing for representation in each of New York City's five boroughs on the New York City Board of Estimate that contained a higher population disparity).

[13] *See* Mahan v. Howell, 410 U.S. 315, 319, 332–33 (1973). *See also* White v. Regester, 412 U.S. 755, 763–64 (1973) (upholding a state legislative redistricting map with a total maximum deviation of 9.9% among house districts and an average deviation of 1.82%); Connor v. Finch, 431 U.S. 407, 417–18 (1977) (invalidating a state legislative redistricting map with a maximum population deviation in the senate districts of 16.5% and in the house districts of 19.3%).

[14] *Mahan*, 410 U.S. at 328.

acceptable considerations that require adoption of a plan with so great a variance."[15] In 2016, the Court held that challengers to maps with a "minor" deviation of less than 10% must show that it is "more probable than not" that the deviation "reflects the predominance of illegitimate reapportionment factors," concluding "that attacks on deviations under 10% will succeed only rarely, in unusual cases."[16] Also in 2016, the Court rejected the argument that the Equal Protection Clause prohibits states from using total population, instead of total voting population, in drawing state legislative redistricting maps.[17]

Amdt14.S1.8.6.5 Inequalities Within a State and Vote Dilution

Fourteenth Amendment, Section 1:

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

Invoking the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court effectively ended the 2000 presidential election contest. In *Bush v. Gore*, the Court determined that the Florida Supreme Court violated the Equal Protection Clause by not identifying and mandating uniform standards among counties for counting ballots.[1] The Florida court had ordered a partial manual recount of the Florida vote for presidential electors, requiring the counting of all ballots that contained a "clear indication of the intent of the voter," but allowing the relevant counties to determine the physical characteristics of a ballot that would satisfy this test.[2]

According to the Supreme Court, the recount process approved by the Florida Supreme Court "is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter."[3] Once the right to vote is granted equally, the state cannot later, by "arbitrary and disparate treatment, value one person's vote over that of another," the Court announced.[4] While acknowledging that local jurisdictions can implement different election systems, the Court underscored that it was remedying a state court ruling that failed to provide "at least some assurance that the rudimentary requirements of equal treatment and

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[15] Chapman v. Meier, 420 U.S. 1, 24 (1975). *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973). (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see* Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivisions).

[16] Harris v. Ariz. Indep. Redistricting Comm'n, 578 U.S. 253, 259 (2016).

[17] *See* Evenwel v. Abbott, 578 U.S. 54, 74 (2016). The Court declined, however, to determine that redistricting based on total population is constitutionally required, noting that the Court has upheld the use of districts based on voting population. *See id.* at 60 (citing Burns v. Richardson, 384 U.S. 73, 93–94 (1966) (upholding a Hawaii redistricting map that was based on the registered-voter population)).

[1] 531 U.S. 98, 110 (2000) (per curiam). ("Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.")

[2] *Id.* at 102.

[3] *Id.* at 109.

[4] *Id.* at 104–05 (citing Harper v. Va. Bd. Of Elections, 383 U.S. 663, 665 (1966)). The Court stated: "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 105.

fundamental fairness are satisfied."[5] However, the Court in *Bush v. Gore* limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[6] Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.[7]

Once a geographical unit is established from which a representative is elected, the Equal Protection Clause requires all who vote in the election "to have an equal vote."[8] In *Gray v. Sanders*, the Supreme Court invalidated a Georgia county unit system as a basis for tabulating votes whereby, based on population, each county was allocated a number of county-unit votes: "Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons."[9] Although each qualified voter was provided one vote in the statewide election under the "county unit system," the Court observed that the "end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier that other larger rural counties."[10] In striking down the law, the Court emphasized that standards of equal protection require that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."[11] Further, the Court in *Gray* characterized analogies drawn between this case and the electoral college, redistricting, and "other phases of the problems of representation in state or federal legislatures or conventions" as "inapposite," observing that the Constitution expressly contemplates those processes and this "case is only a voting case."[12]

By contrast, in *Gordon v. Lance*, the Court approved a 60% affirmative vote requirement in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded.[13] Distinguishing its ruling in *Gray v. Sanders*, the Court pointed out that the equal protection violation found there was based on denying or diluting "voting power because of group characteristics-geographic location and property ownership-that bore no valid relation to the interest of those groups in the subject matter of the election . . . [and] was imposed irrespective of how members of those groups actually voted."[14] Further, while acknowledging that the requirement departed from strict majority rule, the Court pointed out that the Constitution did not prescribe majority rule, but instead, proscribed discrimination through dilution of voting power or denial of the franchise because of some class

[5] *Id.* at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.")

[6] *Id.*

[7] *Id.*

[8] Gray v. Sanders, 372 U.S. 368, 379 (1963).

[9] *Id.* at 372.

[10] *Id.* at 379.

[11] *Id.*

[12] *Id.* at 378.

[13] 403 U.S. 1, 7–8 (1971).

[14] *Id.* at 4.

characteristic-race, urban residency, or the like-and the provision at issue in this case was neither directed to nor affected any identifiable class.[15]

Amdt14.S1.8.6.6 Racial Vote Dilution and Racial Gerrymandering

Fourteenth Amendment, Section 1:

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

Much of the Supreme Court's redistricting jurisprudence has been prompted by disputes concerning the interplay between the requirements of the Voting Rights Act (VRA) and the constitutional standards of equal protection.[1] That is, under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[2] A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA.[3] Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority must be able to demonstrate that the majority votes sufficiently as a bloc to enable the majority to defeat the minority group's preferred candidate absent special circumstances, such as the minority candidate running unopposed.[4] Further interpreting the *Gingles* three-pronged test, in *Bartlett v. Strickland*, the Supreme Court ruled that the first prong of the test-requiring a minority group to be geographically compact enough to constitute a majority in a district-can only be satisfied if the minority group would constitute more than 50% of the voting population in a single-member district.[5]

In addition to the VRA, however, congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the Constitution. According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations-including compactness, contiguity,

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[15] *See id.* at 6–7.

[1] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Equal Protection Clause of the Constitution. *See* 509 U.S. 630, 639–52 (1993) [hereinafter *Shaw I*].

[2] 52 U.S.C. §§ 10301, 10303(f).

[3] 478 U.S. 30 (1986).

[4] *Id.* at 50–51 (citation omitted). The three requirements set forth in *Thornburg v. Gingles* for a Section 2 claim apply to single-member districts as well as to multi-member districts. *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993) ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.").

[5] 556 U.S. 1, 25–26 (2009) (plurality opinion).

and respect for political subdivision lines-then a "strict scrutiny" standard of review is to be applied.[6] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[7] These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries.[8] Case law in this area has revealed that there can be tension between compliance with the VRA and conformance with standards of equal protection.[9]

In a series of cases, the Supreme Court has clarified the standards for ascertaining a racial gerrymandering claim under the Equal Protection Clause. For example, the Court has determined that successful claims of racial gerrymandering require plaintiffs to prove that racial considerations were "dominant and controlling" in the creation of the districts at issue.[10] The Court has also held that in determining whether race is a predominant factor in the redistricting process, and thereby triggering strict scrutiny, a court must engage in a district-by-district analysis instead of analyzing the state as an undifferentiated whole.[11] Further, according to the Court, plaintiffs challenging a state legislative redistricting plan on racial gerrymandering grounds need not prove, as a threshold matter, that the plan conflicts with traditional redistricting criteria.[12] Nonetheless, the Court has held that plaintiffs need "to overcome the presumption of legislative good faith" by demonstrating that a legislature drew a redistricting map "with invidious intent."[13]

Amdt14.S1.8.6.7 Ballot Access

Fourteenth Amendment, Section 1:

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

State laws that specify prerequisites for the names of candidates to appear on election ballots are known as ballot access requirements. Generally, states enact ballot access requirements to prevent ballot overcrowding, voter confusion, election fraud, and to facilitate

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[6] *See* Miller v. Johnson, 515 U. S. 900, 916 (1995). *See also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[7] *Miller*, 515 U.S. at 916.

[8] *See, e.g., Shaw I*, 509 U.S. at 641 ("Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering.")

[9] *See, e.g., id.* at 653–57 (holding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); *Miller*, 515 U.S. at 912–13 (holding that strict scrutiny applies when race is the predominant factor and traditional redistricting principles have been subordinated); Bush v. Vera, 517 U.S. 952, 958–65 (1996) (holding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

[10] *See* Easley v. Cromartie, 532 U.S. 234 (2001).

[11] *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262 (2015).

[12] *See* Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, slip op. at 10 (U.S. Mar. 1, 2017) (holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering.").

[13] Abbott v. Perez, No. 17-586, slip op. at 23 (U.S. June 25, 2018).

election administration.[1] Supreme Court case law demonstrates how ballot access requirements must comport with principles of equal protection under the Fourteenth Amendment.

While reasonable ballot access requirements are likely to be upheld, the Supreme Court has determined that the Constitution will not permit laws that impermissibly restrict or completely prohibit third-party and independent candidates from qualifying for the ballot.[2] According to the Court, on the condition that ballot access requirements do not "unfairly or unnecessarily burden" new party or independent candidates (that is, candidates not affiliated with a political party), it may be constitutional for states to provide different requirements based on whether a candidate is a nominee of a major political party, a minor or new party, or an independent candidate.[3]

In a series of ballot access cases, the Court has applied and refined this analysis. For instance, in the 1971 case of *Jenness v. Fortson*, the Court upheld ballot access requirements whereby candidates belonging to any political party that obtained 20% or more of the vote in the previous gubernatorial or presidential elections could obtain ballot access in the general election by winning the party's primary election while independent or candidates of other parties were required to obtain signatures of at least 5% of those registered to vote at the last election for the office sought.[4] According to the Court, from the perspective of a candidate, the ballot access requirement did not violate the Equal Protection Clause because neither of the prescribed methods "can be assumed to be inherently more burdensome than the other."[5] While recognizing that from the perspective of a political party, "the situation is somewhat different," the Court nonetheless determined that by providing separate mechanisms for obtaining ballot access for new and established political parties, the state was simply acknowledging the differences between the two types of parties.[6] As the Court explained, in enacting the ballot access requirements, the state "surely [had] an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."[7]

In the 1974 case, *Storer v. Brown*, the Court was faced with a ballot access requirement that independent candidates "file a petition signed by voters not less in number than 5% of the total votes cast in California at the last general election."[8] However, the law did not permit

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[1] *See, e.g.,* Storer v. Brown, 415 U.S. 724 (1974).

[2] Lubin v. Panish, 415 U.S. 709, 719 (1974) ("[B]allot access must be genuinely open to all, subject to reasonable requirements."). *See also* McCarthy v. Briscoe, 429 U.S. 1317 (1976); Bullock v. Carter, 405 U.S. 134, 145 (1972) (holding that in the absence of reasonable alternative means of ballot access, a state may not disqualify an indigent candidate unable to pay filing fees); Moore v. Ogilvie, 394 U.S. 814, 818–19 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948) and holding that a requirement that independent candidates obtain 25,000 signatures, including 200 signatures from each of at least 50 of the state's 102 counties, violated the Equal Protection Clause); Williams v. Rhodes, 393 U.S. 23, 24 (1968) (invalidating a ballot access law that rendered it "virtually impossible" for new political party candidates or candidates from an "old party, which has a very small number of members" to appear on a ballot). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 34.

[3] *Lubin*, 415 U.S. at 716 (1974). *See also* Quinn v. Millsap, 491 U.S. 95 (1989); Clements v. Fashing, 457 U.S. 957 (1982); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977); Turner v. Fouche, 396 U.S. 346 (1970); Snowden v. Hughes, 321 U.S. 1 (1944).

[4] 403 U.S. 431, 432–33 (1971).

[5] *Id.* at 441.

[6] *Id.* at 441–42.

[7] *Id.* at 442.

[8] 415 U.S. 724, 738 (1974). *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 175 (1979) (invalidating a ballot access requirement whereby a new party or independent candidate running for mayor

registered voters who voted in the primary election to sign an independent candidate's petition.[9] In addition, the law prohibited an independent candidate from ballot access if the candidate voted in the preceding primary or had a registered affiliation with a political party "within one year prior to the immediately preceding primary."[10] According to the Court in *Storer*, "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot."[11] Acknowledging that "no litmus-paper test" exists for determining which requirements pass constitutional muster, the Court emphasized that is "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'"[12]

In the 1997 case *Timmons v. Twin Cities Area New Party*, the Supreme Court announced that when evaluating whether a state election law comports with the First and Fourteenth Amendments, courts will weigh the "'character and magnitude' of the burden" imposed by the restrictions against the government's asserted interests, considering "the extent to which the State's concerns make the burden necessary."[13] In *Timmons*, the Court held that if ballot access requirements impose only "reasonable, nondiscriminatory restrictions" on ballot access, they will trigger a "less exacting review" whereby "important regulatory interests" asserted by the state will typicially be sufficient "to justify 'reasonable, nondiscriminatory restrictions.'"[14] However, if restrictions are considered to be "severe," the Court held that they "must be narrowly tailored and advance a compelling state interest."[15]

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would need to obtain "substantially more signatures" than a candidate would need for a statewide office). "The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives." *Id.* at 186; Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (invalidating, under the First and Fourteenth Amendments, a ballot access requirement prohibiting the names of candidates affiliated with new political parties from appearing on the ballot until filing an affidavit indicating that its officers did not advocate violent government overthrow). In *Whitcomb*, Justice Lewis Powell wrote a concurrence, joined by Chief Justice Warren Burger, and Justices Harry Blackmun and William Rehnquist, concurring in the result, but arguing that "no colorable justification has been offered for placing on appellants burdens not imposed on the two established parties. It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment." *Id.* at 451–52 (Powell, J., concurring).

[9] *See Storer*, 415 U.S. at 739.

[10] *Id.* at 726.

[11] *Id.* at 746.

[12] 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968); Dunn v. Blumstein, 405 U.S. 330, 335 (1972)). *See also* Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986) (determining that a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office); Am. Party of Tex. v. White, 415 U.S. 767,795 (1974) (upholding, against an equal protection challenge, a state ballot access law requiring, among other things, that to appear on the general election ballot, a new political party must meet certain requirements).

[13] 520 U.S. 351, 358 (1997) (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992) quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). In *Anderson v. Celebrezze*, the Court noted "[i]n this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the 'fundamental rights' strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests." 460 U.S. at 786, n. 7 (citing, e.g., Williams v. Rhodes, 393 U.S. 23 (1968); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 175 (1979)).

[14] *Timmons*, 520 U.S. at 358.

[15] *Id.*

Amdt14.S1.8.7 Non-Race Based Classifications

Amdt14.S1.8.7.1 Overview of Non-Race Based Classifications

Fourteenth Amendment, Section 1:

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

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[1] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[2] and to decide cases concerning statutory and administrative treatments of children born out of wedlock inconsistently.[3] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[4]

However, in a major evaluation of equal protection analysis early in this period, the Court reaffirmed a two-tier approach, determining that where the interests involved that did not occasion strict scrutiny, the Court would decide the case on minimum rationality standards. Justice Lewis Powell, writing for the Court in *San Antonio School Dist. v. Rodriguez*,[5] decisively rejected the contention that a de facto wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[6] a holding that has several times been strongly reaffirmed by the Court.[7] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[8] And classifications that disadvantage persons born out of wedlock are

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[1] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[2] Reed v. Reed, 404 U.S. 71 (1971); for the hint, *see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[3] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (strict review); Labine v. Vincent, 401 U.S. 532 (1971) (lenient review); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (modified strict review).

[4] *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Bullock v. Carter, 405 U.S. 134 (1972). *See* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (Harlan, J., dissenting). *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[5] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[6] 411 U.S. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. *Id.* at 20.

[7] *E.g.*, United States v. Kras, 409 U.S. 434 (1973); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[8] Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Lewis Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, *id.* at 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor

subject to a similar though less exacting scrutiny of purpose and fit.[9] This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[10]

The Court has so far resisted further expansion of classifications that must be justified by a standard more stringent than rational basis. For example, the Court has held that age classifications are neither suspect nor entitled to intermediate scrutiny.[11] Although the Court resists the creation of new suspect or "quasi-suspect" classifications, it may still, on occasion, apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[12]

Amdt14.S1.8.7.2 Alienage Classification

Fourteenth Amendment, Section 1:

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

An alien, whether present lawfully, unlawfully, temporarily, or permanently, is a "person" within the meaning of the Equal Protection Clause and receives its protection.[1] One of the

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compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." *Id.* at 210, n.*. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Id.* at 211, 212. Chief Justice Warren Burger and Justice William Rehnquist would employ the rational basis test for gender classification. *Id.* at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, *E.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in *Frontiero v. Richardson,* 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 n.9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

[9] Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). In *Mathews v. Lucas,* 427 U.S. 495, 506 (1976), the Court commented that discrimination against children born out of wedlock had not historically "approached the severity or pervasiveness" of discrimination against women and Black people. *Lucas* sustained a statutory scheme virtually identical to the one struck down in *Califano v. Goldfarb,* 430 U.S. 199 (1977), except that the latter involved sex while the former involved a classification generally based on whether a child was born out of wedlock.

[10] Applying strict scrutiny, *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

[11] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement at age seventy for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court erred in holding that intellectual disability was a quasi-suspect classification meriting "a more exacting standard of judicial review than is normally accorded economic and social legislation").

[12] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *see* discussion, *supra*.

[1] Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (emphasizing that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"); Graham v. Richardson, 403 U.S. 365, 371 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

earliest equal protection decisions, *Yick Wo v. Hopkins*,[2] involved the constitutionality of a municipal ordinance that granted officials absolute and unrestrained authority to grant licenses for laundries.[3] The Supreme Court found the officials were employing their authority to deny permission to resident Chinese aliens.[4] The Court struck down the facially neutral city ordinance as an equal protection violation, stating that the distinction was based on "no reason . . . except hostility to the race and nationality. . . ."[5]

In many subsequent cases after *Yick Wo* until 1948, the Court allowed less favorable treatment of aliens whenever the alienage classification related to a "special public interest."[6] In particular, the Court upheld state laws forbidding aliens from taking possession of natural resources, citing a state's significant legitimate interest in reserving use of these resources for its citizens.[7] The Court also sustained laws prohibiting the ownership of land by aliens and the indirect control of lands by aliens.[8] By contrast, in *Truax v. Reich*,[9] the Court struck down an Arizona law that required employers with more than five employees to hire at least 80% qualified voters or native-born citizens.[10] According to the Court, "No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment."[11]

The Court eroded the "special interest" doctrine in the 1948 decision *Takahashi v. Fish & Game Commission*,[12] which involved a challenge brought by a Japanese alien (then ineligible for U.S. citizenship under federal law) to a state statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship."[13] The Court struck down the California law under the Fourteenth Amendment, holding that "'ownership' [of fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shore while permitting all others to do so."[14] Writing for the

[2] 118 U.S. 356 (1886).

[3] *Id.* at 367–68.

[4] *Id.* at 374.

[5] *Id.*

[6] Heim v. McCall, 239 U.S. 175, 194 (1915) (upholding New York law that prohibited the employment of aliens on public works contracts for the construction of subways); Crane v. New York, 239 U.S. 195, 198 (1915) (affirming New York law that made it a crime to employ aliens on public works contracts).

[7] *See* Patsone v. Pennsylvania, 232 U.S. 138 (1914) (killing of wild game); McCready v. Viriginia, 94 U.S. 391, 396 (1876) (planting of oysters).

[8] Terrace v. Thomason, 263 U.S. 197, 217 (1923) (finding that aliens were distinguishable as to land ownership and use for reasons other than hostility to race); Porterfield v. Webb, 263 U.S. 225, 232–33 (1923) (sustaining California statute prohibiting the use of land by 'ineligible' aliens); Webb v. O'Brien, 263 U.S. 313, 322 (1923) (validating law prohibiting food crop contracts with aliens); Frick v. Webb, 263 U.S. 326, 334 (1923) (approving of law restricting transfer to aliens of shares of a land owning corporation).

[9] 239 U.S. 33 (1915).

[10] *Id.* at 40–43. The Court also extended the "special public interest" doctrine to exclude aliens from receiving occupational licenses. *See* Clarke v. Deckebach, 274 U.S. 392, 396–97 (1927) (ruling that states could prevent aliens from being licensed to operate pool halls).

[11] *Truax*, 239 U.S. at 43. The Court partially relied on preemption principles, citing the federal government's authority to control immigration. The Court stated that "[t]he assertion of an authority to deny to aliens the opportunity to earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode." *Id.* at 42.

[12] 334 U.S. 410 (1948).

[13] *Id.* at 413–14.

[14] *Id.* at 421. The *Takahashi* decision was preceded by *Oyama v. California,* 332 U.S. 633 (1948), in which the majority seemingly questioned in dicta a distinction between citizens and aliens in the application of a land law under the Fourteenth Amendment, but ultimately declined to fully address the equal protection arguments. *See id.* at 646–47. Justice Hugo Black concurred, and would have decided the case "on the broader grounds that the basic provisions of the California Alien Land Law violate the equal protection clause of the Fourteenth Amendment and

Court, Justice Hugo Black reasoned that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[15]

The Court began applying a more explicitly rigorous standard of review to alienage classification statutes in the 1970s. In the 1971 decision *Graham v. Richardson*,[16] the Supreme Court struck down state statutes that either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[17] The Court announced that it would apply strict scrutiny to alienage classifications, reasoning that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close scrutiny."[18]

Other decisions applying strict scrutiny soon followed. In the 1973 decision *Sugarman v. Dougall*,[19] the Court voided a state law making citizenship a requirement for any position in the competitive class of a state civil service system.[20] According to the Court, a state's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[21] and this power would extend "to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[22] However, a flat ban on alien employees for much of the state's career public service, including both policy-making and nonpolicy-making jobs, ran afoul of the requirement that, in achieving a valid interest through the use of a suspect classification, the state must employ means that are precisely drawn in light of the valid purpose.[23] In *In re Griffiths*,[24] the Court struck down a state law that excluded aliens from being licensed as attorneys.[25] The Court reaffirmed that strict scrutiny was the proper test for distinctions based on alienage and reasoned that it was impermissible under the Fourteenth Amendment for states to require citizenship as a condition of practicing law.[26] Likewise, the Court in *Examining Board v. Flores de Otero*[27] invalidated a Puerto Rico

conflict with federal laws and treaties governing the immigration of aliens and their rights after arrival in this country." *Id.* at 647 (Black, J., concurring, joined by Douglas, J.).

[15] *Takahashi*, 334 U.S. at 420. As in *Truax*, the Court in part relied upon principles of preemption, explaining that "[s]tate Laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with the constitutionally derived power to regulate immigration." *Id.* at 419.

[16] 403 U.S. 365 (1971).

[17] *Id.* at 372.

[18] *Id.* at 371–72. Citing *Takahashi*, the *Graham* court also held that the law was invalid because it interfered with the federal government's exclusive authority over immigration. *Id.* at 378 (affirming that "state laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to Federal Government"). In other words, once the federal government allows an alien to enter the United States, a state cannot discriminate against those present.

[19] 413 U.S. 634 (1973).

[20] *Id.* at 646.

[21] *Id.* at 647–49.

[22] *Id.* at 647.

[23] *Id.* at 646–47. The majority held the "special public interest" doctrine had no applicability in this case, but it did not invalidate the doctrine as a general matter. *Id.* at 643–45. In his dissenting opinion, Justice William Rehnquist argued that the proper inquiry was "whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar," and would have rejected the notion of alienage as a suspect classification triggering close judicial scrutiny on the basis that the Fourteenth Amendment was intended "to prohibit states from invidiously discriminating by reason of race." *Id.* at 649, 658 (Rehnquist, J., dissenting).

[24] 413 U.S. 717 (1973).

[25] *Id.* at 729.

[26] *Id.* at 721–22.

[27] 426 U.S. 572 (1976).

statute that barred licensing aliens to practice engineering.[28] Additionally, in *Nyquist v. Mauclet*,[29] the Supreme Court applied strict scrutiny to invalidate a New York law that restricted the receipt of scholarships and similar financial support to U.S. citizens, those who had applied for citizenship, and those who declared an intent to apply for citizenship as soon as they became eligible.[30]

In the following Term, however, the Supreme Court held that not every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"[31] Accordingly, the Court has carved out an exception and applies rational basis review to alienage classifications related to self-government and the democratic process. In *Foley v. Connelie*,[32] the Court upheld a state law that excluded aliens from appointment as members of the state police force.[33] The Court reasoned that the police function discharged "a most fundamental obligation of government to its constituency" and necessarily cloaked the police with substantial discretionary powers.[34] Continuing to enlarge the exception, the Court in *Ambach v. Norwick*[35] sustained a state law barring resident aliens who had not manifested an intention to apply for citizenship from employment as public school teachers.[36] The Court applied *Foley*, declaring that rational basis review was appropriate.[37] Teachers, the Court observed, perform a task that "go[es] to the heart of representative government" because of the role of public education in cultivating civic values, as well as the responsibility and discretion they have in fulfilling that role.[38]

Then, in *Cabelle v. Chavez-Salido*,[39] the Supreme Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers" as it applied to employment as a probation officer.[40] Applying rational basis review, the Court reasoned that probation officers both serve as law enforcement and perform an educational function for those they supervise.[41] In *Bernal v. Fainter*,[42] however, the Supreme Court invalidated a Texas law that required U.S. citizenship to become a notary public.[43] The Court declined to apply the exception and instead reviewed the law under strict scrutiny. The Court distinguished notaries

[28] *Id.* at 601. Because the statute was enacted by Puerto Rico, the Court considered whether the Fifth or Fourteenth Amendments should govern, but ultimately deemed the question immaterial as the same result would be achieved under either amendment. *Id.*

[29] 432 U.S. 1 (1977).

[30] *Id.* at 7–12.

[31] Foley v. Connelie, 435 U.S. 291, 295 (1978).

[32] *Foley*, 436 U.S. 291

[33] *Id.* at 299–300.

[34] *Id.* at 297.

[35] 441 U.S. 68 (1979).

[36] *Id.* at 80–81

[37] *Id.* at 74–75.

[38] *Id.* at 76–80 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)) (internal quotation marks omitted).

[39] 454 U.S. 432 (1982).

[40] *Id.* at 443–44. In a dissenting opinion, Justice Harry Blackmun would have applied strict scrutiny review instead of rational basis review. *Id.* at 454. He stated, "[A] state statute that bars aliens from political positions lying squarely within the political community nevertheless violates the Equal Protection Clause if it excludes aliens from other public jobs in an unthinking or haphazard manner. The statutes at issue here represent just such an unthinking and haphazard exercise of state power." *Id.*

[41] *Id.* at 445–46 ("[T]hey, like the state troopers in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens.").

[42] 467 U.S. 216 (1984).

[43] *Id.* at 225.

from employees who "are invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals."[44]

Thus, the Court has so far made three distinctions when analyzing equal protection challenges based on alienage. First, it has disapproved of the earlier line of cases that allowed aliens to be treated in a less favorable manner whenever the classification is based on a "special public interest," and now would foreclose attempts by the states to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, subject to a limited exception, classifications with an adverse impact on aliens will generally be subject to strict scrutiny and usually fail. Third, some alienage classifications related to self-government and the democratic process need only satisfy rational basis review, but typically only when those classifications relate to positions that involve policy-making responsibility or the exercise of authority over others.

The Supreme Court has addressed one instance involving the application of the Equal Protection Clause in the more specific context of unlawfully present aliens. In *Plyler v. Doe*,[45] the Court considered a Texas education law that withheld from local school districts any state funds for the education of children not "legally admitted" to the country and authorized local school districts to deny enrollment to these children.[46] The Court did not explicitly articulate a level of scrutiny but rejected the application of strict scrutiny, stating that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a constitutional irrelevancy. Nor is education a fundamental right."[47] Instead, the Court appeared to apply intermediate scrutiny in evaluating discrimination against unlawfully present alien children in regard to education.[48] The Court held the Texas law unconstitutional under the Equal Protection Clause, rejecting Texas's purported interests in preserving limited resources for its lawful residents, deterring an influx of unlawfully present aliens, avoiding the special burden imposed by these children, and serving children who were more likely to remain in the state and contribute to its welfare.[49] The total denial of an education, according to the Court, would stamp the children with an "enduring disability" that would permanently harm both them and the state.[50]

Amdt14.S1.8.7.3 Out of Wedlock Births

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[44] *Id.* at 226.

[45] 457 U.S. 202 (1982).

[46] *Id.* at 205.

[47] *Id.* at 223.

[48] *See id.* at 223–224 (explaining that "the discrimination contained in [the challenged law] can hardly be considered rational unless it furthers some substantial goal of the state"); *see also id.* at 237 (Powell, J, concurring) (stating that "[o]ur review in a case such as these is properly heightened," and citing to *Craig v. Boren*, 429 U.S. 1980 (1976), which articulated the intermediate scrutiny standard). *But see id.* at 252–53 (Burger, C.J., dissenting) (arguing that rational basis review and not heightened scrutiny was appropriate because there was no suspect classification and no fundamental right).

[49] *Id.* at 227–30.

[50] *Id.* at 230 (remarking that "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime"); *see also id.* at 238–39 (Powell, J., concurring) (emphasizing the blamelessness of the children who were being denied an education because of the misconduct of their parents).

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging persons born out of wedlock and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply.[1] Although the Court has determined that a person's status as having been born out of wedlock "is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[2] The common rationale of all the cases involving state action that distinguishes among people based on whether they were born out of wedlock is not clear, is in many respects not wholly consistent,[3] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments so that some children born out of wedlock who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon children born out of wedlock or some classes of children born out of wedlock (for example, those not acknowledged by their fathers) than upon children born to married parents is permissible.[4]

The issue of intestate succession rights for children born out of wedlock has divided the Court over the entire period. At first adverting to the broad power of the states over descent of

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[1] The first cases set the stage for the lack of consistency. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968), *and* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws that precluded wrongful death actions in cases involving the child or the mother when the child was born out of wedlock, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workers' compensation statute distinguishing between unacknowledged children born out of wedlock and those born to wedded parents, in which scrutiny was intermediate.

[2] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, *id.* at 510, while observing a few pages earlier that classifications based on whether a person was born out of wedlock are entitled to less exacting scrutiny than either race *or* sex. *Id.* at 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (cases involving classifications based both on the sex of a parent and whether a child was born out of wedlock).

[3] The major inconsistency arises from three 5-4 decisions. *Labine v. Vincent,* 401 U.S. 532 (1971), was largely overruled by *Trimble v. Gordon,* 430 U.S. 762 (1977), which itself was substantially limited by *Lalli v. Lalli,* 439 U.S. 259 (1978). Justice Lewis Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, *Lalli v. Lalli*, 439 U.S. at 277 (Brennan, White, Marshall, and Stevens, JJ., dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, *Trimble v. Gordon*, 430 U.S. at 776, 777 (Burger, C.J., and Stewart, Blackmun, and Rehnquist, JJ., dissenting), Justice Lewis Powell applied his own intermediate scrutiny and selectively voided and sustained. *See Lalli v. Lalli* (Powell, J., plurality opinion).

[4] A classification that absolutely distinguishes between children born to married parents and children born to unmarried parents is not alone subject to such review; one that distinguishes among classes of children born out of wedlock (e.g., those children born out wedlock and whose parents did not intermarry or who were not acknowledged by their fathers) is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. *E.g.*, Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).

real property, the Court employed relaxed scrutiny to sustain a law denying children born out of wedlock the right to share equally with children born to married parents in the estate of their common father, who had acknowledged the children born out of wedlock (but not "legitimated" them) and who had died intestate.[5] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[6] which found an equal protection violation in a statute allowing children born out of wedlock to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been "legitimated" by the marriage of the parents. The father in *Trimble* had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.[7] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they wold have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[8] Third, the argument that the law presented no insurmountable barrier to children born out of wedlock inheriting since a decedent could have left a will, married the mother, or taken steps to "legitimate" the child, was rejected as inapposite.[9] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of children born out of wedlock to intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[10] Because the state law did not follow a reasonable middle ground, it was invalidated.

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[5] Labine v. Vincent, 401 U.S. 532 (1971). *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of classifications based on whether a person was born out of wedlock.

[6] 430 U.S. 762 (1977). Chief Justice Warren Burger and Justices Potter Stewart, Harry Blackmun, and William Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in *Labine*. *Id.* at 776. Justice William Rehnquist also dissented separately. *Id.* at 777.

[7] 430 U.S. at 768–70. Although this purpose had been alluded to in *Labine v. Vincent,* 401 U.S. 532, 538 (1971), it was rejected as a justification in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. Parham v. Hughes, 441 U.S. 347, 352–53 (1979).

[8] Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[9] 430 U.S. at 773–74. This justification had been prominent in *Labine v. Vincent,* 401 U.S. 532, 539 (1971), and its absence had been deemed critical in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Lewis Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); *c.f. id.* at 736 (Powell, J., dissenting).

[10] Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice William Rehnquist's dissent is especially critical of this approach. *Id.* at 777, 781–86. Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).

Amdt14.S1.8.7.3
Out of Wedlock Births

A reasonable middle ground was discerned, at least by Justice Lewis Powell, in *Lalli v. Lalli*,[11] concerning a statute that permitted children born to married parents to inherit automatically from both their parents, while children born out of wedlock generally could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of children born out of wedlock and avoiding spurious claims against intestate estates. To be sure, some children born out of wedlock who were unquestionably established as children of the deceased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, although the state's interest could no doubt have been served by permitting other kinds of proof, that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[12]

The Court's difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording children born to married parents a right to judicial action to obtain support from their fathers while not affording the right to children born out of wedlock denied the latter equal protection. "[A] State may not invidiously discriminate against [children born out of wedlock] by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother."[13]

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[11] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Lewis Powell in the result, although only two joined his opinion. Justices Harry Blackmun and William Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. *Id.* at 276. The four dissenters, who had joined the *Trimble* majority with Justice Lewis Lewis Powell, thought the two cases were indistinguishable. *Id.* at 277.

[12] Illustrating the difficulty are two cases in which the fathers of children born out of wedlock challenged statutes treating them differently than mothers of such children were treated. In *Parham v. Hughes,* 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than one based on whether a child was born out of wedlock and sustained a bar to a wrongful death action by the father of a child born out of wedlock who had not "legitimated" him; in *Caban v. Mohammed,* 441 U.S. 380 (1979), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of a child born out of wedlock to block his adoption by refusing to consent. Both decisions were 5-4.

[13] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis added). Following the decision, Texas authorized children born out of wedlock to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age eighteen. In *Mills v. Habluetzel,* 456 U.S. 91 (1982), the Court invalidated the one-year limitation. Although a state has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a two-year statute of limitations on paternity and support actions was held to deny equal protection to certain children born out of wedlock in *Pickett v. Brown,* 462 U.S. 1 (1983), and a six-year limit was struck down in *Clark v. Jeter,* 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in *Gomez*, 409 U.S. at

Similarly, the Court struck down a federal Social Security provision that made eligible for benefits, because of an insured parent's disability, all children born to that parent while he or she was married as well as those children born out of wedlock to that parent who were capable of inheriting personal property from the wage-earning parent under state intestacy law; children who were deemed to be born out of wedlock only because of a nonobvious defect in their parents' marriage; and children born out of wedlock who had been "legitimated" in accordance with state law, but that made other children born out of wedlock eligible only if they were born prior to the onset of disability and if they were dependent upon the parent, or lived with the parent, prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on children born out of wedlock was necessary to avoid fraud.[14]

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all children born to the deceased and his or her spouse while he or she was married, as well as those children born out of wedlock who were able to inherit under state intestacy laws, who were deemed to be born out of wedlock only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had bwho held entitled to the father's support by a court. Children born out of wedlock that were not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience, which was a permissible device because those children born out of wedlock who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact, and it was irrelevant that other children not dependent in fact also received benefits.[15]

Amdt14.S1.8.8 Gender-Based Classifications

Amdt14.S1.8.8.1 Doctrine on Gender Classifications from 1870s to 1960s

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

538. Also, the state's interest in imposing the two-year limit was undercut by exceptions (e.g., for children born out of wedlock receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a six-year limit was belied by that state's more recent enactment of a non-retroactive eighteen-year limit for paternity and support actions.

[14] Jiminez v. Weinberger, 417 U.S. 628 (1974). *But cf.* Califano v. Boles, 443 U.S. 282 (1979). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and they have at least one child who is born to both parents while they were married; born to one parent and adopted by the other; or adopted by both denied children born out of wedlock equal protection); Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn.) (three-judge court), and Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md.) (three-judge court) (Social Security provision entitling certain children born out of wedlock to monthly benefit payments only to extent that payments to widow and children born to the deceased parent while he or she was married do not exhaust benefits allowed by law denies children born out of wedlock equal protection).

[15] Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-4 decision read the purpose differently, *see* Califano v. Boles, 443 U.S. 282 (1979).

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enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones that prevailed well into the twentieth century. For example, the Court stated in 1873 that "[t]he civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[1] On the same premise, a statute restricting the franchise to men was sustained.[2]

The greater number of cases involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours[3] or minimum wages[4] or by restricting some of the things women could be required to do.[5] A 1961 decision upheld a state law that required jury service of men but that gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."[6] Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women.[7] In a highly controversial ruling, the Court sustained a state law that forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[8]

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work.[9]

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[1] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

[2] Minor v. Happersett, 88 U.S. (21 Wall) 162 (1874) (privileges and immunities).

[3] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[4] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[5] *E.g.*, Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.

[6] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[7] Cronin v. Adams, 192 U.S. 108 (1904).

[8] Goesaert v. Cleary, 335 U.S. 464 (1948).

[9] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. §§ 2000e et seq., bans discrimination against either sex in employment. *See, e.g.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Plans v. Norris, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See* Corning Glass Works v.

Some states have followed suit.[10] While the proposed Equal Rights Amendment was before the states and ultimately failed to be ratified,[11] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification of sex classifications.

Amdt14.S1.8.8.2 Doctrine on Gender Classifications During the 1970s

Fourteenth Amendment, Section 1:

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

In *Reed v. Reed*,[1] the Court held invalid a state probate law that gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the state advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a state may be advanced by a classification based solely on sex.[2]

Amdt14.S1.8.8.3 General Approach to Gender Classifications

Fourteenth Amendment, Section 1:

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

It is now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to

Brennan, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see* County of Washington v. Gunther, 452 U.S. 161 (1981).

[10] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

[11] *See* Amdt14.S1.4.1 Overview of Incorporation of the Bill of Rights.

[1] 404 U.S. 71 (1971).

[2] 404 U.S. at 75–77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in *Reed* was before the Court in *Kirchberg v. Feenstra,* 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

achievement of those objectives."[1] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[2] a majority of the Court has arrived at the intermediate standard that many had thought it was applying in any event.[3] The Court first examines the statutory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[4]

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as eighteen for females and twenty-one for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[5] Similarly, a state jury system that in effect excluded almost all

[1] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); *id.* at 483 (Blackmun, J., concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, *Orr v. Orr*, 440 U.S. at 279; *Caban v. Mohammed*, 441 U.S. at 394; *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724, although Justice William Rehnquist and Chief Justice Warren Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. *Craig v. Boren*, 429 U.S. at 217, 218–21; *Califano v. Goldfarb*, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[2] In *Frontiero v. Richardson,* 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. *Id.* at 684–87 (Brennan, Douglas, White, and Marshall, JJ.). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. *Id.* at 691 (Powell and Blackmun, JJ., and Burger, C.J.). Justice Potter Stewart found the statute void under traditional scrutiny and Justice William Rehnquist dissented. *Id.* at 691. In *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 n.9 (1982), Justice Sandra Day O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[3] Although their concurrences in *Craig v. Boren,* 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Lewis Powell and John Paul Stevens have since joined or written opinions stating the test and applying it. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Powell, J., writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Powell, J., concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Stevens, J., concurring); *Caban v. Mohammed*, 441 U.S. at 401 (Stevens, J., dissenting). Chief Justice Warren Burger and Justice William Rehnquist had not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see Califano v. Westcott*, 443 U.S. at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Blackmun, J., dissenting).

[4] The test is thus the same as is applied to classifications based on whether a person was born out of wedlock, although with apparently more rigor when sex is involved.

[5] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice John Paul Stevens in particular was concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, *e.g.*, Califano v. Goldfarb, 430 U.S. 199, 222–23 (1977) (concurring), and he would sustain some otherwise impermissible distinctions if he found the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.[6]

Even when the negative "stereotype" that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,[7] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case that first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under twenty-one and to females under eighteen.[8] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the state as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[9]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court in *Orr v. Orr* acknowledged that assisting needy spouses was a legitimate and important governmental objective. Ordinarily, therefore, the Court would have considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded that the classification based on sex had "a fair and substantial relation to the object of the legislation."[10] However, the Court observed that the state already conducted individualized hearings with respect to the need of the wife, so that with little if any additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[11]

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[6] Taylor v. Louisiana, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt v. Florida,* 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[7] 511 U.S. 127 (1994).

[8] Craig v. Boren, 429 U.S. 190 (1976).

[9] 429 U.S. at 198, 199–200, 201–04.

[10] 440 U.S. 268, 281 (1979).

[11] 440 U.S. at 281–83. An administrative convenience justification was not available, therefore. *Id.* at 281 & n.12. Although such an argument has been accepted as a sufficient justification in at least some cases involving state action that distinguishes among people based on whether they were born out of wedlock, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, 427 U.S. at 509–10, the Court interpreted *Frontiero v. Richardson,* 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize

Amdt14.S1.8.8.3
General Approach to Gender Classifications

Various forms of discrimination between unwed mothers and unwed fathers received different treatments based on the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of a child born out of wedlock to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of children born out of wedlock and their consequent "legitimation" was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the state dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[12]

On the other hand, the Court sustained a Georgia statute that permitted the mother of a child born out of wedlock to sue for the wrongful death of the child but that allowed the father to sue only if he had "legitimated" the child and there is no mother.[13] Similarly, the Court let stand, under the Fifth Amendment, a federal statute that required that, in order for a child born out of wedlock overseas to gain citizenship, a citizen father, unlike a citizen mother, must acknowledge or "legitimate" the child before the child's eighteenth birthday.[14] The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about parentage.

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determinations about widows as well as widowers." Justice John Paul Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).

[12] Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. *Id.* at 394 (Stewart, J.), 401 (Stevens and Rehnquist, JJ., and Burger, C.J.). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner, *see* Califano v. Boles, 443 U.S. 282 (1979).

[13] Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the state—to avoid difficulties in proving paternity—was an important one and was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could "legitimate" children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. *Id.* at 353–58. Justice Lewis Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by "legitimating" the child. *Id.* at 359. Justices Byron White, William Brennan, Thurgood Marshall, and Harry Blackmun, who had been in the majority in *Caban*, dissented.

[14] Nguyen v. INS, 533 U.S. 53 (2001).*See also* Miller v. Albright, 523 U.S. 420, 424 (1998) (opinion of Stevens, J.) (concluding that a requirement in a citizenship statute that children born abroad and out of wedlock to citizen fathers, but not to citizen mothers, obtain formal proof of paternity by age eighteen does not violate the equal protection component of the Fifth Amendment's Due Process Clause). Importantly, however, the Court in *Sessions v. Morales-Santana* distinguished *Nguyen* and *Miller* in ruling that a derivative citizenship statute for children born abroad and out of wedlock to a U.S. citizen and foreign national violated equal protection principles because the statute imposed lengthier physical presence requirements on citizen fathers than citizen mothers. *See* 137 S. Ct. 1678, 1694 (2017). Specifically, the *Morales-Santana* Court held that unlike the statute at issue in *Nguyen* and *Miller*, the physical presence requirement being challenged in *Morales-Santana* did nothing to demonstrate the parent's tie to the child and was not a "minimal" burden on the citizen parent. *Id.* at 1694. The *Morales-Santana* Court also concluded that, while the Court in *Fiallo v. Bell,* 430 U.S. 787 (1977), had applied a very deferential standard when reviewing gender-based distinctions in the context of alien admission preferences, a more "exacting standard of review" was appropriate when assessing the permissibility of such distinctions in the application of derivative citizenship statutes. *Id.* at 1693–95 (describing the *Fiallo* Court's ruling as being supported by the "extremely broad power to admit or exclude aliens" and concluding that heightened scrutiny was appropriate in the review of gender-based distinctions made by a derivative citizenship statute, which did not touch upon the "entry preference for aliens" governed by *Fiallo*).

The issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[15] In *Weinberger v. Wiesenfeld*,[16] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Because the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill-fitted the end and was invidiously discriminatory.

But, when, in *Califano v. Goldfarb*,[17] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency that ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[18] Justice John Paul Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[19]

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[15] Frontiero v. Richardson, 411 U.S. 677 (1973).

[16] 420 U.S. 636 (1975).

[17] 430 U.S. 199 (1977). The dissent argued that whatever the classification used, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. *Id.* at 224 (Rehnquist, Stewart, and Blackmun, JJ., with Burger, C.J.). In *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in *Goldfarb*, only Justice William Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

[18] 430 U.S. at 204–09, 212–17 (Brennan, White, Marshall, and Powell, JJ.). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in *Heckler v. Mathews,* 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

[19] 430 U.S. at 217. Justice John Paul Stevens adhered to this view in *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[20] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of *Craig v. Boren*. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.[21]

In *Michael M. v. Superior Court*,[22] the Court expressly adopted the *Craig v. Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under eighteen years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that, although the law was founded on a clear sex distinction, it was justified because it served an important governmental interest—the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that, for purposes of this classification, men and women were not similarly situated, and the statute did not deny equal protection.[23]

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[24] The state argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of

voiding in *Califano v. Westcott,* 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[20] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices William Rehnquist, Potter Stewart, Harry Blackmun, Lewis Powell, and John Paul Stevens, and Chief Justice Warren Burger. Dissenting were Justices Byron White, Thurgood Marshall, and William Brennan. *Id.* at 83, 86.

[21] 453 U.S. at 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. *Id.* at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, *id.* at 81, was contrary to recent precedent.

[22] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices William Rehnquist, Potter Stewart, and Lewis Powell, and Chief Justice Warren Burger, constituting only a plurality. Justice Harry Blackmun concurred in a somewhat more limited opinion. *Id.* at 481. Dissenting were Justices William Brennan, Byron White, Thurgood Marshall, and John Paul Stevens. *Id.* at 488, 496.

[23] 450 U.S. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. *Id.* at 488, 496.

[24] United States v. Virginia, 518 U.S. 515 (1996).

behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the state were not "exceedingly persuasive," and thus the state did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the state at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige, or alumni network.

The Court in *Sessions v. Morales-Santana* applied the "exceedingly persuasive justification" test to strike down a gender-based classification found in a statute that allowed for the acquisition of U.S. citizenship by a child born abroad to an unwed couple if one of the parents was a U.S. citizen.[25] The law at issue in *Morales-Santana*, which had been enacted many decades earlier, conditioned the grant of citizenship on the U.S. citizen parent's physical presence in the United States prior to the child's birth, providing a shorter presence requirement for an unwed U.S. citizen mother relative to the unwed U.S. citizen father.[26] According to the majority, such a classification "must substantially serve an important government interest *today*,"[27] and the law in question was based on "two once habitual, but now untenable, assumptions": (1) that marriage presupposes that the husband is dominant and the wife is subordinate; (2) an unwed mother is the natural and sole guardian of a non-marital child.[28] Having found that the law was an "overbroad generalization[ ]" about males and females and was based on the "obsolescing view" about unwed fathers,[29] the Court concluded that the citizenship provision's "discrete duration-of-residency requirements for unwed mothers and fathers who have accepted parental responsibility [was] stunningly anachronistic."[30]

In response to what the lower court had described as the "most vexing problem" in the case,[31] the *Morales-Santana* Court, in crafting a remedy for the equal protection violation, deviated from the presumption that "extension, rather than nullification" of the denied benefit is generally the "proper course."[32] The Court observed that Congress had established

[25] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1683 (2017) (holding that "the gender line Congress drew is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'").

[26] *Id.* at 1687–88 (describing 8 U.S.C. §§ 1401 & 1409 (1958 ed.)).

[27] *Id.* at 9 (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

[28] *Id.* at 1690–91.

[29] *Id.* at 1692.

[30] *Id.* at 1693. In so holding, the *Morales-Santana* Court rejected the government's argument that the challenged law's gender distinction helped ensure that the child born abroad and out of wedlock to a U.S. citizen and foreign national would have a strong connection with the United States. *Id.* at 1694–95. The government argued that an unwed alien mother, on account of being the only legally recognized parent, would have a "competing national influence" upon the child that warranted the requirement that the U.S. father have a longer physical connection with the United States. *Id.* The Court concluded that the argument was based on the assumption that an alien father of a nonmarital child would not accept parental responsibility, a "[l]ump characterization" about gender roles that did not pass equal protection inspection. *Id.* at 1695. Moreover, even assuming that an interest in ensuring a connection to the United States could support the law, the Court held that the law's gender-based means could not serve the desired end because the law allowed for an individual with no ties whatsoever to the United States to become a citizen if his U.S. citizen mother lived in the country for a year prior to his birth. *Id.* at 1695–96.

The Court also rejected the government's argument that Congress wished to reduce the risk of "statelessness" for the foreign-born child of a U.S. citizen mother; an argument premised on the belief that countries are more likely to grant citizenship to the child of a citizen mother than to the child of a citizen father. *Id.* at 1696. The Court noted there was little evidence that a statelessness concern prompted the physical presence requirements, *id.* at 1696–97, and the Court also was skeptical that the risk of statelessness in actuality disproportionately endangered the children of unwed U.S. citizen mothers. *Id.* at 1697–98.

[31] *See* Morales-Santana v. Lynch, 804 F.3d 521, 535 (2d Cir. 2015).

[32] *See Morales-Santana*, slip op. at 25 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

derivative citizenship rules that varied depending upon whether one or both parents were U.S. citizens and whether the child was born in or outside marriage.[33] Justice Ruth Bader Ginsburg writing for the majority concluded that extending the much-shorter physical presence requirement applicable to unwed U.S. citizen mothers to unwed U.S. citizen fathers would run significantly counter to Congress's intentions when it established this statutory scheme, because such a remedy would result in a longer physical presence requirement for a *married* U.S. citizen who had a child abroad than for a similarly situated *unmarried* U.S. citizen.[34] As a result, the Court held that the longer physical presence requirement for unwed U.S. citizen fathers governed, as that is the remedy that "Congress likely would have chosen had it been apprised of the constitutional infirmity."[35]

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education v. LaFleur*,[36] which was decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively, before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[37] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

Amdt14.S1.8.8.4 Facially Non-Neutral Laws Benefiting Women

Fourteenth Amendment, Section 1:

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

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification.

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[33] *Id.* at 2–4, 26.

[34] *Id.* at 26 ("For if [the] one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S. citizen parent is married?").

[35] *Id.* at 27 (internal citations and quotations omitted).

[36] 414 U.S. 632 (1974). Justice Lewis Powell concurred on equal protection grounds. *Id.* at 651. *See also* Turner v. Department of Employment Security, 423 U.S. 44 (1975).

[37] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496 n.20. For a rejection of a similar attempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

Kahn v. Shevin[1] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the state had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[2] And, in *Schlesinger v. Ballard*,[3] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to thirteen years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[4] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[5]

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[6] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefitting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school that did accept men, and he would have had difficulty doing so and retaining his job. The state defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[7] But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a

[1] 416 U.S. 351 (1974).

[2] 416 U.S. at 355.

[3] 419 U.S. 498 (1975).

[4] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice John Paul Stevens called for overruling *Kahn*, *Califano v. Goldfarb*, 430 U.S. at 223–24, but Justice Harry Blackmun would preserve that case. Orr v. Orr, 440 U.S. at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Lewis Powell; less stringent standard of review for benign sex classifications).

[5] Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. *Id.* at 321.

[6] 458 U.S. 718 (1982).

[7] 458 U.S. at 728.

woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."[8] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[9]

Amdt14.S1.8.9 Non-Suspect Classifications

Amdt14.S1.8.9.1 Meaning of Person in the Equal Protection Clause

Fourteenth Amendment, Section 1:

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

In the case in which it was first called upon to interpret this clause, the Court doubted whether this provision could apply to state actions that were not directed at newly freed slaves, arguing that this Amendment was "clearly a provision for that race" and intended to remedy discriminatory laws directed at freed slaves.[1] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices, as with the Due Process Clause, seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the Clause.[2] Nine years later, Chief Justice Morrison Waite announced from the bench that the Court would not hear argument on the question whether the Equal Protection Clause applied to corporations. "We are all of the opinion that it does."[3] The word has been given the broadest possible meaning. "These provisions are universal in their application, to all persons within the

[8] 458 U.S. at 730. In addition to obligating the state to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the state "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." *Id.* at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[9] In the major dissent, Justice Lewis Powell argued that only a rational basis standard ought to be applied to sex classifications that would "*expand* women's choices," but that the exclusion here satisfied intermediate review because it promoted diversity of educational opportunity and was premised on the belief that single-sex colleges offer "distinctive benefits" to society. *Id.* at 735, 740 (emphasis by Justice), 743. The Court noted that, because the state maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," *id.* at 720 n.1, although Justice Lewis Powell thought the decision did preclude such institutions. *Id.* at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), *aff'd by an equally divided Court*, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[2] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Chicago, M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877).

[3] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism chs. 9, 10, and pp. 566–84 (1968). Justice Hugo Black, in *Connecticut Gen. Life Ins. Co. v. Johnson,* 303 U.S. 77, 85 (1938), and Justice William O. Douglas, in *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."[4] The only qualification is that a municipal corporation cannot invoke the clause against its state.[5]

Amdt14.S1.8.9.2 Meaning of Within Its Jurisdiction in the Equal Protection Clause

Fourteenth Amendment, Section 1:

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

Persons "within its jurisdiction" are entitled to equal protection from a state. Largely because Article IV, Section 2, has from the beginning guaranteed the privileges and immunities of citizens in the several states, the Court has rarely construed the phrase in relation to natural persons.[1] As to business entities, it was first held that a foreign corporation that was not doing business in a state in a manner that subjected it to the process of a state's courts was not "within the jurisdiction" of the state and could not complain that resident creditors were given preferences in the distribution of assets of an insolvent corporation.[2] This holding was subsequently qualified, however, with the Court holding that a foreign corporation seeking to recover possession of property wrongfully taken in one state, but suing in another state in which it was not licensed to do business, was "within the jurisdiction" of the latter state, so that unequal burdens could not be imposed on the maintenance of the suit.[3] The test of amenability to service of process within the state was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[4] On the other hand, if a state has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws, but not necessarily to identical treatment with domestic corporations.[5]

Amdt14.S1.8.9.3 Police Power Classifications and Equal Protection Clause

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

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[4] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). For modern examples, *see* Levy v. Louisiana, 391 U.S. 68, 70 (1968); Graham v. Richardson, 403 U.S. 365, 371 (1971).

[5] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[1] *But see* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens unlawfully present in a state are "within its jurisdiction" and may thus raise equal protection claims).

[2] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

[3] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[4] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[5] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Justice Oliver Wendell Holmes' characterization of the Equal Protection Clause as the "usual last refuge of constitutional arguments"[1] was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[2] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[3] and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[4] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature "*could rationally have decided*" that its classification would foster its goal.[5] The Court has condemned a variety of statutory classifications as failing

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[1] Buck v. Bell, 274 U.S. 200, 208 (1927).

[2] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[3] City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.* at 303–04.

[4] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for twenty years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305–06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[5] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newspaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on

motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices William O. Douglas and Hugo Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding 1, 3, or 5 pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1905); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919)

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a state, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). *See also* North v. Russell, 427 U.S. 328, 338 (1976).Geographic distinctions in regulatory laws

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggist or manufacturers from regulation. Lloyd v. Dollison, 194 U.S. 445 (1904); Eberle v. Michigan, 232 U.S. 700 (1914).

Landlord-tenant: requiring trial no later than 6 days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal v. Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S. 339 (1917);

the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute that forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual companies to operate in this manner.[6] A law that required private motor vehicle carriers to obtain

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exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other states from registration requirement, Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars, and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a state may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. L. Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the Equal Protection Clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of twenty or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, *e.g.*, cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). *See also* Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).

[6] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[7] The same result befell a statute that permitted mill dealers without well-advertised trade names the benefit of a price differential but that restricted this benefit to such dealers entering the business before a certain date.[8] In a decision since overruled, the Court struck down a law that exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[9]

Amdt14.S1.8.10 Economic Regulation and Taxing Power

Amdt14.S1.8.10.1 Overview of Economic Regulation and Taxing Power

Fourteenth Amendment, Section 1:

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

At the outset, the Court did not regard the Equal Protection Clause as having any bearing on taxation.[1] It soon, however, entertained cases assailing specific tax laws under this provision,[2] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."[3] The Court observed, however, that the Equal Protection Clause "was not intended to compel the State to adopt an iron rule of equal taxation" and propounded some conclusions that remain valid today.[4] In succeeding years the Clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

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[7] Smith v. Cahoon, 283 U.S. 553 (1931).

[8] Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936). *See* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

[9] Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

[1] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[2] Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[3] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[4] The state "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." 134 U.S. at 237. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

Amdt14.S1.8.10.2 Classifications for State Taxes

Fourteenth Amendment, Section 1:

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

The power of the state to classify for purposes of taxation is "of wide range and flexibility."[1] A state may adjust its taxing system in such a way as to favor certain industries or forms of

[1] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a state in contrast with a rate of 10 cents per $100 on deposits in the state. Madden v. Kentucky, 309 U.S. 83 (1940).

Coal: a tax of two and one-half percent on anthracite but not on bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the state, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Gambling: slot machines on excursion riverboats are taxed at a maximum rate of 20%, while slot machines at a racetrack are taxed at a maximum rate of 36%. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook v. Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the state selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

industry[2] and may tax different types of taxpayers differently, despite the fact that they compete.[3] It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed."[4] Classification may not be arbitrary. It must be based on a real and substantial difference[5] and the difference need not be great or conspicuous,[6] but there must be no discrimination in favor of one as against another of the same class.[7] Also, discriminations of an unusual character are scrutinized with special care.[8] A gross sales tax graduated at increasing rates with the volume of sales,[9] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country,[10] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[11] have been held to be a repugnant to the Equal Protection Clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[12] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[13]

One not within the class claimed to be discriminated against cannot challenge the constitutionality of a statute on the ground that it denies equal protection of the law.[14] If a tax applies to a class that may be separately taxed, those within the class may not complain because the class might have been more aptly defined or because others, not of the class, are taxed improperly.[15]

Amdt14.S1.8.10.3 Foreign Corporations, Nonresidents, and State Taxes

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).

[2] Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. v. Montana, 233 U.S. 331 (1914); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[3] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[4] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[5] Southern Ry. v. Greene, 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[6] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

[7] Giozza v. Tiernan, 148 U.S. 657, 662 (1893).

[8] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). *See also* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[9] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).

[10] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[11] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). This case was formally overruled in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973).

[12] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).

[13] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[14] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).

[15] Morf v. Bingaman, 298 U.S. 407, 413 (1936).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause does not require identical taxes upon all foreign and domestic corporations in every case.[1] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that state in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the state, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[2] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[3] and that where it has acquired property of a fixed and permanent nature in a state, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.[4] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the Equal Protection Clause where foreign companies writing only casualty insurance were not subject to a similar tax.[5] Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[6] Even though the right of a foreign corporation to do business in a state rests on a license, the Equal Protection Clause is held to ensure it equality of treatment, at least so far as ad valorem taxation is concerned.[7] The Court, in *WHYY Inc. v. Glassboro*,[8] held that a foreign nonprofit corporation licensed to do business in the taxing state is denied equal protection of the law where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister state and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing state.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[9] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate

[1] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[2] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).

[3] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).

[4] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).

[5] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

[6] Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in *Western & Southern Life Ins. Co. v. State Bd. Of Equalization,* 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[7] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

[8] 393 U.S. 117 (1968).

[9] 470 U.S. 869, 878 (1985). The vote was 5-4, with Justice Lewis Powell's opinion for the Court joined by Chief Justice Warren Burger and by Justices Byron White, Harry Blackmun, and John Paul Stevens. Justice Sandra Day O'Connor's dissent was joined by Justices William Brennan, Thurgood Marshall, and William Rehnquist.

commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[10] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[11]

Amdt14.S1.8.10.4 State Income Taxes

Fourteenth Amendment, Section 1:

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

A state law that taxes the entire income of domestic corporations that do business in the state, including that derived within the state, while exempting entirely the income received outside the state by domestic corporations that do no local business, is arbitrary and invalid.[1] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the state, although residents are permitted to deduct all losses, wherever incurred.[2] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year that were deductible from gross income under the law in effect when they were received, does not violate the Equal Protection Clause.[3]

Amdt14.S1.8.10.5 State Inheritance Taxes

Fourteenth Amendment, Section 1:

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

There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred, and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[1] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the

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[10] 470 U.S. at 880.

[11] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual per se invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

[1] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954), sustaining a municipal income tax imposed on gross wages of employed persons but only on net profits of the self-employed, of corporations, and of business enterprises.

[2] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[3] Welch v. Henry, 305 U.S. 134 (1938).

[1] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).

remainder passes to collateral heirs.[2] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[3] Vested and contingent remainders may be treated differently.[4] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the state.[5] In computing the tax collectible from a nonresident decedent's property within the state, a state may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the state bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[6]

Amdt14.S1.8.10.6 Motor Vehicle Taxes

Fourteenth Amendment, Section 1:

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

In demanding compensation for the use of highways, a state may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[1] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than it taxes similar vehicles carrying property not for hire, is reasonable, because the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less extensive than that of one engaged in business as a common carrier.[2] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than are taxes on property not so employed.[3] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[4] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the state for purpose of sale does not violate the Equal Protection Clause as applied to cars moving in caravans.[5] The exemption from a tax for a permit to bring cars into the state in caravans of cars moved for sale between zones in the state is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt from the tax.[6] Also sustained as valid have been exemptions of vehicles weighing less than 3,000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the

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[2] Billings v. Illinois, 188 U.S. 97 (1903).

[3] Campbell v. California, 200 U.S. 87 (1906).

[4] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).

[5] Board of Educ. v. Illinois, 203 U.S. 553 (1906).

[6] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[1] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

[2] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).

[3] Alward v. Johnson, 282 U.S. 509 (1931).

[4] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).

[5] Morf v. Bingaman, 298 U.S. 407 (1936).

[6] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

exempt vehicles, when loaded, may outweigh those taxed;[7] and exemptions from vehicle registration and license fees levied on private carriers operating a motor vehicle in the business of transporting persons or property for hire, the exemptions including one for vehicles hauling people and farm products exclusively between points not having railroad facilities and not passing through or beyond municipalities having railroad facilities.[8]

Amdt14.S1.8.10.7 Property Taxes

Fourteenth Amendment, Section 1:

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

The state's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[1] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[2] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the state.[3] Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[4]

Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the Equal Protection Clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.[5] Subsequently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*,[6] found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from eight to thirty-five times higher than comparable neighboring property for which the assessor failed over a ten-year period to readjust appraisals.

Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, whereas assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[7] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a

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[7] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).

[8] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).

[1] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[2] Missouri v. Dockery, 191 U.S. 165 (1903).

[3] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).

[4] Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[5] Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). *See also* Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).

[6] 488 U.S. 336 (1989).

[7] Nordlinger v. Hahn, 505 U.S. 1 (1992).

coherent state policy.[8] California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.[9]

Allegheny Pittsburgh was similarly distinguished in *Armour v. City of Indianapolis*,[10] where the Court held that Indianapolis, which had abandoned one method of assessing payments against affected lots for sewer projects for another, could forgive outstanding assessments payments without refunding assessments already paid. In *Armour*, owners of affected lots had been given the option of paying in one lump sum, or of paying in a ten, twenty or thirty-year installment plan. Despite arguments that the forgiveness of the assessment resulted in a significant disparity in the assessment paid by similarly situated homeowners, the Court found that avoiding the administrative burden of continuing to collect the outstanding fees was a rational basis for the City's decision.[11]

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[12] Equal protection is denied if a state does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[13] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[14]

Amdt14.S1.8.10.8 Special Assessments

Fourteenth Amendment, Section 1:

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

A special assessment is not discriminatory because apportioned on an ad valorem basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[2] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are

[8] 505 U.S. at 14–15.

[9] 505 U.S. at 12–13.

[10] 566 U.S. 673 (2012).

[11] 566 U.S. at 682–84.

[12] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

[13] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

[14] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).

[1] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).

[2] Kansas City So. Ry. v. Road Improv. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).

based on real property alone.[3] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[4] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having fewer than twenty-five miles of main line within the district than for those having more.[5]

Amdt14.S1.8.11 Sexual Orientation-Based Classifications

Fourteenth Amendment, Section 1:

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

In its 1996 decision *Romer v. Evans*,[1] the Supreme Court struck down a state constitutional amendment that both overturned local ordinances prohibiting discrimination against homosexuals, lesbians, or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to adopt the analysis of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.[2] The Court also declined to apply the heightened standard reserved for suspect classes to classifications based on sexual orientation, and assessed only whether the legislative classification had a rational relation to a legitimate end.

The Court concluded that the amendment failed even this restrained review. Animus against a class of persons, in the court's view, was not a legitimate government goal: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[3] The Court rejected arguments that the state amendment protected the freedom of association rights of landlords and employers, or would conserve resources for fighting discrimination against other groups. The Court found the law unnecessarily broad for these stated purposes, and concluded that no other legitimate rationale existed for such a restriction.[4]

In the 2013 decision of *United States v. Windsor*,[5] the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which restricted federal recognition of same-sex marriages by specifying that, for any federal statute, ruling, regulation, or interpretation by an administrative agency, the word "spouse" would mean a husband or wife of the opposite sex.[6] In *Windsor*, the petitioner had married her same-sex spouse in Canada and lived in New York where the marriage was recognized. After her partner died, the petitioner sought to claim a

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[3] Road Improv. Dist. v. Missouri Pacific R.R., 274 U.S. 188 (1927).

[4] Branson v. Bush, 251 U.S. 182 (1919).

[5] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[1] 517 U.S. 620 (1996).

[2] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[3] *Romer*, 517 U.S. at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[4] *Id.* at 635.

[5] 570 U.S. 744 (2013).

[6] Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).

federal estate tax exemption for surviving spouses.[7] DOMA precluded her claim for an exemption. In examining the federal statute, the Court initially noted Section 3 of DOMA took the "unusual" step of departing from the "history and tradition of reliance on state law to define marriage" in order to alter the reach of over 1,000 federal laws and limit the scope of federal benefits.[8] Citing *Romer*, the Court noted that discrimination of "unusual character" warranted more careful scrutiny.[9]

Noting New York's recognition of petitioner's marriage, the Court said, the state conferred a "dignity and status of immense import,"[10] and the federal government, with Section 3 of DOMA, was aiming to impose "restrictions and disabilities" on and "injure the very class" New York sought to protect.[11] Accordingly, the Court concluded that improper animus or purpose motivated Section 3 of DOMA because the law's avowed "purpose and practical" effect was to "impose a . . . stigma upon all who enter into same-sex marriages made lawful" by the states.[12] Determining that "no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,"[13] the Court held that Section 3 of DOMA violates "basic due process and equal protection principles applicable to the Federal Government."[14] In striking down Section 3, the Court did not expressly set out what test the government must meet to justify laws calling for differentiated treatment based on sexual orientation.

Two years after *Windsor*, the Court, in *Obergefell v. Hodges* invalidated several state laws limiting the licensing and recognition of marriage to two people of the opposite sex.[15] While the decision primarily rested on substantive due process grounds,[16] the Court noted that the "right of same sex couples to marry" is "derived, too," from the Fourteenth Amendment's Equal Protection Clause.[17] The Court characterized the Due Process Clause and the Equal Protection Clause as being closely related, and ruled that the Equal Protection Clause prevents states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite sex couples.[18] In reaching that conclusion, the Court noted that, just as evolving societal norms inform the liberty rights of same-sex couples, so too do "new insights and societal understandings" about homosexuality reveal "unjustified inequality" with respect to traditional concepts of the institution of marriage.[19] The Court viewed marriage laws

[7] Section 3 also provided that "marriage" would mean only a legal union between one man and one woman.

[8] *Windsor*, 570 U.S. at 767–68.

[9] *Id.* at 768 (citing *Romer*, 517 U.S. at 633).

[10] *Id.*

[11] *Id.* at 768–70.

[12] *Id.* at 770.

[13] *Id.* at 775.

[14] *Id.* at 769–70. Because the case was decided under the Due Process Clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue.

[15] *See* No. 14-556, slip op. at 2, 28 (U.S. June 26, 2015).

[16] *Id.* at 10–19.

[17] *Id.* at 19.

[18] *Id.* at 23. However, the *Obergefell* Court did not apply any traditional equal protection analysis assessing the nature of the classification, the underlying justifications, or the fit between the classification and its purpose. Instead, the *Obergefell* Court concluded that state classifications distinguishing between opposite- and same-sex couples violated equal protection principles on their face and therefore were unconstitutional. *Id.* at 21–22; *see also* Amdt14.S1.8.13.1 Overview of Fundamental Rights.

[19] *See Obergefell*, slip op. at 19–21.

prohibiting the licensing and recognition of same-sex marriages as working a grave and continuing harm to same-sex couples, serving to "disrespect and subordinate them."[20]

Amdt14.S1.8.12 Wealth-Based Distinctions

Amdt14.S1.8.12.1 Overview of Wealth-Based Distinctions and Equal Protection

Fourteenth Amendment, Section 1:

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

Whatever may be the status of wealth distinctions per se as a suspect classification,[1] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin v. Illinois*,[2] surely one of the most seminal cases in modern constitutional law. There, the state conditioned full direct appellate review—review to which all convicted defendants were entitled—on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Hugo Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." Although the state was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was that it treated defendants with money differently from defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[3]

The principle of *Griffin* was extended in *Douglas v. California*,[4] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of

[20] *Id.* at 22.

[1] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[2] 351 U.S. 12 (1956).

[3] 351 U.S. at 17, 18, 19. Although Justice Hugo Black was not explicit, it seems clear that the system was found to violate both the Due Process and Equal Protection Clauses. Justice Felix Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." *Id.* at 23.

[4] 372 U.S. 353 (1963). Justice Thomas Clark dissented, protesting the Court's "new fetish for indigency," *id.* at 358, 359, and Justices John Harlan and Potter Stewart also dissented. *Id.* at 360.

the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."[5]

From the beginning, Justice John Harlan opposed reliance on the Equal Protection Clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the Equal Protection Clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional."[6] As he protested in *Douglas*: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely."[7]

Due process furnished the standard, Justice John Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system that merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system that denied due process.[8]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal."[9]

Amdt14.S1.8.12.2 Criminal Procedures, Sentences, and Poverty

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United*

[5] 372 U.S. at 357–58.

[6] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).

[7] Douglas v. California, 372 U.S. 353, 361 (1963).

[8] 372 U.S. at 363–67.

[9] Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"[I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[1] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ."[2] No state may condition the right to appeal[3] or the right to file a petition for habeas corpus[4] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the states are not required to furnish full and complete transcripts of their trials to indigents when excerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[5] This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[6] A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[7] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[8]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the Due Process nor the Equal Protection Clause requires a state to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the state's higher courts or in the United States Supreme Court. Due process does not require that, after an appeal has been provided, the state must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in

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[1] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[2] Draper v. Washington, 372 U.S. 487, 496 (1963).

[3] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

[4] Smith v. Bennett, 365 U.S. 708 (1961).

[5] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, *see* Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).

[6] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

[7] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an *Anders* brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). *But see* Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an *Anders* brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[8] Evitts v. Lucey, 469 U.S. 387 (1985).

which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[9] Not even death row inmates have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[10]

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a state may not deny prisoners legal assistance of another inmate,[11] and it must make available certain minimal legal materials.[12]

A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[13] held that it was a denial of equal protection for a state to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine that was also levied upon conviction. And *Tate v. Short*[14] held that, in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection

Fourteenth Amendment, Section 1:

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

In *Boddie v. Connecticut*,[1] Justice John Harlan carried a majority of the Court with him in using a due process analysis to evaluate the constitutionality of a state's filing fees in divorce actions that a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that, when the state monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the state could terminate the marital status—then it denied due process by inflexibly imposing fees that kept some persons from using that avenue. Justice John Harlan's opinion averred that a facially neutral law or policy that did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental

[9] Ross v. Moffitt, 417 U.S. 600 (1974). *See also* Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse state for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[10] Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which "unit attorneys" assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).

[11] Johnson v. Avery, 393 U.S. 483 (1969).

[12] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[13] 399 U.S. 235 (1970).

[14] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the state's penal policy.

[1] 401 U.S. 371 (1971).

interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States v. Kras*,[2] the Court held that the imposition of filing fees that blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[3]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[4]

The continuing vitality of *Griffin v. Illinois*, however, is seen in *M.L.B. v. S.L.J.*,[5] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the state, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state's limiting "[c]hoices about marriage, family life, and the upbringing of children,"[6] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal,[7] and

[2] 409 U.S. 434 (1973).

[3] 409 U.S. at 443–46. The equal protection argument was rejected by using the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Potter Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. *Id.* at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. *Id.* at 458. Justices William O. Douglas and William Brennan concurred in Justice Potter Stewart's dissent, as indeed did Justice Thurgood Marshall.

[4] Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-4 that prevailed in *Kras*. *See also* Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the *Boddie* principle do continue to arise. Little v. Streater, 452 U.S. 1 (1981) (in paternity suit that state required complainant to initiate, indigent defendant entitled to have state pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of indigent parent to appointed counsel when state seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[5] 519 U.S. 102 (1996).

[6] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[7] Mayer v. Chicago, 404 U.S. 189 (1971).

that the forced dissolution of parental rights was "more substantial than mere loss of money,"[8] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

Amdt14.S1.8.12.4 Educational Opportunity, Wealth, and Equal Protection

Fourteenth Amendment, Section 1:

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

Making even clearer its approach in de facto wealth classification cases, the Court in *San Antonio School District v. Rodriguez*[1] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in forty-nine of the fifty states of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a de facto wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the state's interest in protecting and promoting local control of education.[2]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[3] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

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[8] 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

[1] 411 U.S. 1 (1973). The opinion by Justice Lewis Powell was concurred in by the Chief Justice and Justices Potter Stewart, Harry Blackmun, and William Rehnquist. Justices William O. Douglas, William Brennan, Byron White, and Thurgood Marshall dissented. *Id.* at 62, 63, 70.

[2] 411 U.S. at 44–55. Applying the rational justification test, Justice Byron White would have found that the system did not use means rationally related to the end sought to be achieved. *Id.* at 63.

[3] 411 U.S. at 20. *But see id.* at 70, 117–24 (Marshall and Douglas, JJ., dissenting).

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[4]

Rodriguez clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a per se suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[5] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[6] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[7]

Amdt14.S1.8.12.5 Abortion, Public Assistance, and Equal Protection

Fourteenth Amendment, Section 1:

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

Rodriguez furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[1] holding that a state's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, the Court held that the indigent are not a suspect class.[2] Again, as in *Rodriguez* and in *Kras*, the Court held that, when the state has not

[4] 411 U.S. at 29–39. *But see id.* at 62 (Brennan, J., dissenting), 70, 110–17 (Marshall and Douglas, JJ., dissenting).

[5] *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[6] 487 U.S. 450 (1988). This was a 5-4 decision, with Justice Sanra Day O'Connor's opinion of the Court being joined by Chief Justice William Rehnquist and Justices Byron White, Antonin Scalia, and Anthony Kennedy, and with Justices Thurgood Marshall, William Brennan, John Paul Stevens, and Harry Blackmun dissenting.

[7] 487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

[1] 432 U.S. 464 (1977).

[2] 432 U.S. at 470–71.

monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[3] Expansion of this area of the law of equal protection seems especially limited.

Amdt14.S1.8.13 Fundamental Rights

Amdt14.S1.8.13.1 Overview of Fundamental Rights

Fourteenth Amendment, Section 1:

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

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[1]

It is thought[2] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[3] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Earl Warren observed that, "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[4] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility[5] and the phrase "compelling state interest" was used several times in Justice William Brennan's opinion in *Shapiro v. Thompson*.[6] Thereafter, the phrase was used in several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[7]

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[3] 432 U.S. at 471–74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Potter Stewart and Lewis Powell in *Zablocki v. Redhail,* 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that *Dandridge v. Williams*, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

[1] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[2] *Shapiro*, 394 U.S. at 660 (Harlan, J., dissenting).

[3] 316 U.S. 535, 541 (1942).

[4] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[5] Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[6] 394 U.S. 618, 627, 634, 638 (1969).

[7] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).

Although no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[8] it was evident from the cases that the right to vote,[9] the right of interstate travel,[10] the right to be free of wealth distinctions in the criminal process,[11] and the right of procreation[12] were at least some of those interests that triggered active review when de jure or de facto official distinctions were made with respect to them. In *Rodriguez*,[13] the Court also sought to rationalize and restrict this branch of active review, as that case involved both a claim that de facto wealth classifications should be suspect and a claim that education was a fundamental interest, so that providing less of it to people because they were poor triggered a compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[14] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* did not ultimately prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review, Justice Lewis Powell's admonition that only interests expressly or impliedly protected by the Constitution should be considered "fundamental" did not prevent the expansion of the list of such interests. The difficulty was that Court decisions on the right to vote, the right to travel, the right to procreate, as well as other rights, premise the constitutional violation to be of the Equal Protection Clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right.[15] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification.[16] Although denials of public funding of abortions werebecause only poor held to implicate no fundamental interest—abortion's being a fundamental interest—and no suspect classification—because only poor women needed public funding[17] other denials of public assistance because of alienage, sex, or whether a person was born out of wedlock have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.[18] And, in *Plyler v. Doe*,[19] the complete denial of education to the children of unlawfully present aliens was found subject to intermediate scrutiny and invalidated.

An open question after *Obergefell v. Hodges*, the 2015 case finding the right to same-sex marriage is protected by the Constitution, is the extent to which the Court is reconceptualizing

[8] This indefiniteness has been a recurring theme in dissents. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J.); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Rehnquist, J.).

[9] *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

[10] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[11] *E.g.*, Tate v. Short, 401 U.S. 395 (1971).

[12] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[13] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[14] 411 U.S. at 30, 33–34. *But see id.* at 62 (Brennan, J., dissenting), 70, 110–17 (Marshall and Douglas, J.J., dissenting).

[15] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and *id.* at 66–68 (Brennan, J., concurring), 78–80 (O'Connor, J., concurring) (travel).

[16] Zablocki v. Redhail, 434 U.S. 374 (1978).

[17] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[18] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974) (whether a person was born to married parents); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[19] 457 U.S. 202 (1982).

equal protection analysis.[20] In *Obergefell*, the Court concluded that state laws that distinguished between marriages between same- and opposite-sex married couples violated the Equal Protection Clause.[21] However, in lieu of more traditional equal protection analysis, the *Obergefell* Court did not identify whether the base classification made by the challenged state marriage laws was "suspect." Nor did the *Obergefell* Court engage in a balancing test to determine whether the purpose of the state classification was tailored to or fit the contours of the classification. Instead, the Court merely declared that state laws prohibiting same-sex marriage "abridge[d] central precepts of equality."[22] It remains to be seen whether *Obergefell* signals a new direction for the Court's equal protection jurisprudence or is merely an anomaly that indicates the fluctuating nature of active review, as the doctrine has been subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. Nonetheless, as will be more fully reviewed below, the sliding scale of review underlies many of the Court's most recent equal protection cases, even if the jurisprudence and its doctrinal basis have not been fully elucidated or consistently endorsed by the Court.

Amdt14.S1.8.13.2 Interstate Travel as a Fundamental Right

Fourteenth Amendment, Section 1:

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

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.[1] The second, expressly addressed by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the "Privileges and Immunities" of a citizen of the latter state.[2] The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period before taking advantage of the benefits of that state's citizenship.

Amdt14.S1.8.13.3 Residency Requirements and Interstate Travel

Fourteenth Amendment, Section 1:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or*

[20] *See* 135 S. Ct. 2584 (2015).

[21] *Id.* at 2590–91.

[22] *Id.*

[1] Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of 'free ingress and regress to and from' neighboring states which was expressly mentioned in the text of the Articles of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Id.* at 501 (citations omitted).

[2] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) ("without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, the Court approved a doctrinal shift, so that state laws that distinguished between their own citizens, based on how long they had been in the state, would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.[1] The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the state for the prescribed period and those who have not.[2] But persons who have moved recently, at least from state to state,[3] have exercised a right protected by the Constitution, and the durational residency classification either deters the exercise of that right or penalizes those who have exercised it.[4] Any such classification is invalid "unless shown to be necessary to promote a *compelling* governmental interest."[5] The constitutional right to travel has long been recognized,[6] but it is only relatively recently that the strict standard of equal protection review has been applied to nullify durational residency requirements.

Thus, in *Shapiro v. Thompson*,[7] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the state[8] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the state or to bar the entry of those who came from low-paying states to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[9] If, on the other hand, the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity

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[1] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[2] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Because the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the Privileges and Immunities Clause, Article IV, § 2, cl. 1.

[3] Intrastate travel is protected to the extent that the classification fails to meet equal protection standards in some respect. *Compare* Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge court), *aff'd. per curiam*, 405 U.S. 1035 (1972), *with* Arlington County Bd. v. Richards, 434 U.S. 5 (1977). The same principle applies in the Commerce Clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[4] Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Jones v. Helms, 452 U.S. 412, 420–21 (1981). *See also* Oregon v. Mitchell, 400 U.S. 112, 236–39 (1970) (Brennan, White, and Marshall, JJ.), and *id.* at 285–92 (Stewart and Blackmun, JJ., and Burger, C.J.).

[5] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[6] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the Equal Protection Clause are questions puzzled over and unresolved by the Court. United States v. Guest, 383 U.S. 745, 758, 759 (1966), and *id.* at 763–64 (Harlan, J., concurring and dissenting), *id.* at 777 n.3 (Brennan, J., concurring and dissenting); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and *id.* at 671 ((Harlan, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 31–32 (1973); Jones v. Helms, 452 U.S. 412, 417–19 (1981); Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and *id.* at 66–68 (Brennan, J., concurring), 78–81 (O'Connor, J., concurring).

[7] 394 U.S. 618 (1969).

[8] The durational residency provision established by Congress for the District of Columbia was also voided. 394 U.S. at 641–42.

[9] 394 U.S. at 627–33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the state solely to obtain welfare assistance.

for fraud, and encouragement of early entry of new residents into the labor force—then the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification that infringed a fundamental interest.[10] In *Dunn v. Blumstein*,[11] where the durational residency requirements denied the franchise to newcomers, such administrative justifications were found constitutionally insufficient to justify the classification.[12] The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law that limited welfare benefits for California citizens who had resided in the state for less than a year to the level of benefits that they would have received in the state of their prior residence.[13]

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[14] Although it is not clear what the precise basis of the ruling is, it appears that the Court found that the state's interest in requiring that those who seek a divorce from its courts be genuinely attached to the state and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[15] Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.[16] More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to "consume" benefits within a state's borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).[17]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the state. The differences between the durational residency cases previously

[10] 394 U.S. at 633–38. *Shapiro* was reaffirmed in *Graham v. Richardson,* 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (voiding requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), *aff'd per curiam*, 404 U.S. 1054 (1972); Lopez v. Wyman, Civ. No. 1971-308 (W.D.N.Y. 1971), *aff'd per curiam*, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. Pease v. Hansen, 404 U.S. 70 (1971).

[11] 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in *Kanapaux v. Ellisor,* 419 U.S. 891 (1974), and *Sununu v. Stark,* 420 U.S. 958 (1975).

[12] For additional discussion of durational residence as a qualification to vote, see Amdt14.S1.8.6.2 Voter Qualifications.

[13] Saenz v. Roe, 526 U.S. 489, 505 (1999).

[14] 419 U.S. 393 (1975). Justices Thurgood Marshall and William Brennan dissented on the merits. *Id.* at 418.

[15] 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[16] Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441, 452 & n.9 (1973), and *id.* at 456, 464, 467 (dicta). In *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

[17] *Saenz v. Roe*, 526 U.S. at 505.

decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[18]

Still unresolved are issues such as durational residency requirements for occupational licenses and other purposes.[19] But this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[20] and the cases do not inhibit the states when, having reasons for doing so, they bar travel by certain persons.[21]

Section 2—Apportionment of Representation

Amdt14.S2.1 Overview of Apportionment of Representation

Fourteenth Amendment, Section 2:

> *Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*

With the abolition of slavery by the Thirteenth Amendment, enslaved persons and their descendants, who formerly counted as three-fifths of a person, would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, and there appeared the prospect that the readmitted Southern states would gain a political advantage in Congress when combined with Democrats from the North. Because the South was adamantly opposed to African American suffrage, all the congressmen would be elected by White voters. Many wished to provide for the enfranchisement of African Americans and proposals to this effect were voted on in both the House and the Senate, but only a few Northern states permitted African Americans to vote, and a series of referenda on the question in Northern states revealed substantial White hostility to the proposal. Therefore, a compromise was worked out to effect a reduction in the representation of any state that discriminated against males in the franchise.[1]

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[18] Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

[19] La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[20] *E.g.*, McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

[21] Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the state).

[1] *See generally* J. James, The Framing of the Fourteenth Amendment (1956).

Amdt14.S2.1
Overview of Apportionment of Representation

No serious effort was ever made in Congress to effectuate Section 2, and the only judicial attempt was rebuffed.[2] With subsequent constitutional amendments adopted and the use of federal coercive powers to enfranchise persons, the section is little more than a historical curiosity.[3]

However, in *Richardson v. Ramirez*,[4] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of Section 2 the Equal Protection Clause was simply inapplicable.

Section 3—Disqualification from Holding Office

Amdt14.S3.1 Overview of Disqualification Clause

Fourteenth Amendment, Section 3:

> *No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.*

The right to remove disabilities imposed by this Section was exercised by Congress at different times on behalf of enumerated individuals.[1] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States."[2] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[3]

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[2] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

[3] The Section did furnish a basis to Justice John Harlan to argue that inasmuch as Section 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying Section 1 to questions relating to the franchise. *Compare* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Harlan, J., concurring and dissenting), *with id.* at 229, 250 (Brennan, J., concurring and dissenting). The language of the Section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in *Oregon v. Mitchell* as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att'y Gen. 518 (1940).

[4] 418 U.S. 24 (1974). Justices Thurgood Marshall, William O. Douglas, and William Brennan dissented. *Id.* at 56, 86.

[1] *E.g.*, and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.

[2] Ch. 193, 17 Stat. 142.

[3] Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of Section 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. Griffin's Case, 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this Section from again holding office under the United States. 18 Op. Att'y Gen. 149 (1885). On the construction of "engaged in rebellion," *see* United States v. Powell, 27 F. Cas. 605 (No. 16079) (C.C.D.N.C. 1871).

Section 4—Public Debt

Amdt14.S4.1 Overview of Public Debt Clause

Fourteenth Amendment, Section 4:

> *The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.*

Although Section 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt'. . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[1]

Section 5—Enforcement

Amdt14.S5.1 Overview of Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In the aftermath of the Civil War, Congress, in addition to proposing to the states the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[1] Several of these laws were general civil rights statutes that broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the states, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[2] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[3] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the Commerce Clause[4] until Supreme Court decisions indicated an expansive concept of congressional power

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[1] Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." On a Confederate bond problem, *see* Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). *See also* The Pietro Campanella, 73 F. Supp. 18 (D. Md. 1947).

[1] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of February 28, 1871, ch. 99, 16 Stat. 433; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C. §§ 1981–83, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnaping Act of 1866, ch. 86, 14 Stat. 50, and the Peonage Abolition Act, ch. 187, 14 Stat. 546, 18 U.S.C. §§ 1581–88, and 42 U.S.C. § 1994.

[2] *See generally* R. Carr, Federal Protection of Civil Rights: Quest for a Sword (1947).

[3] For cases under 18 U.S.C. §§ 241 and 242 in their previous codifications, *see* United States v. Mosley, 238 U.S. 383 (1915); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Bathgate, 246 U.S. 220 (1918); United States v. Wheeler, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945).

[4] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

under the Civil War Amendments,[5] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[6]

Amdt14.S5.2 Who Congress May Regulate

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,[1] and to provide criminal[2] and civil[3] liability for state officials and agents[4] or persons associated with them[5] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[6] present no problems of constitutional foundation, although there may well be other problems of application.[7] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875[8] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The *Civil Rights Cases*[9] found this enactment to be beyond Congress's power to enforce the Fourteenth Amendment. The Court observed that Section 1 prohibited only state action and did not reach private conduct. Therefore, Congress's power under Section 5 to enforce Section 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the

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[5] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[6] 82 Stat. 73, 18 U.S.C. § 245.

[1] Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare* Georgia v. Rachel, 384 U.S. 780 (1966), *with* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[2] 18 U.S.C. §§ 241, 242. *See* Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Johnson, 390 U.S. 563 (1968).

[3] 42 U.S.C. § 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[4] *Ex parte* Virginia, 100 U.S. 339 (1880).

[5] United States v. Price, 383 U.S. 787 (1966).

[6] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting application to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[7] *E.g.*, the problem of "specific intent" in *Screws v. United States,* 325 U.S. 91 (1945), and *Williams v. United States,* 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States, which divided the Court in *United States v. Williams,* 341 U.S. 70 (1951), and which was resolved in *United States v. Price,* 383 U.S. 787 (1966).

[8] 18 Stat. 335, §§ 1, 2.

[9] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation revived by *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968).

regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[10] The holding in this case had already been preceded by *United States v. Cruikshank*[11] and by *United States v. Harris*[12] in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the states themselves.[13]

Cruikshank did, however, recognize a small category of federal rights that Congress could protect against private deprivation, rights that the Court viewed as deriving particularly from one's status as a citizen of the United States and that Congress had a general police power to protect.[14] These rights included the right to vote in federal elections, general and primary,[15] the right to federal protection while in the custody of federal officers,[16] and the right to inform federal officials of violations of federal law.[17] The right of interstate travel is a basic right derived from the Federal Constitution, which Congress may protect.[18] In *United States v. Williams*,[19] in the context of state action, the Court divided 4-4 over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States v. Price*[20] and *United States v. Guest*,[21] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the Due Process and Equal Protection Clauses.

Because the Court found that both *Price* and *Guest* concerned sufficient state action, it did not then have to reach the question of Section 241's constitutionality when applied to private action that interfered with rights not the subject of a general police power. But Justice William Brennan, responding to what he apparently intepreted as language in the Court's opinion construing Congress's power under Section 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress's power was broader.[22] "Although the Fourteenth Amendment

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[10] 109 U.S. at 11. Justice John Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function that satisfied the state action requirement in any event. *Id.* at 46–48, 56–57.

[11] 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.

[12] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

[13] *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Hodges v. United States, 203 U.S. 1 (1906); United States v. Wheeler, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see* James v. Bowman, 190 U.S. 127 (1903).

[14] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights that the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[15] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[16] Logan v. United States, 144 U.S. 263 (1892).

[17] *In re* Quarles and Butler, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[18] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[19] 341 U.S. 70 (1951).

[20] 383 U.S. 787 (1966) (Due Process Clause).

[21] 383 U.S. 745 (1966) (Equal Protection Clause).

[22] Justice William Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Earl Warren and Justice William O. Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5

itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."[23] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights that, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," that is, by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the Equal Protection Clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and Section 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[24]

The Court, however, ultimately rejected this expansion of the powers of Congress in *United States v. Morrison*.[25] In *Morrison*, the Court invalidated a provision of the Violence Against Women Act[26] that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,[27] dismissing the dicta in *Guest*, and reaffirming the precedents of the *Civil Rights Cases* and *United States v. Harris*. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the state or any state actor, but rather at the individuals committing the criminal acts.[28]

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empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," *id.* at 782 (emphasis by the Justice), was based upon the language of Justice Thomas Clark, joined by Justices Hugo Black and Abe Fortas, *id.* at 761, that, because Justice William Brennan had reached the issue, the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762. In the opinion of the Court, Justice Potter Stewart disclaimed any intention of speaking of Congress's power under Section 5. *Id.* at 755.

[23] 383 U.S. at 782.

[24] 383 U.S. at 777–79, 784.

[25] 529 U.S. 598 (2000).

[26] Pub. L. No. 103-322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981.

[27] 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

[28] This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in *United States v. Harris*) lacks a "color of law" requirement. Although the requirement was read into it in *Collins v. Hardyman,* 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in *Griffin v. Breckenridge,* 403 U.S. 88, 97 (1971) (although it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State"). What the unanimous Court held in *Griffin* was that an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress's powers under Section 5 of the Fourteenth Amendment. *Id.* at 107.

Amdt14.S5.3 Pre-Modern Doctrine on Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

In the *Civil Rights Cases*,[1] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws that Section 1 forbids the states to adopt. The Court was quite clear that, under its responsibilities of judicial review, it was the body that would determine that a state law was impermissible and that a federal law passed pursuant to Section 5 was necessary and proper to enforce Section 1.[2] But, in *United States v. Guest*,[3] Justice William Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors," that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach v. Morgan*,[4] Justice William Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to Section 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965[5] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce."[6] Because the Court had previously upheld an English literacy requirement under equal protection challenge,[7] acceptance of the argument would have doomed the federal law. But, said Justice William Brennan, Congress itself might have questioned the justifications put forward by the state in defense of its law and might have concluded that, instead of being supported by acceptable reasons, the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations that might have led Congress to its conclusion; because Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress's prerogative to weigh" the considerations and the Court would sustain the

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The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd*, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

[1] 109 U.S. 3, 13–14 (1883).

[2] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[3] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).

[4] 384 U.S. 641 (1966). Besides the ground of decision discussed here, *Morgan* also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the Equal Protection Clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the Equal Protection Clause under "necessary and proper" standards. *Id.* at 652–653. A similar "necessary and proper" approach underlay *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), under the Fifteenth Amendment's Enforcement Clause.

[5] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[6] 384 U.S. at 648.

[7] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.[8]

In dissent, Justice John Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."[9] Justice William Brennan rejected this reasoning: "We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[10] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;[11] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[12]

Congress's power under *Morgan* returned to the Court's consideration when several states challenged congressional legislation[13] lowering the voting age in all elections to eighteen and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan*'s vitality was in some considerable doubt, at least with regard to the reach that many observers had previously seen.[14] Four Justices accepted *Morgan* in full,[15] while one Justice rejected it totally[16] and another would have limited it to racial cases.[17] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision, but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[18]

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[8] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

[9] 384 U.S. at 668. Justice Potter Stewart joined this dissent.

[10] 384 U.S. at 651 n.10. Justice Sandra Day O'Connor for the Court quoted and reiterated Justice William Brennan's language in *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 731–33 (1982).

[11] 82 Stat. 73, 18 U.S.C. § 245. *See* S. Rep. No. 721, 90th Congress, 1st Sess. 6–7 (1967). *See also* 82 Stat. 81, 42 U.S.C. §§ 3601 et seq.

[12] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. Rep. No. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases that were subjects of the legislation were *Miranda v. Arizona,* 384 U.S. 436 (1966), and *United States v. Wade,* 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[13] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[14] Oregon v. Mitchell, 400 U.S. 112 (1970).

[15] 400 U.S. at 229, 278–81 (Brennan, White, and Marshall, JJ.), *id.* at 135, 141–44 (Douglas, J.).

[16] 400 U.S. at 152, 204–09 (Harlan, J.).

[17] 400 U.S. at 119, 126–31 (Black, J.).

[18] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the Clause, and what state interests are 'compelling.'" 400 U.S. at 296 (Stewart and Blackmun, JJ., and Burger, C.J.). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. *Id.* at 286.

More recent decisions read broadly Congress's power to make determinations that appear to be substantive decisions with respect to constitutional violations.[19] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[20] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to use Section 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.[21]

Amdt14.S5.4 Modern Doctrine on Enforcement Clause

Fourteenth Amendment, Section 5:

> *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

City of Boerne v. Flores[1] illustrates that the Court will not always defer to Congress's determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In *Flores*, the Court held that the Religious Freedom Restoration Act,[2] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[3] exceeded congressional power under Section of the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[4] Unlike the pervasive suppression of the African American vote in the South that led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.[5]

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in *Boerne*, as litigants precluded from arguing that

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[19] *See* discussion of City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion of Burger, C.J.,), and *id.* at 500–02 (Powell, J., concurring).

[20] The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn *City of Mobile v. Bolden,* 446 U.S. 55 (1980). A substantial change of direction in *Rogers v. Lodge,* 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thereby avoiding a possible constitutional conflict.

[21] *See The Human Life Bill: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 97th Congress, lst Sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982).

[1] 521 U.S. 507 (1997).

[2] Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq.

[3] 494 U.S. 872 (1990).

[4] 521 U.S. at 533.

[5] 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

a state's sovereign immunity has been abrogated under Article I congressional powers[6] seek alternative legislative authority in Section 5. For instance, in *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,[7] a bank that had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.[8]

A similar result was reached regarding the application of the Age Discrimination in Employment Act (ADEA) to state agencies in *Kimel v. Florida Bd. of Regents*.[9] In determining that the Act did not meet the "congruence and proportionality" test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities, and characteristics.[10] Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior."[11]

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of Univ. of Ala. v. Garrett*[12] also rejected the recovery of money damages against states, this time under of the Americans with Disabilities Act of 1990 (ADA).[13] Title I of the ADA prohibits employers, including states, from "discriminating against a qualified individual with a disability"[14] and requires employers to "make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so]. . . would impose an undue hardship on the . . . business."[15] Although the Court had previously overturned discriminatory

[6] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a state's Eleventh Amendment immunity, but *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). *See* discussion pp. 1533–37.

[7] 527 U.S. 627 (1999).

[8] 527 U.S. at 639–46; *see also* Allen v. Cooper, 140 S. Ct. 994, 1005–07 (2020) (holding that evidence of unconstitutional state-copyright infringement was not materially different than the record for state-patent infringement at issue in *Florida Prepaid*); *cf.* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673–75 (1999) (concluding that Congress, by subjecting states to suits for false advertisement, exceeded its powers under the Fourteenth Amendment because the statute did not implicate property interests protected by the Due Process Clause).

[9] 528 U.S. 62 (2000). Again, the issue of the Congress's power under Section 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the Commerce Clause.

[10] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).

[11] 528 U.S. at 86, quoting *City of Boerne*, 521 U.S. at 532.

[12] 531 U.S. 356 (2001).

[13] 42 U.S.C. §§ 12111–12117.

[14] 42 U.S.C. § 12112(a).

[15] 42 U.S.C. § 12112(b)(5)(A).

legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*,[16] the Court had held that determinations of when states had violated the Equal Protection Clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind of "reasonable accommodations" required under the ADA would not generally rise to the level of a violation of the Fourteenth Amendment, and instances of such failures did not qualify as a "history and pattern of unconstitutional employment discrimination."[17] Thus, according to the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,[18] but the requirements of the ADA would be out of proportion to the alleged offenses.

The Court's more recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[19] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid "family care" leave to care for a close relative with a serious health condition. Noting that Section 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[20] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the "state-sanctioned" gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act (FMLA), this time to consider the Act's "self care" (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Md.*, a four-Justice plurality, joined by concurring Justice Antonin Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration.[21] According to the plurality, the self care provisions were intended to ameliorate discrimination based on illness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care

[16] 473 U.S. 432 (1985).

[17] 531 U.S. at 368.

[18] As Justice Stephen Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.

[19] 538 U.S. 721 (2003).

[20] 538 U.S. at 736. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976), so they must be substantially related to the achievement of important governmental objectives, United States v. Virginia, 518 U.S. 515, 533 (1996).

[21] 566 U.S. ___, No. 10-1016, slip op. (2012) (male state employee denied unpaid sick leave).

leave to this state benefit might help some women suffering pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.[22]

The Court in *Tennessee v. Lane*[23] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[24] but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of *Garrett*.[25] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[26]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[27] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.[28]

Congress's authority under Section 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[29] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[30]

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[22] Justice Ruth Bader Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA's leave provisions were not, in the dissent's opinion, susceptible to being rent into separate pieces for analytical purposes.

[23] 541 U.S. 509 (2004).

[24] 42 USCS § 12132.

[25] 531 U.S. 356 (2001).

[26] *See, e.g.*, Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[27] 541 U.S. at 524.

[28] 541 U.S. at 524–25. Justice William Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. *Id.* at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach,* 383 U.S. 301, 312–15 (1966).

[29] 546 U.S. 151 (2006).

[30] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).