[Note: Numbers in brackets refer to the printed pages of Understanding Constitutional Law by Norman Redlich, John Attanasio, and Joel K. Goldstein where the topic is discussed.]

LexisNexis Capsule Summary
Constitutional Law

Authors' Note

Students come to Constitutional Law with very high expectations. It is what many of them think the law and law school is all about. As is frequently the case, students' intuitions are not far from the mark. After all, the constitutional power is what distinguishes American judges and lawyers from those of other lands. The judicial review power has now been adopted by other nations, but it still represents one of the most important contributions made by American lawyers.

The power is awesome when one thinks that six citizens–five members of the Supreme Court and one person challenging a law–can command something that contradicts the wishes of every other person in the country. There should be a sense of excitement in studying this area. Adding to the riveting quality of constitutional jurisprudence is the nature of the questions that it routinely engages. These involve the basic structure of our government and our fundamental values as a society and as a culture.

The United States is a large land mass within whose borders a number of different governmental entities operate. It is critical to understanding our constitutional structure that the Framers intended to disperse power among a number of different government entities. Indeed, the Framers viewed dispersing governmental authority as one of the most important means of preventing tyranny. In one of the most famous quotes from the Federalist Papers, James Madison said:

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

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> primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

Federalist No. 51, in THE FEDERALIST 349 (J. Cooke ed. 1961).

Still, no vesting sovereignty in a single governmental authority, like a king, presents a complex set of problems. Most important, what are the boundary lines of authority between these various governmental entities? Where does the authority of one begin and another end? Moreover, who sets these boundary lines of power between these various governmental entities?

"Human history," says H.G. Wells, "is in essence a history of ideas." The great theme in the history of American Constitutional Law is the concept of law as a check upon public power. That idea has been given practical reality in the decisions of the United States Supreme Court. Those decisions are–to paraphrase Holmes–a virtual magic mirror in which we see reflected our whole constitutional development and all that it has meant to the nation. When one thinks on this majestic theme, the eyes dazzle: that is what Constitutional Law is all about.

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Chapter 1
THE COURTS AND JUDICIAL REVIEW

Introduction [1]

Judicial review involves the power of courts to review legislation to determine whether it is consistent with the Constitution. A fundamental question in constitutional law concerns why courts are authorized to exercise this power**.**

§1.01 Constitutional Law and Argument [1-4]

A constitution is a nation's basic law. The constitution contains the basic principles according to which the nation is governed. It both authorizes and limits governmental power.

Constitutional law involves interpretation. Judges, lawyers and scholars use several types of constitutional argument to analyze and interpret the Constitution.

a. The constitutional text
b. Historical argument
c. Structural argument

    i. Intent of the framers; originalism

    But the framers' intent is often not clear.
    Why should it bind us centuries later?

    ii. Ongoing history

    iii. Judicial doctrine

d. Structural argument
e. Value arguments

§1.02 Judicial Review [4-8]

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is cited as authority for the judicial review power of courts.

Facts: Marbury sued to compel delivery of his commission as a Justice of the Peace after President Jefferson and Secretary of State Madison failed to deliver it to him after President Adams had appointed him.

Chief Justice Marshall held that Section 13 of the Judiciary Act of 1789 was

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unconstitutional because it sought to confer on the Supreme Court original jurisdiction over a type of dispute over which the Constitution gave it only appellate jurisdiction. Where a statute violated the Constitution it was the duty of the courts to apply the Constitution as paramount law which superceded inconsistent statutes.

These two principles–the preeminence of the Constitution and judicial review–were not explicitly provided for in the Constitution but are supported by various types of constitutional argument.

Marbury can be read as giving the judiciary power of judicial review or as giving the judiciary the ultimate power to interpret the Constitution. Although many have argued that other branches also have the power and duty to interpret the Constitution, the Court increasingly contends that it has the ultimate power to do so.

§1.03 Review of State Action [8-10]

More critical than the principle of judicial review over national legislation is the principle of judicial review over state action. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) held that the Court could review acts of state legislatures and declare them unconstitutional. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) upheld the constitutionality of section 25 of the Judiciary Act of 1789 which empowered the Supreme Court to review certain decisions of the highest state court which, generally speaking, ruled adversely to some federal right or claim. The Court rejected Virginia's position that its courts' interpretations were not subject to federal review regarding federal law. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court again affirmed its power to review state court interpretations of federal law.

§1.04 Judicial Independence [10-11]

Art. III sec. 1 provides that federal Art. III judges have life tenure during "good behavior" and protection against salary reduction in order to protect the independence of the judiciary.

But federal judges are not exempt from nondiscriminatory tax increases that apply to them as well as other officials. *United States v. Hatter*, 532 U.S. 557 (2001).

§1.05 Judicial Dependence [11-12]

The judiciary is dependent, however, on the executive branch to obey and carry out its orders.

It also is dependent on Congress which has some control over federal jurisdiction. This raises important questions regarding the extent to which Congress can restrict the jurisdiction of federal courts. The Constitution gives Congress some power regarding

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creating and presumably abolishing federal courts. *Marbury* ,on the other hand, states that the structural principle of the rule of law requires that there be judicial remedies for violation of rights. Can Congress reduce federal jurisdiction in a way which denies remedies for some rights?

§1.06 Court Organization [12-14]

The Constitution provides for the existence of a Supreme Court in Art. III sec. 1 but Congress can control its composition, when it meets and its rules.

Under the Exceptions Clause (Art. III, sec.2 cl. 2) Congress can make exceptions to and regulate the appellate jurisdiction of the Supreme Court. Does this clause confer broad power to restrict the Court's appellate jurisdiction or simply to make limited exceptions?

Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868), held that Congress had power to remove the Court's appellate jurisdiction regarding habeas appeals conferred by an 1867 Act. Still, appellate jurisdiction remained as conferred by the Judiciary Act of 1789 so all routes to the Court were not eliminated. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), recognized some limits to Congress' power to restrict appellate jurisdiction of the Court.

The Ordain and Establish Clause of Art. III sec. 1 empowers Congress to decide whether to create lower federal courts. Cases suggest it has broad power in this respect although some, including Justice Story, have suggested that power is not unlimited. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), confirms that Congress need not confer on lower federal courts the full jurisdiction the Constitution would allow.

It is not clear that Congress could eliminate all jurisdiction regarding a federal right without violating the *Marbury* principle.

§1.07. Jurisdiction: Lower Courts and Legislative Control [14-18]

§1.08. Supreme Court Jurisdiction [18-22]

§1.09 Non-Article III Adjudication [22-24]

Congress can also restrict the importance of the federal courts by creating federal tribunals which do not have the Art. III characteristics of life tenure and salary protection and accordingly may not be as independent of Congress. Congress has typically been allowed to create such tribunals dealing with military justice, the territories, the District of Columbia and disputes involving public rights (e.g. the Tax Court, social security benefits, etc.). The Court has policed the expansion of such tribunals by using a balancing test.

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§1.10 Cases and Controversies [24-46]

[1] Doctrines of Justiciability: An Overview

In large part from the Case and Controversy requirement of Art. III, the Court has inferred various justiciability doctrines which limit the Court's jurisdiction. Some of these doctrines are constitutionally based and cannot be overridden legislatively. Others are based on prudential concerns and may yield to legislative acts.

[2] Advisory Opinions

Federal courts will not render Advisory Opinions.

[3] Standing

[a] Constitutional Requirements

The party bringing a lawsuit must have Standing, i.e. it must show that it has suffered an "injury in fact" which was caused by the defendant's conduct and that a favorable judicial ruling would redress that harm.

[c] Taxpayers

Taxpayers generally do not have standing based on that status alone subject to a limited exception recognized in *Flast v. Cohen*, 392 U.S. 83 (1968) that recognizes such taxpayer standing when the taxpayer attacks an expenditure under the Taxing and Spending Clause which violates a specific constitutional limitation on that power.

[g] Congressional Standing

Legislators lack standing to challenge actions which damage their institution without affecting their private interests. *Raines v. Byrd*, 521 U.S. 811 (1997).

[6] Ripeness

Ripeness conveys the requirement that a dispute must have reached a point where the challenged governmental action has a direct adverse impact on the individual making the challenge. Self-executing acts are ripe once enacted; those that require some further action before a legal consequence attaches may be more controversial. At times, courts have held that such laws are not ripe until the further action has occurred.

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[7] Mootness

Mootness deals with cases that no longer present a live Art. III case or controversy. At times, however, courts will hear such cases that are "capable of repetition yet evading review" because otherwise such cases would escape judicial review.

[8] Political Questions

1. Political questions are issues which the federal courts will not address because their subject matter is deemed to be not fit for judicial resolution.

    a. *Baker v. Carr*, 369 U.S. 186 (1962), articulates the classic statement of the various strands of the political question doctrine which includes a textual commitment of an issue to another branch, lack of judicial standards, impossibility of deciding an issue without policy judgments inappropriate for the judiciary, inability to decide an issue without showing disrespect for a coordinate branch, an unusual need to defer to a prior political decision, or a need for the nation to speak in one voice.

    b. Issues dealing with foreign policy or defense matters present classic political questions.

    c. The Court declined to view as political questions the issues in *Bush v. Gore*, 531 U.S. 98 (2001), which ultimately decided the 2000 Presidential election.

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Chapter 2
THE FEDERAL SYSTEM

Introduction [47]

The federal system allocates power between the national and state governments.

§2.01 Main Features [47-50]

[1] Components of Federalism

1. Union of autonomous states

2. Division of powers between national government and states

3. Direct operation of each government within its sphere on all within its territorial boundaries

4. Law enforcement apparatus in each level of government

5. Federal supremacy over conflicting state action.

[2] Union of Autonomous States

1. The Supremacy Clause provides the textual basis for this principle.

2. Chief Justice John Marshall interpreted the clause to mean:

   a. states may not interfere with the federal government and

   b. constitutional federal action prevails over inconsistent state action.

§2.02 Reserved Powers [50-54]

[1] Tenth Amendment as Source of State Power

The Tenth Amendment provides the support for those who argue for a more expansive state power. Although some argue that it is a tautology, others point to it as a structural confirmation of limits on federal power.

[2] Interposition

Interposition rests on the proposition that the states, having entered into a compact to form the Union, retain the right to assert their sovereignty to trump unwanted

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federal action. The Supreme Court rejected this idea in *Cooper v. Aaron*, 358 U.S. 1 (1958) and elsewhere.

[3] Police Power

Police power refers to the state power to legislate to protect the health, safety and welfare of its citizens.

[4] Term Limits

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) the Court articulated different visions of the Tenth Amendment. Five justices argued that the Tenth Amendment reserved to the states only powers they possessed before the Constitution was created. Four justices contended that the states retained all power not denied them.

§2.03 Federal Police Power [54]

Although technically there is no federal police power, the Commerce Clause has served as the basis for the federal government to take action to protect the health, safety and welfare of citizens.

§2.04 Supremacy and State Taxation [54-58]

[1] Federal Immunity From State Taxation: An Overview

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) held that Maryland could not tax notes issued by the Bank of the United States.

Federal tax immunity exists whenever the state seeks to tax the United States or an agency or instrumentality closely related to it so the two cannot be viewed as separate entities.

[2] Federal Property

Federal property is also exempt from state taxation. More complicated rules apply when a state seeks to tax private citizens using federal property.

[3] Private Immunities

More recent decisions have denied tax immunity simply because a state tax would affect the United States. Thus, states have been allowed to tax federal contractors in some instances.

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[4] Congressional Power

Congress retains authority to extend federal tax immunity in situations beyond those implicit in the Constitution.

§2.05 Supremacy and Police Power [58-59]

The Supremacy Clause immunizes activities of the federal government from state regulation. Yet states may regulate, to some extent, private parties who work for the United States or those who do business with the federal government.

§2.06 State Tax Immunities [60-61]

In 1870, the Court held in *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870), the salaries of state officers immune from federal taxation. This doctrine of reciprocal state tax immunity was overruled around 1940. And in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court overruled the holding that state bond interest was immune from nondiscriminatory federal tax.

§2.07 State Regulatory Immunities [61-63]

1. Whether a state is subject to regulation by a generally applicable federal law presents a more controversial question.

2. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held in a 5-4 decision that Congress could not subject states to wage and hour regulations imposed on private employers. The Commerce Clause did not authorize regulation of states acting in areas of "traditional governmental functions."

3. However, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court, in another 5-4 decision overruled *National League of Cities*. The "traditional governmental function" test was unworkable and the Court concluded that the Constitution imposed no judicially enforceable immunities for states from generally applicable federal laws. Instead, the states should look for protection from the political process where they were represented. Although Justices Rehnquist and O'Connor suggested in their dissents that *Garcia* would be overturned when the Court's composition changed, it has survived through at least the October, 2002 term.

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§2.08 Republican Government and Violence [63-65]

Article IV requires that the United States guarantee every state a Republican form of government. In *Luther v. Burden*, 48 U.S. (7 How.) 1 (1849), a case which arose out of the Dorr Rebellion in Rhode Island, the Court rejected the claim that courts could enforce such claims, suggesting their resolution rested with the political departments.

§2.09 Cooperative Federalism [65-71]

[1] The Federal Government and the States

State officials may help enforce federal laws but the Constitution limits the ability of the federal government to require that they do so. Based upon the Supremacy Clause, state officials are obligated to follow and obey federal law and to apply it instead of conflicting state law. In addition, *Testa v. Katt*, 330 U.S. 386 (1947), held that Congress could require state courts to hear federal cases and to enforce federal law.

Congress cannot however commandeer the state legislature by requiring it to enact specific legislation. Congress can give a state the choice between legislating as Congress wants or accepting federal preemption in an area within federal power. It may also give the states incentives to legislate according to a federal plan by use of conditional grants under the Spending Power. It cannot however require the state to legislate in a particular way. *New York v. United States*, 505 U.S. 144(1992).

Congress also is limited in its ability to require state executive officials to administer a federal regulatory program. In *Printz v. United States*, 521 U.S. 898 (1997), the Court struck down a provision of the Brady Bill which required local law enforcement officials to investigate prospective handgun purchasers. The Court held that Congress could not conscript state officials to administer a federal program although Justice O'Connor's concurrence suggested that state officials could be required to perform certain information reporting functions.

[2] Litigating Against a State

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Although the Eleventh Amendment on its face seems limited to diversity situations (i.e. when a citizen of state A sues state B in federal court) the Courts have give it wider application.

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In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court in a 5-4 decision, held that Congress could not abrogate the state's sovereign immunity in federal court pursuant to an Article I power. The Court held that Congress could abrogate a state's Eleventh Amendment immunity in federal court only pursuant to the Fourteenth Amendment. *Seminole Tribe* did not foreclose all remedies a private party might have against a state. In addition to the Fourteenth Amendment, it left open the possibility of suit against a state in state court.

In *Alden v. Maine*, 527 U.S. 706 (1999), the Court in a 5-4 decision held that a private party could not sue a state for money damages in state court, thereby closing one of the remedies *Seminole Tribe* left open. The Court relied on the Tenth Amendment to extend the concept of sovereign immunity to this application.

More recently, the Court extended the state's sovereign immunity to prevent a federal administrative agency from adjudicating a private party's claim against a state run entity.

The Court has limited Congress' ability to use the Fourteenth Amendment to abrogate state sovereign immunity. In several cases, it has held that Congress' legislation in question was not directed at a sufficiently widespread pattern of past state conduct to justify abrogating state sovereign immunity.

The dissenters in *Seminole Tribe* and *Alden* have argued in part that the Eleventh Amendment does not extend beyond diversity suits in federal court and that any other principle regarding sovereign immunity rests on the common law, not the Constitution, and accordingly can be abrogated by Congress.

States may still be subject to suit if they consent to be sued and state officials can be sued in an *Ex parte Young*, 209 U.S. 123 (1908) action for prospective injunctive relief or for monetary relief provided that it comes from the officer, not the state treasury. The federal government can sue a state as can another state.

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Chapter 3
CONGRESSIONAL POWER

Introduction [73]

The Vesting Clause in Article I vests all legislative powers "herein granted" in Congress. The limitation of powers conferred to those "herein granted" distinguishes the Vesting Clause in Article I from the parallel clauses in Articles II and III. It also suggests that Congress' powers are simply those the Constitution grants.

Most powers of Congress are set forth in Article I section 8, although others appear elsewhere (e.g. the Senate's power to advise and consent to certain appointments and to treaties is in Article II, Congress' power to enforce various amendments to the Constitution is set forth in the amendments in question).

§3.01 Implied Powers [73-76]

The Constitution's structure suggests the existence of implied powers beyond those enumerated in the Constitution. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall held that the Constitution implicitly authorized Congress to take the means necessary to give effect to the powers granted. The Federalist Papers suggested that Marshall's conclusion was consistent with Madison's intent (*see* No. 44).

In addition the Necessary and Proper Clause provided textual support for Marshall's conclusion. Through an elaborate and ingenious argument, Marshall argued that the Clause expanded rather than limited Congress' enumerated powers and conferred power to take action which was useful even though not indispensable.

The test for action under the Clause was stated as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional."

The Necessary and Proper Clause has proved to be a source of considerable additional powers. It authorizes action regarding not only the powers set forth in Article I but throughout the Constitution.

§3.02. General Welfare [76]

"Police power" may be used to promote the public welfare.

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§3.03 Taxing Power [77-79]

[1] Broad Power of Taxation For National Purposes

Congress is given power to tax to provide for the common defense and the general welfare. As such Congress has broad power to tax.

[2] Purpose of Taxation

Although some cases earlier in the 20th century suggested that Congress could not use the taxing power as a pretense to regulate an activity rather than raise revenue and could not reach activities it could not otherwise regulate, these limitations have been rejected. Thus in *United States v. Kahriger*, 345 U.S. 22 (1953), the Court upheld a tax on bookies even though the statute's primary purpose was to regulate the activity, not to generate revenue.

Nonetheless, Congress cannot tax in a way which would otherwise violate some constitutional prohibition. (e.g. a tax on newspapers alone)

§3.04 Spending Power [80-81]

Prior to 1937, cases held that Congress could not spend for ends it could not directly achieve. More recently that restriction has been abandoned.

In *South Dakota v. Dole*, 483 U.S. 203 (1987) the Court upheld a federal statute that reduced the amount of federal highway funds distributed to states that allowed minors to purchase alcohol. The Court held that Congress could attach conditions to spending grants subject to the following restrictions:

a. The expenditures had to be for the general welfare.

b. Congress had to state conditions clearly.

c. Conditions had to relate to the federal interest in the national program.

d. Expenditures could not violate any independent constitutional requirement.

The General Welfare Clause is a limitation on the power to tax and spend, not a separate source of Congressional power.

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§3.05 Fiscal Powers [81-83]

The Constitution empowers Congress to borrow and coin money and regulate the value thereof. *McCulloch* established the power of Congress to establish banks with power to issue notes.

§3.06 Citizenship [83-85]

[1] Becoming and Remaining a Citizen

The Fourteenth Amendment makes citizenship depend solely on birth or naturalization. Congress is empowered to "establish a uniform rule of naturalization." Art. I, sec. 8, cl. 4.

§3.07 Treaty Power [86-87]

The Constitution provides that the President and Senate share the treaty power. A treaty becomes part of the law of the land to which the Supremacy Clause assigns priority vis a vis inconsistent state law. Federal statutes and treaties have equal priority with the latter in time controlling the prior.

Missouri v. Holland, 252 U.S. 416 (1920), suggested that the President and Senate could achieve ends through treaty which were beyond the constitutional power of Congress. It seems unlikely the Court would adhere to this result today. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court held, in a plurality opinion, that a foreign agreement could not transcend constitutional bounds.

§3.08 Civil Rights Enforcement and State Action [87-92]

The Thirteenth, Fourteenth and Fifteenth Amendments confer important powers on Congress to enforce the terms of the Amendments. The Fourteenth and Fifteenth Amendments forbid certain types of state action.

State action is a broad term which includes legislative and executive action as well as some judicial conduct and even some private action occurring under state authority. State action can occur when a private party discharges some governmental function. Accordingly, courts have held that a criminal defendant's use of peremptory jury challenges in a racially discriminatory fashion can constitute state action. Similarly, a political party which conducted a primary election was found to be committing state action.

There are, however, limits to the doctrine. Thus, the Court refused to find state action when a private club refused to serve African Americans. The fact that it had a state

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issued liquor license was not sufficient to make it a public entity for purposes of the Fourteenth Amendment.

§3.09 Congressional Enforcement [92-94]

Although Congress has broad power to enforce the Civil War Amendments, *City of Boerne v. Flores*, 521 U.S. 507 (1997), held that it could not expand the substantive sweep of the Amendments. In *Boerne*, the Court held that the Religious Freedom Restoration Act extended beyond Congress' power because it revised the constitutional norm rather than simply providing a remedy for an existing norm. The Court reasserted that *Marbury* empowered the Court to define the substantive scope of the Constitution.

§3.10 Involuntary Servitude [94-95]

Congressional power to enforce the Thirteenth Amendment extends far beyond the cases involving actual imposition of slavery or involuntary servitude and is not limited to protection of any particular race.

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Chapter 4
COMMERCE CLAUSE

Introduction [97]

The Commerce Clause constitutes the principal domestic power of the federal government. The interpretation of the Commerce Clause has changed over time.

§4.01 Marshall's Conception [97-99]

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall articulated a broad vision of the Commerce Clause.

a. "Commerce" extended beyond navigation to include commercial intercourse.

b. "Regulate" involved the power to prescribe the rule by which commerce could be governed.

c. "Among the states" did not include "that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or effect other States." Implicitly, it did include commerce which affected another state even though it did not involve crossing a state line.

   i. Of course, much of this discussion was dicta because the facts of the case clearly involved interstate movement.

The nineteenth century included little federal legislation and most interpretations of the Commerce Clause dealt with state rather than federal regulation.

§4.02 Productive Industries [99-107]

[1] The *E.C. Knight* Formal Approach

The predominant approach during the early twentieth century used formalistic doctrine to limit the power of the federal government to regulate under the Commerce Clause.

United States v. E. C. Knight Co., 156 U.S. 1 (1895), illustrated the formalistic approach, distinguishing between manufacture and commerce, indirect and direct effects, and local and national activities. Congress could regulate commerce but not manufacture activities which affected commerce directly but not indirectly,

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and national activities but not local ones. The monopoly of sugar production at issue in the case was on the manufacture, indirect and local side of the line.

[2] Other Doctrinal Streams

Two other doctrinal streams coexisted with those followed in *E. C. Knight* although they were reserved for businesses affected with a public interest

a. In the *Shreveport Rate Case*, 234 U.S. 342 (1914), the Court upheld congressional authority to regulate intrastate rail rates which had close and substantial relationship to interstate rail traffic.

a. Stream or Current of Commerce approach–This approach, associated with *Swift & Co. v. United States*, 196 U.S. 375 (1905), allowed Congress to regulate activities that were part of a stream of commerce.

[3] Early New Deal Cases

Early New Deal cases adopted the approach of *E. C. Knight* and struck down New Deal legislation based on the three tests formulated there. *See e.g., Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *Carter v. Carter Coal Co*., 298 U.S. 238 (1936). Tensions in these tests were becoming evident, however, and this approach narrowly survived in *Carter Coal* over Justice Cardozo's dissent which suggested that federal power should exist to regulate activities which had a close and intimate and obvious relationship to commerce.

[4] *Jones & Laughlin*

The Court adopted Justice Cardozo's approach in *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937) to uphold the National Labor Relations Act of 1935 in a 5-4 decision. In place of the bright line tests which *E. C. Knight* had sought to apply, the Court suggested that it would proceed on a case by case basis to determine if the activity Congress was regulating had a close and substantial relationship to commerce.

[5] *Darby* and *Wickard*

The Court broke decisively with the dual federalism approach of the early 20th century in *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 110 (1942). *Darby* held that Congress could regulate productive activity that had a substantial effect on commerce. *Wickard* allowed Congress to regulate farm production intended solely for consumption on the farm. The cumulative effect of such production, when aggregated could have a substantial effect on commerce, thereby justifying federal regulation.

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§4.03 Regulation Versus Prohibition [107-111]

[2] *Child Labor Case*

The Court's Commerce Clause jurisprudence also changed in cases which clearly involved interstate activity. In the *Child Labor Case*, 247 U.S. 251 (1918), the Court had struck down a federal law regulating movement of goods in interstate commerce made in factories which used child labor. The Court concluded that such legislation was a pretext for regulating productive activity and argued that the only harm occurred in the producing state, not the receiving state.

[3] *Darby* and Bootstrapping

1. In *Darby*, the Court rejected this approach. Congress' motive was irrelevant. Congress had power to regulate transportation of products made using labor that did not meet certain conditions.

2. *Darby* also expanded Congress' ability to regulate through the Commerce Clause by endorsing a bootstrapping approach which linked the Commerce Clause and Necessary and Proper Clauses. Since Congress could under the Commerce Clause regulate the interstate movement of goods made using certain labor it could also regulate production of such goods as a means reasonably adapted to achieve the permitted end.

§4.04 1964 Civil Rights Act [111-112]

The Modern Commerce Clause jurisprudence followed from *Darby* and *Wickard* and featured extensive deference to Congress.

The 1964 Civil Rights Act rested on the Commerce Clause. The Court upheld the Act in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) even though Congress used the Commerce Clause to address the moral evil of racial discrimination in public accommodations.

§4.05 Outer Limits [112-113]

§4.06 *Lopez*: Another Turning Point? [113-116]

In *United States v. Lopez*, 514 U.S. 549 (1995) the Court in a 5-4 decision struck down a federal law making it unlawful to possess a gun near a school. The Court held that the legislation did not involve an economic or commercial activity which had a substantial affect on commerce and accordingly was outside the federal commerce power. *Lopez*

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represented the first time in nearly 60 years where the Court struck down a federal law as violating the Commerce Clause.

Five years later, in *United States v. Morrison*, 529 U.S. 598 (2000) the Court held that the Commerce Clause did not authorize Congress to adopt the Violence Against Women Act (VAWA). Although Congress had made extensive findings that violence against women impacted the economy, the Court held that the findings were too attenuated from commerce to support the legislation.

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Chapter 5
COMMERCE AND THE STATES: THE DORMANT COMMERCE CLAUSE

§5.01 The Purpose of the Dormant Commerce Clause [117-119]

The Dormant Commerce Clause seeks to achieve two purposes. First, it seeks to create a national economic market by preventing states from imposing barriers to trade. Second, it seeks to foster political cohesion by inhibiting states from imposing reciprocal barriers. The Dormant Commerce Clause addresses the situation in which Congress has not regulated some area which is within the Commerce power. Where Congress is silent, what, if any, barriers are there to state regulation?

The Dormant Commerce Clause is not really a separate clause in the Constitution. It simply refers to a body of constitutional jurisprudence which sets parameters for state regulation when Congress has not regulated an area within the Commerce power. The Dormant Commerce Clause is somewhat controversial and constitutional arguments can be invoked to oppose or defend it. Some form of Dormant Commerce Clause has existed for most of American history.

§5.02 Historical Evolution [120-123]

[1] Justice Marshall's Views

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall indicated some sympathy for the view that the Commerce Clause conferred an exclusive power on Congress such that states could not regulate within the Commerce power even with Congress was dormant. He did not, however need to resolve the issue in *Gibbons*. Subsequently, he upheld state police power legislation in instances when it came within the Commerce power.

[2] *Local Pilot Case*

Cooley v. Board of Wardens, 53 U.S. 299 (1851), upheld a Pennsylvania statute requiring vessels to use a local pilot. *Cooley* took an intermediate course between those who argued that the Commerce Clause precluded any state action within its bounds and those who argued that absent congressional action, states could regulate without restraint within areas covered by the Commerce power. *Cooley* held that states could not regulate matters needing a uniform national approach but could regulate local matters.

[3] Railroad Regulation

Although *Cooley* was followed for a time, other approaches emerged to address railroad cases. The Court distinguished between legislation which affected

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commerce directly (which only the federal government could regulate) and that which affected commerce indirectly (which states could regulate).

[4] Towards a Balancing Test

Ultimately, in 1945, the Court used a balancing test to determine whether state safety legislation violated the Dormant Commerce Clause.

§5.03 The Modern Approach [123]

Like *Cooley*, the Court has continued to adopt an intermediate approach which sometimes allows and sometimes prohibits state regulation. In general, if a state statute discriminates against commerce on its face, purpose or effect, it is subjected to strict scrutiny and is found unconstitutional unless the state can justify it as serving a compelling state purpose in the least restrictive way. If the state statute does not discriminate, it is measured against a more lenient balancing test which asks whether the state's health or safety interest is clearly outweighed by the burden on commerce.

§5.04 Discriminatory Laws [123-126]

Strict scrutiny is applied where the state seeks simply to protect the economic interests of its citizens at the expense of outsiders. When the Court detects such economic protectionism, the state statute is deemed per se invalid.

States generally do not articulate such a protectionist purpose on the face of a statute or in legislative history. Where, however, a state cannot point to a legitimate state purpose for the statute or cannot show the absence of a nondiscriminatory alternative way to achieve its purpose, the Court infers that the true purpose was protectionist.

Although the impact of state legislation on instaters and out-of-staters may be relevant to the analysis, it is not dispositive. The fact that there are out-of-state losers or instate beneficiaries does not mean the state statute necessarily fails. The Dormant Commerce Clause serves to protect the interstate market, not particular entrepreneurs. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

Statutes subject to strict scrutiny are almost invariably invalidated.

§5.05 *Pike* Balancing Test [126-127]

The *Pike* balancing test takes its name from *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970). It provides: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

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Under the *Pike* balancing test, the burden is on the party challenging the statute to show that it imposes too great a burden on commerce.

§5.06 The Political Process Rationale [127]

The Dormant Commerce Clause responds in part to concern that state legislatures will favor their instate constituents over out-of-staters. Where the Court identifies sufficient instate losers it may conclude that they served as surrogates for out-of-staters and accordingly that the political process need not be scrutinized.

§5.07 Appropriate State Measures [128]

The Dormant Commerce Clause does not prohibit all state regulation. Thus states may impose a variety of license fees, reasonable quarantine laws to protect against disease, and some embargo measures forbidding exports when backed by sound health or safety concerns.

§5.08. Prohibitory Laws [128-130]

§5.09 Exceptions to the Dormant Commerce Clause [131-134]

[1] Market Participant Exception

When the state acts as a market participant, i.e. a buyer or seller of goods or services, rather than as a market regulator, the Dormant Commerce Clause does not apply. In other words, the state, as a market participant, may choose to favor its own citizens. *See e.g. Reeves v. Stake*, 447 U.S. 429 (1980).

But the state can only favor its own citizens in the market in which it participates. Thus, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the Court struck down an Alaska law that required all who bought timber from the state to process it in state. Alaska could favor its own in selling the timber but could not impose regulations which discriminated in favor of its own citizens regarding conduct in a downstream market.

The rationales for this exception include the fact that the Commerce Clause addresses regulation of, not participation in, markets, the argument that when the state acts as a proprietor it should be treated like other proprietors, and the argument that where states decide to favor their own as buyers or sellers they are in effect deciding to subsidize some part of their population at the expense of the general state treasury, a decision that arguably should be within the power of people of a state. On the other hand, a state is not like other entrepreneurs–it can tax, for instance.

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[2] Additional Exceptions

Litigants have pressed the Court to create other exceptions in recent years including a public utilities exception and a domestic charities exception. The Court arguably created the former in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), but only four justices endorsed the latter. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

[3] Congressional Consent

The Dormant Commerce Clause does not apply when Congress authorizes state action which would otherwise be invalid under the strict scrutiny or *Pike* balancing tests. The Commerce Clause is primarily a grant of power to Congress to regulate commerce. The Dormant Commerce Clause reflects an inference that so long as Congress is silent it will only allow states to regulate consistent with those two tests. But Congress may rebut that inference by authorizing the states to regulate in a manner that would otherwise be forbidden. Of course, Congress cannot authorize state action which would violate some other part of the Constitution.

§5.10 Congressional Conflict: Preemption [134-135]

Congress can also exclude state regulation in a particular area. When it does so, the Dormant Commerce Clause does not apply since Congress has regulated pursuant to its Commerce power.

When federal and state legislation conflict, the Supremacy Clause of course holds that the federal law prevails.

Congress can also preempt an entire field of regulation by displaying an intent that federal law occupy a field to the exclusion of state law.

§5.11 *Camps Newfound/Owatonna* [520 U.S. 564]: A Recent Application [135-136]

§5.12 Privileges and Immunities [136-138]

Article IV provides in part that "[t]he citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states." The Clause basically precludes a state from treating out-of-staters worse than instaters with respect to privileges and immunities.

The Privileges and Immunities Clause accordingly resembles the Dormant Commerce Clause. There are, however, important differences including the following:

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a. The Privileges and Immunities Clause applies only to individual citizens, not to corporations, for instance.

b. The Privileges and Immunities Clause only addresses discriminatory measures; it does not have a test parallel to the *Pike* balancing test.

c. The Privileges and Immunities Clause only protects privileges and immunities.

d. The market participant exception does not apply.

The threshold issue is whether an activity is a Privilege and Immunity. These relate to activities which are "sufficiently basic to the livelihood of the Nation." These would include the right to police and fire protection when out of state, the right to medical care, the right to pursue a trade and the right to engage in political speech and religious worship.

A state may only discriminate against out-of-staters regarding a Privilege and Immunity if it has a substantial reason for the difference in treatment and discrimination against nonresidents bears a substantial relationship to the state's objectives.

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Chapter 6
EXECUTIVE POWER

Introduction [139-140]

Article II basically addresses executive power. It is supplemented by the veto power set out in Art. I sec. 7, and the 12th, 20th, 22nd and 25th Amendments to the Constitution.

Creation of the executive required some of the final compromises at the Constitutional Convention as the framers sought to create an energetic executive yet one subject to political and legal checks.

§6.01 Election [140-141]

Under the Twelfth Amendment, the President is chosen by electors chosen in each state for that purpose. Each state has a number of electors equal to the number of senators and representatives it has in Congress. States have broad discretion regarding how to choose electors.

In *Bush v. Gore*, 531 U.S. 98 (2000), the Court held that the Florida Supreme Court's manual recount order violated the Equal Protection Clause of the Constitution. A five justice majority further held that insufficient time remained to allow the case to be remanded to the Florida high court to fashion an order which would allow the recount to proceed.

Although the electors were initially envisioned as wise men who would exercise independent judgment, the rise of political parties made them automatons chosen for their party loyalty. States may not constitutionally compel electors to support their party's candidate by statute although informal practices usually are sufficient to accomplish that result.

The 20th Amendment made January 20 the date on which the Presidential and Vice-Presidential terms began and ended.

The 22nd Amendment provides that no person could be elected more than two terms or serve more than ten years.

§6.02 Theories of Presidential Power [141-147]

[1] Historical Background

Whereas some construe Presidential power broadly, others argue for a narrower definition of Presidential powers.

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The debate turns to some extent on whether the vesting clause in Article II ("The executive power shall be vested in a President of the United States...") is seen as conferring powers or as simply conferring a title on the person who possesses the powers set forth elsewhere in Article II.

Whereas Alexander Hamilton argued that the vesting clause conferred broad power James Madison viewed the clause as having the more modest purpose. Whereas Theodore Roosevelt viewed the President as the "steward" of the American people, his successor, William Howard Taft, thought the President lacked any power not specifically granted by other clauses.

[2] ***Neagle*** **Case [135 U.S. 1]**

The Court held that the President's duty to "take Care that the Laws be faithfully executed" empowered him to act to safeguard certain American rights or interests even absent statutory authority, here authorizing protection for a Supreme Court justice whose life had been threatened.

[3] Peace of the United States

In *In re Debs*, 158 U.S. 564 (1895), the Court upheld the President's power to act to safeguard public peace.

[4] ***United States v. Midwest Oil Co.*** **[236 U.S. 459]**

The Court upheld the President's power to withdraw public lands from use for oil exploration based upon longstanding practice.

[5] ***Steel Seizure*** **Case [343 U.S. 579]**

The Court struck down President Truman's action in directing Secretary of Commerce Charles Sawyer to seize the nation's steel mills to avert a threatened strike during the Korean War.

The six member majority produced six opinions (Justice Black's opinion of the Court and five concurrences) and not all members of the majority shared the views of Justice Black. Black's formalistic opinion reasoned in part that President Truman was engaged in lawmaking rather than law enforcing and accordingly had overstepped the bounds of his office. Some justices (e.g. Frankfurter and Jackson) drew significance from the fact that Congress had declined to give the President the authority President Truman exercised.

Three dissenters argued for a broad Presidential power to exercise emergency powers. Some of the concurring justices agreed that the President had some

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inherent emergency power but did not think this case an appropriate circumstance for its use.

[6] Jackson's Categories and Inherent Power Limitations

Justice Jackson's concurring opinion was the most significant opinion in the case based, at least, on the historical attention it has received.

Justice Jackson separated three circumstances–when the President acts with congressional support, when he asks against congressional silence, and when he acts at odds with Congress. The President's powers are greatest in the first instance and weakest in the last. Since Congress had declined to authorize the sort of action President Truman took, Justice Jackson viewed the steel seizure as falling in the last category and accordingly representing a weak exercise of Presidential power.

§6.03 President as Legislative Leader [147-150]

[2] Veto Power

The veto power is the most significant legislative power the President possesses though not the only one. It derives from the requirement, stated in Article I, section 7, that every bill passed by the House and Senate must be presented to the President.

The President cannot veto only part of a bill. Accordingly, the Court recently ruled the Line Item Veto Act unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998).

[3] Legislative Veto

The Court previously held unconstitutional the legislative veto feature which Congress has incorporated in numerous pieces of legislation which allows one or both houses to delegate power to the executive branch while retaining some control over executive action. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

§6.04 Administrative Role [151-155]

[1] Appointing Power

Although Congress can create offices and define their qualifications it cannot appoint persons to hold offices of the United States.

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The Constitution empowers the President to appoint federal officers with the Senate's advice and consent.

Congress can vest the appointment of "inferior officers" in the President, the courts of law or heads of department. Whether someone is an inferior officer may turn on whether he/she is subject to removal or supervision by a superior, *Edmond v. United States*, 520 U.S. 651 (1997), or the nature of his/her duties, jurisdiction and tenure. *Morrison v. Olson*, 487 U.S. 654 (1988).

The Constitution allows at least some interbranch appointments. *See e.g. Morrison*, supra.

[2] Removal Power

The Constitution does not explicitly grant the President power to remove executive officers but the Court has held that power to be inherent in executive power, at least with respect to certain officers. *Myers v. United States*, 272 U.S. 52 (1926).

More recently, the Court has held that although Congress cannot claim for itself power to remove an officer charged with executing the laws, *Bowsher v. Synar*, 478 U.S. 714 (1986), it can restrict the President's power to remove that officer at least so long as the restriction does not compromise the President's ability to fulfill the constitutional duties of the office. *Morrison*, supra.

§6.05 Law Enforcement [155-158]

The President has a constitutional duty to execute laws and the power to pardon.

§6.06 Foreign Affairs [159-163]

[1] Leading Role of President

The foreign affairs power is divided between the President and Congress but in practice the President has exercised the dominant role.

[2] *Curtiss-Wright* [299 U.S. 304]

The case stands for the idea that the President can exercise broad power in foreign affairs and is often relied upon by Presidents to support claims to sweeping executive power in foreign policy. This interpretation rests largely on dicta in Justice Sutherland's opinion. In fact, Congress had authorized the action President Roosevelt had taken.

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[4] *Steel Seizure* Case [343 U.S. 579]

The *Steel Seizure* case offers a different vision. To the extent it relates to foreign affairs–it did after all involve a seizure of steel mills to support the Korean War–it envisions a consultative approach.

[5] Executive Agreements

The President's power to receive and dispatch ambassadors implicitly suggests a power to recognize foreign governments. This has been used to justify the idea that the President rightly speaks for the United States in foreign policy.

Executive agreements with other countries have largely replaced treaties as the method of entering into agreements with other countries. With or without legislative sanction, they are binding international agreements.

They may have domestic impact, too as was shown in *Dames & Moore v. Regan*, 453 U.S. 464 (1981), which upheld the executive agreements resolving the Iran hostage situation which suspended American claims pending in American courts and required that they be presented to an Iran-United States Claims Tribunal.

Executive agreements override inconsistent state law. *See e.g. United States v. Belmont*, 301 U.S. 324 (1937).

§6.07 Commander in Chief [163-168]

[1] Constitutional Duty of President

The Commander in Chief Clause (Art. II section 2) provides the basis for the President's power to commit troops to battle. The President's power is clearest when the President acts to repel attack but Presidents have made more sweeping claims under it to dispatch military force.

[2] War Powers Resolution

The War Powers Resolution sought to regulate exercise of that power by limiting the President's ability to commit troops to battle for more than 60 (or in some cases, 90) days without congressional authorization and by introducing some features designed to promote accountability. But others claim that the measure was unconstitutional in abdicating to the President Congress' power to declare war.

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§6.08 Presidential Accountability [168-172]

[1] The President as Defendant

Although some cases involving Presidential power named Presidential surrogates as defendants (e.g. *Marbury v. Madison*) the President can be sued as a defendant. *United States v. Nixon*, 418 U.S. 683 (1974).

[2] Executive Privileges and Immunities

The President can claim executive privilege with respect to conversations and papers but that claim will not necessarily prevail. In *United States v. Nixon*, the Court held that the President's generalized claim to the confidentiality of his papers will not prevail over the needs of the criminal justice system for evidence. The Court suggested that a claim based on national security or for Presidential papers in a civil case might be treated differently.

The President has absolute immunity from liability for actions relating to his Presidential duties, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), but not regarding claims arising out of events which preceded his tenure in office. *Clinton v. Jones*, 520 U.S. 681 (1997).

[3] Impeachment

The President, as well as the Vice President and other civil officers of the United States can be impeached and removed for treason, bribery and other high crimes and misdemeanors. *See* U.S. Const., Art II, section 4.

Andrew Johnson and William Clinton were the only Presidents to be impeached but neither was removed from office. Richard M. Nixon would have been impeached and removed but resigned to avoid those results.

§6.09 Succession and Disability [172-173]

The Twenty-fifth Amendment confirms the Tyler precedent whereby the Vice President becomes President upon the death, resignation or removal of the President, provides a procedure whereby the President can fill a Vice-Presidential vacancy with congressional confirmation, and provides procedures whereby the Vice President can act as President upon the disability of the President.

§6.10 Separation of Powers [173-176]

Separation of powers, like federalism, is a structural idea implicit in the architecture of the Constitution.

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At times the Court has used a formalistic approach which envisions the functions of the federal government as being strictly divided between the three institutions of the federal government. At other times, the Court has adopted a more functionalistic approach which allows adjustments so long as they do not involve a usurpation by one branch of the powers assigned to another, so long as no one branch aggrandizes its powers at the expense of another, and so long as the ability of a branch to discharge its functions is not compromised.

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Chapter 7
LIBERTY, PROPERTY AND DUE PROCESS, TAKING AND CONTRACT CLAUSES

Introduction [177-178]

The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution have been invoked in a number of distinct contexts to protect various classes or categories of rights. Although it has limits, one classification occasionally used would describe some due process rights as property rights and others as personal rights. Another classifying principle for rights guaranteed by the Due Process Clause involves the distinction between substantive and procedural rights.

§7.01 Introduction to the Incorporation Controversy and the Bill of Rights [178-182]

The Incorporation Controversy addresses the issue of whether the Fourteenth Amendment incorporates the protections of the Bill of Rights to make them applicable against the states. Before the adoption of the Fourteenth Amendment in 1868, the Supreme Court held in *Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243 (1833), that the protections found in the Bill of Rights were not applicable against the states. The Fourteenth Amendment reopened the door for the argument that the Bill of Rights should also be applied against the states. The Supreme Court first addressed this argument in the *Slaughter-House Cases,* 83 U.S. 36 (1872). The majority's decision in *Slaughter-House* is still good law today. The Privileges and Immunities Clause of the Fourteenth Amendment remains essentially written out of the Constitution by *Slaughter-House*.

Slaughter-House is important for several reasons. *Slaughter-House* was the Supreme Court's first interpretation of the Civil War Amendments, which applied against the states. The Court refused the invitation to redistribute power away from the states and toward the federal government. In particular, the opinion narrowly construed the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment. Most of the decision has since been reversed, and the Court has much more liberally construed the Fourteenth Amendment.

§7.02 The Rights of the Accused: The "Incorporation Controversy" [182-189]

As the different opinions in *Slaughter-House* illustrate, the incorporation controversy involves important questions of federalism. Did the Fourteenth Amendment rearrange the powers of the states in relation to the federal government? More specifically, did it reverse the holding in *Barron* and make the Bill of Rights applicable against the states? Most of the provisions of the Bill of Rights have been applied or incorporated by the Court against the states including: the right to compensation for property taken by the state; the rights of free speech, press and religion covered by the First Amendment; the

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Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel; to a speedy and public trial; to confrontation of opposing witnesses; and to compulsory process for obtaining witnesses. The Supreme Court's use of selective incorporation has come very close to Justice Black's ideal of total incorporation. In fact, the Court has incorporated all of the procedural protections of the Bill of Rights, namely the Fourth, Fifth, Sixth, and Eighth Amendments, except the Sixth Amendment right to indictment by a grand jury, the Seventh Amendment right to civil jury trial, and the Eighth Amendment protection against excessive bail. It also has not applied to the states the Second Amendment right to bear arms, and the Third Amendment right not to have soldiers quartered in one's home.

Although the Supreme Court has applied most of the specific provisions of the Bill of Rights against the states, a related issue arises as to whether the states will be held to the same standards as those imposed by the federal requirements. In many instances, a majority of the Court has applied the Bill of Rights to the states with the same rules required of the federal government. For example, in *Mapp v. Ohio*, 367 U.S. 643 (1961) the Court applied against the state government the exclusionary rule remedy that it had previously applied against the federal government. However, in cases involving jury size and unanimous verdicts, the Court has not constitutionally imposed on the states federal statutory requirements, such as unanimous verdicts. A related controversy amplified in a jury decision involves whether federal standards for applying the exclusionary rule should be lowered to make the state standards equivalent.

§7.03 Regulation of Business and Other Property Interests [190-215]

[1] Liberty of Contract Under the Due Process Clauses

Substantive due process is the concept that there are certain rights so fundamental to our traditions of justice that, no matter what procedural guarantees government affords, government cannot abridge those rights. The basis of substantive due process has generally been the "liberty" clause of the Fourteenth Amendment (i.e., government would be violating a person's liberty despite the procedural guarantees afforded). Substantive due process requires a broad reading of the word "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendment. This is the same substantive due process analysis that the Court uses today in such areas as privacy, birth control, and the right to choose an abortion.

In *Lochner v. New York*, 198 U.S. 45 (1905), the owner of a bakery challenged a New York statute that prohibited the employment of bakery employees for more than 10 hours a day or 60 hours a week. Although the statute restricted liberty of contract *between* the employees and the employers, the bakery owner claimed that

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the statute violated the employer's and employee's liberty of contract to purchase and sell labor. Instead of balancing the interests of the employees against the employers, the Court balanced the contract interests of employers and employees against the interest of New York in regulating public welfare.

The liberty of contract right being asserted in *Lochner v. New York* was a substantive due process right based on the Liberty Clause of the Fourteenth Amendment, not the Contract Clause of Article I, section 10 of the Constitution. Fearing legislative invasion into all aspects of private life, the Court used substantive due process to prevent legislatures from enacting laws that drew lines, with respect to an individual's freedom, that the Court considered arbitrary.

The programs of President Franklin Delano Roosevelt's New Deal during the 1930s increased the controversy regarding the use of substantive due process to invalidate economic regulation. The Supreme Court used federalism and substantive due process rationales to strike down many key provisions of the New Deal. The victims included the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Bituminous Coal Conservation Act. These invalidated statutes were central components of the New Deal legislative program, designed to combat the Great Depression. The stand off between Roosevelt and the Supreme Court (described by the President as the "Nine Old Men") resulted in the New Deal constitutional crisis of the mid 1930s. Determined to continue with his legislative program, President Roosevelt, following his overwhelming re-election in 1936, proposed a "Court packing plan" that would have allowed the President to appoint a new Supreme Court Justice for each incumbent who was 70 years old and had served ten years on the Supreme Court. The plan would have provided the President with six new appointments. The plan generated enormous controversy and was criticized by many of the President's supporters.

Disaster was avoided when the Supreme Court made the famous "switch-in-time-that-saved-nine" compromise in the spring of 1937. The shifting votes of Chief Justice Hughes and Justice Roberts enabled the Court to uphold several key New Deal provisions including the National Labor Relations Act and the Social Security Act.

In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), the Supreme Court established what is now generally agreed to be the current standard of judicial review for economic regulation. The Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it."

In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court listed areas in which this extremely deferential standard of review would not apply. The

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footnote explained the Court's decision to expand its protection of personal rights:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see ...; on restraints upon the dissemination of information, see ...; on interferences with political organizations, see ...; as to prohibition of peaceable assembly, see ....
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Carolene Products*, 304 U.S. at 152 n.4.

This footnote embodies the political settlement reached as a result of the New Deal Constitutional Crisis; the Supreme Court would curtail its scrutiny of economic rights and expand its scrutiny of more "personal" rights. In effect, footnote four was a blueprint for the modern Supreme Court's jurisprudence.

There are three basic sets of personal rights at the heart of footnote four: the rights of the accused (amendments four through eight), restrictions on the political process (the rights of voting, association, and free speech), and the rights of "discrete and insular minorities." Why did the Court retain scrutiny over these areas? Does something make the Court superior to the Legislature in protecting these three types of "personal rights," but not economic rights?

By definition, "discrete and insular minorities" are groups that have historically been unsuccessful at protecting their interests in the majoritarian democratic political process. The same was true for those accused of committing crimes, who appear to be helpless minorities when pitted against the prosecutorial power of the state. Moreover, it was necessary to closely scrutinize restrictions on the political process because that process could not police itself. Most obviously, political "in groups" could attempt to exclude political "out groups" in order to solidify their power. When this occurred, the political process needed a neutral referee: "the

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referee is to intervene only when one team is gaining unfair advantage, not because the 'wrong' team has scored. Our government cannot be said to be 'malfunctioning' simply because it sometimes generates outcomes with which we disagree, however strongly." John H. Ely, Democracy and Distrust 103 (1980). All three of these interests require the protection of a counter-majoritarian institution that could check the interests of the majority.

The legislature is elected by a majority of the people, which makes it well-suited to protect majoritarian and utilitarian interests. Because the long-run distribution of societal wealth is a utilitarian issue, it is the proper realm of the legislature that was structured to reflect the greatest good for the greatest number. Federal judges are noticeably removed from the majoritarian political process; they are appointed for life. This makes the courts functionally superior to the legislature in protecting the interests of "discrete and insular minorities," and the political process itself. Therefore, courts were deemed better suited to protect counter-majoritarian "personal" rights.

The modern Court has not abandoned safeguarding property rights. Most notable is the guarantee of just compensation when government takes private property. The modern Court also affords very limited protection to liberty of contract.

[2] Economic Regulation and the Contract Clause of Article I, Section 10

In *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), the Court rejected a Contract Clause challenge to an act prohibiting oil companies from passing on several taxes to consumers, even though pre-existing contracts required consumer absorption of such tax increases.

[3] Government Takings of Property Requiring Just Compensation

The Fifth Amendment's guarantee against taking without just compensation was one of the earliest constitutional protections of economic rights incorporated into the Fourteenth Amendment. The Fifth Amendment does not prohibit government takings of property, but only requires just compensation. The easiest way to find a taking is through government occupation or expropriation of property for itself. Physical invasions can comprise takings even if government does not expropriate the property for itself. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court found that cable television companies' permanent encroachments on rental property were takings, even though the physical invasion of the apartment house only consisted of cables less than ½ inch in diameter and had a minimal economic impact on the owner. A permanent physical occupation caused by the government is basically a *per se* taking.

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A taking need not be a complete physical occupation of the property to be compensable, although government appropriation of property for its own use is more likely to result in a taking. To the extent that regulations diminish the value of property, they could be deemed takings requiring just compensation. Widespread use of regulatory takings would increase the cost and thereby severely impair government's ability to regulate. It could also re-institute *Lochner*-type problems of severely circumscribing government regulations. Perhaps, for this reason, the Court has been reluctant to find regulatory takings.

In the area of land use regulation, however, the Court has increased scrutiny in the context of regulatory takings that have some elements of physical impairment or invasion. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that conditioning a building permit on a landowner's grant of a public easement across his land constituted a taking. The Court found that the government had not established a nexus between a legitimate governmental objective of nondevelopment and the means of exacting the easement.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court specified two per se rules in which regulatory takings automatically required compensation. One was the *Loretto* situation of physical invasion of property. The other was depriving property owners of "all economically beneficial uses" for their property. *Id.* at 1016.

[4] Economic Penalties

A final area of the Court's economic rights jurisprudence involves excessive penalties. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), the Court held that an award for punitive damages that totaled 145 times the amount of compensatory damages was disproportionate and violated the Due Process Clause.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), imposed three guideposts that are used to determine whether an award is grossly excessive. The first was that a state may not assess punitive damages for unlawful conduct that occurs outside its jurisdiction. The second *Gore* guidepost indicates that an award of more than four times the amount of compensatory damages moves close to the limit that would constitutionally be allowed. The *Gore* Court referred to a legislative history that spans the past 700 years that allowed for awards meant to deter and punish worth 2 to 4 times the amount of damages. Although this history is not a strict guideline, it is instructive. The third guidepost discussed in *Gore* allows the Court to look to penalties in similar cases.

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§7.04 Liberty in Procreation and Other Personal Matters [215-241]

[1] The Childbearing Decision: Contraception and Abortion

Griswold v. Connecticut, 381 U.S. 479 (1965), was significant because many scholars viewed the decision as a return to the substantive due process analysis disavowed by the Court in the post-*Lochner* era. In *Griswold*, administrators of the Planned Parenthood League of Connecticut were arrested and charged under state statutes prohibiting the use or provision of contraceptives. Writing for the majority, Justice Douglas refused to rely explicitly on substantive due process analysis, asserting that the Court does not sit as a "super-legislature" to review legislation on social and economic matters. Instead, Justice Douglas argued that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Specifically, the First Amendment Right of Association, the Fourth Amendment protection against unreasonable searches, the Fifth Amendment protection against self-incrimination, and the Ninth Amendment combined to create a "zone of privacy" impenetrable by government. Based on this "penumbras" analysis, Justice Douglas held that the statutes in *Griswold* were overbroad in infringing on the privacy of the marital relationship. In prohibiting the use of contraceptives (as opposed to their manufacture or sale), the law appeared to allow police to search the marital bedroom for evidence of contraceptives.

In three separate concurrences, Justices Goldberg and White agreed with Justice Douglas' conclusion that the *Griswold* statutes were unconstitutional, but their analyses differed. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, used the Ninth Amendment to support his position that the Fourteenth Amendment Due Process Clause protected a fundamental right to "marital privacy." Justice Goldberg found substantial historical problems with using the Fourteenth Amendment to incorporate the Ninth Amendment against the states, as the Framers had intended the Ninth Amendment to limit the power of the federal government, not the states. Instead, he construed the amendment as expressing the exhaustive list of fundamental rights. In finding a right of marital privacy, Justice Goldberg looked to "'the traditions and [collective] conscience of our people'" to determine whether the principle was "'so rooted [there] ... as to be ranked as fundamental.'" *Id.* at 487 (quoting *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934)).

Critical to the Court's modern substantive due process jurisprudence are the cases involving a woman's right to choose an abortion. The first case to guarantee that right was *Roe v. Wade,* 410 U.S. 113 (1973). The Texas statute invalidated in *Roe* made it a crime to procure or attempt an abortion except to save the life of the mother. The reasoning of *Roe* applied to a much broader range of abortion restrictions than those in this fairly restrictive statute. In *Doe v. Bolton*, 410 U.S.

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179 (1973), a companion case to *Roe* decided the same day, the Court invalidated a Georgia law based on the new Model Penal Code's provisions regarding abortion. The Georgia law restricted abortion except to protect the life or health of the mother, to prevent the birth of a fetus with a serious birth defect, or to end a pregnancy resulting from rape.

In *Roe*, Justice Blackmun premised the right to choose an abortion on the constitutional right of privacy which deprived from the concept of personal liberty in the Due Process Clause. In describing the scope of modern substantive due process, the Court relied on the *Palko v. Connecticut,* 302 U.S. 319 (1937), formulation of rights that are "fundamental" or "implicit in the concept of ordered liberty." *Id.* at 324. The ambit of these rights extended to marriage, procreation, contraception, family relationships, child rearing, and education.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the majority formally adopted an "undue burden" standard, while reaffirming the essential meaning of *Roe*. In so doing, the majority rejected the heightened "strict scrutiny" standard to state regulation of abortion. The majority also rejected *Roe*'s trimester framework, allowing the state to impose abortion regulations that would have been overruled under this framework, although prior decisions had clearly reached this point.

The plurality rejected *Roe*'s trimester framework due to its unnecessarily rigid character and its diminishment of the importance of the substantial state interest in potential life that existed throughout the pregnancy. Instead, the Court adopted an "undue burden" standard posited by Justice O'Connor in earlier dissenting and concurring opinions. Under this approach, a regulation was unconstitutional if it unduly burdened a woman's right to choose an abortion. A regulation imposed an undue burden if "it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 876.

In applying the undue burden standard to the *Casey* statute, the plurality upheld three of the four challenged provisions. They upheld the 24-hour waiting period and the requirement that a woman must certify in writing that her physician had informed her of the availability of state-published materials describing the fetus, medical assistance for childbirth, paternal child support, adoption agencies, and other abortion alternatives. A majority of Justices struck down the requirement that a woman certify in writing that she had notified her spouse of her abortion. Alternatively, a woman could certify that another man impregnated her, that her husband could not be found, that the pregnancy resulted from spousal sexual assault, or that such notification would subject her to the danger of physical assault. In light of the district court's findings of spousal abuse surrounding pregnancy, the requirement was unconstitutional.

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The *Casey* Court upheld the parental consent provision, requiring the informed consent of one parent. This provision included an exception for medical emergencies and allowed "judicial bypass" if a determination could be made that the minor seeking an abortion had given informed consent, and that the abortion was in her best interest.

With the exception of disclosure of spousal notification, the provision requiring abortion providers to keep records was upheld. While preserving the confidentiality of the woman's identity, the provision required identification of the treating and referring physicians; the woman's age, prior pregnancies, and prior abortions; fetal weight and age; the date of the abortion and the procedure used; medical conditions that might complicate the abortion or medical complications from the abortion; when applicable, the basis for determining that the abortion was medically necessary; and the woman's marital status. Abortion facilities were required to report quarterly the number of abortions on their premises by trimester. The plurality found maintenance of such records advanced the state interest in health and posed no substantial obstacle to the right to abort.

[2] The Family Relationship

The Court has also extended substantive due process protection to marriage and familial relationships.

[3] Homosexuality

In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court invalidated a Texas law that made it a crime for two persons of the same sex to engage in intimate sexual conduct. The Texas statute in *Lawrence* only applied to same-sex sexuality. The Court struck down the statute as it does not further a "legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 2484. Justice O'Connor concurred in the judgment, based on equal protection.

[4] Right to Die

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court held that Washington's prohibition against assisted suicide did not violate the Due Process Clause of the Fourteenth Amendment. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Court recognized not a "'right to die'" but a constitutional right to "'refuse life-saving hydration and nutrition.'" Justice O'Connor concurred, joined by Justices Ginsburg and Breyer. She stated that the Court need not decide whether patients have a constitutional right to receive palliative care even if it will hasten death, as the law at issue permitted such care.

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[5] Other Autonomy Issues

Substantive due process issues have also arisen in areas other than marriage, family, procreation, and child rearing. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Court refused to extend constitutional protection to the accumulation and distribution of sensitive personal information. Specifically, the Court refused a challenge to New York's maintenance of computer records of the names and addresses of persons who had received a doctor's prescription for certain drugs for which lawful and unlawful markets existed. In *Kelley v. Johnson*, 425 U.S. 238 (1976), the Supreme Court rejected a police officer's challenge to a police department regulation specifying the style and length of a patrolman's hair.

§7.05 Personal Property Rights: New Forms of Protection for New Property Interests [241-145]

As the Court expanded the scope of personal rights and generally continued its restrictive approach to protection for property rights, it also accorded protection to new rights that blurred the line between "personal" and "property" rights. These cases, which might best be described as involving "personal property" rights, blend substantive due process analyses.

Many of the "personal property rights" cases involve the question of legislated government entitlements, where government bestows some privilege on individuals, such as welfare or employment. Another class of cases involves governmental deprivation of constitutionally based liberty or property interests in areas such as corporal punishment or non-renewal of government contracts. These two types of cases share a common thread in that they do not deprive the government of the power to engage in a certain action or deprive an individual of a particular entitlement. Instead, these cases demand procedural safeguards before the government can take action.

Goldberg v. Kelly, 397 U.S. 254 (1970), represents the "entitlement" strand of cases. In *Goldberg*, the Court addressed the deprivation of government entitlements in the form of welfare rights. The Court held unconstitutional New York's review of the termination by a post-termination, evidentiary hearing. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court described the elements involved in its determination of the type of due process required:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including ... the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 335.

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Generally, the Court has not required the pre-termination hearing specified in *Goldberg*.

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Chapter 8
RACIAL EQUALITY

Introduction [247-249]

The Equal Protection Clause of the Fourteenth Amendment was designed to impose upon the states a duty to prohibit legislative classifications and administrative behavior that discriminated against particular groups in the distribution of certain fundamental rights. Drawing on *United States v. Carolene Products*, 304 U.S. 144 (1938), the suspect class strand of equal protection jurisprudence prohibits government discrimination against groups of people based on race, national origin, gender, alienage, illegitimacy and certain other criteria. The fundamental rights strand of equal protection jurisprudence prohibits discrimination with respect to certain fundamental rights–primarily voting, travel, and access to the judicial process. The impetus that shaped equal protection analysis was discrimination based on race, more specifically the legacy of constitutionalized slavery.

§8.01 Segregation in Public Facilities [249-262]

[1] The Rise and Fall of "Separate but Equal"

In the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court rejected the apartheid system that *Plessy* sanctioned by striking down the doctrine of "separate but equal."

[2] Enforcing *Brown*: The Fashioning of Judicial Relief

The prohibitory injunctions necessary to dismantle much of the discriminatory system still in effect after *Brown*, such as separate water fountains, bathrooms, and bus seating, were relatively straightforward remedies. However, the mandatory injunctions necessary to desegregate public schools are remedies that have remained more controversial and more difficult to effectuate. The Court stated that school authorities must make a prompt and reasonable start. Once such a start was made, the defendant school boards had the burden of establishing the necessity of additional time. In subsequent cases, the Court started to define the types of remedies that would satisfy *Brown.*

In 1971, the Court handed down the watershed school desegregation remedy case of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court suggested gerrymandering or clustering of attendance zones as one remedy for correcting past discriminations. Clustering attendance zones of primarily white areas and primarily black areas of the school district often necessitated busing. The Court acknowledged the desirability of neighborhood schools and viewed busing as an interim measure necessary to correct past discrimination. The Court

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also acknowledged the negative impact of the costs of busing on the educational process and sought to minimize those costs.

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973), *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979), facilitated a plaintiff's making out a *prima facie* case of intentional discrimination. The geographic presumption of *Keyes* allowed a finding of system-wide discrimination from a finding of intentional discrimination in a small segment of a school district. *Columbus* and *Dayton* imposed a temporal presumption upon school boards that generated the duty to eradicate the effects of any pre-*Brown* intentional discrimination that existed in 1954. Basically, these presumptions eroded the intentional discrimination requirement in school desegregation cases. However, the Court did not similarly relax this requirement in other areas, such as employment or housing.

[3] Limiting the Remedies

In 1974, the Supreme Court first began to limit remedies for intentional segregation. In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court refused to allow an interdistrict remedy when the lower court found only the city district of Detroit to have intentionally discriminated. The Court allowed interdistrict remedies only where evidence existed of some conspiratorial action among the districts.

While *Milliken* placed a geographic limit on school desegregation remedies, *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976), imposed temporal limits on desegregation orders. In *Spangler*, the Supreme Court held that once a court implemented a racially neutral attendance plan, it could not modify its order to accommodate changes in the school population that were caused by population shifts rather than the segregative actions of school officials.

In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court stated that the judiciary should return the supervision of school districts to local school boards as early as possible. The equitable powers of a federal district court ended once a dual system had become unitary. *Missouri v. Jenkins (Jenkins II),* 515 U.S. 70 (1995), stated that the appropriate inquiry into the district court's remedies must evaluate whether they helped to restore the victims of segregation to the position they would have occupied had such segregation not occurred.

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§8.02 Other Forms of Racial Discrimination [262-285]

[1] General Principles: Purposeful Discrimination and Suspect Classes

The school desegregation cases illustrate that an Equal Protection Clause violation requires a finding of discriminatory intent. Even though these cases lightened the burden of proving discriminatory intent, simply proving discriminatory effect or impact was not sufficient. The Court had imposed a much tougher discriminatory intent requirement to prove discrimination in such areas as employment, housing, zoning, and voting–where laws, neutral on their face, have a demonstrably uneven impact on different racial groups.

The "suspect class" concept has become an integral part of the equal protection analysis and was a key component of the "two-tiered" standard of equal protection developed by the Supreme Court under Chief Justice Warren. Under this standard, laws that affected "fundamental interests" or "suspect classes" were upheld only if necessary to promote a compelling state interest. In contrast, other laws were sustained if they bore only a reasonable relationship to a legitimate state end. The Warren Court applied the suspect classification strand of two-tiered analysis to government action that discriminated against racial and ethnic minorities. The Court's more recent affirmative action jurisprudence has extended strict scrutiny to all laws that discriminate based on race even if the disadvantaged group is white. In the area of university admissions, the Court has allowed affirmative action to achieve a "critical mass" of under represented minority groups. Moreover, the Court's two-tiered equal protection jurisprudence has evolved into a multi-tiered approach with, for example, middle-tiered scrutiny used for discrimination based on gender and illegitimacy. Indeed, even the middle-tier of equal protection is fraying, as the middle-tier standard in gender cases may be more strict than that in illegitimacy cases. A separate standard of heightened rationality is being used for laws that discriminate based on mental retardation.

Nevertheless, as a rationale for increased equal protection scrutiny in certain areas, the concept of suspect classes has remained influential. One way to justify a stricter standard of judicial review for suspect classification stems from Justice Stone's famous *Carolene Products* footnote four. 304 U.S. 144, 153 (1938). In that footnote, Justice Stone spoke of statutes directed at certain religious groups, nationalities, and racial minorities that comprised "discrete and insular minorities." Laws necessarily involve line-drawing, but lines adversely affecting discrete and insular minorities required a more searching judicial scrutiny, since these are groups who have historically been unable to protect themselves using the political process. Justice Stone's formulation had considerable influence when the courts were faced with claims that aliens, women, and illegitimates, among others, were "suspect classes" entitled to the heightened review that the

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categorization requires. Discrimination based on race, national origin, and alienage received strict scrutiny, while discrimination based on gender and illegitimacy receive middle-tier scrutiny.

Demonstrating its hostility to racial classification, the Court has invalidated laws that were racially neutral on their face but challenged as being discriminatory in their administration. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court expressly made the point that facially neutral laws nevertheless violated the Equal Protection Clause if they were administered in a racially discriminatory manner. In that case, the Court struck down a law regulating laundries because it was applied and administered so as to disadvantage only Chinese laundry owners.

[2] Racial Discrimination in Employment

Washington v. Davis, 426 U.S. 229 (1976), was perhaps the key case enshrining this requirement in equal protection jurisprudence. In *Davis*, the Supreme Court upheld against an equal protection challenge a qualifying test for candidates for police officers.

[3] Housing and Zoning

Under *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a plaintiff need only show that discrimination was a motivating factor in the decision, not the sole or even the dominant or primary factor. Impact was seldom sufficient, standing alone, to establish discriminatory intent, but disparate impact was an important starting point.

[4] Voting

Early voting rights cases attempted to eliminate racially gerrymandered districts that were drawn to dilute or eliminate the voting strength of black persons. Black neighborhoods were broken into strangely shaped districts to insure a white majority in each of the districts, effectively preventing the election of black candidates. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court applied the principles of *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), to invalidate a racially-based gerrymander designed to foster the election of black candidates. The Court held that irrational reapportionment schemes, which were inexplicable on grounds other than race, had to be narrowly tailored to serve a compelling state interest. Although it remanded the case for further consideration, the *Shaw* Court did suggest certain race-based districting that may pass strict scrutiny.

In *Hunt v. Cromartie II*, 532 U.S. 234 (2001), the Court held clearly erroneous the finding of the three-judge District Court that race was a predominant factor in the

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districting plan for North Carolina's Congressional District 12. Writing for the majority, Justice Breyer noted that courts should use "'*extraordinary caution*'" [*id.* at 242] examining claims alleging that a State has used race to draw a district's boundaries, particularly when the State's districting plan is justified by a "legitimate political explanation" [*id.*] and the voting population is "one in which race and political affiliation are highly correlated." *Id.* Because race and political affiliation were closely connected in North Carolina, a plaintiff must first show "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id.* at 258. Second, a plaintiff must establish that those alternatives would have created "greater racial balance." *Id.*

[5] The Criminal Justice System

In *Batson v. Kentucky*, 476 U.S. 79 (1986), a black defendant challenged the prosecutor's use of all of his peremptory challenges to strike every black person from the jury. The Court held that race-based peremptory challenges violated the Equal Protection Clause. They not only harmed the defendant, but also undermined public confidence in the criminal justice system. To establish a *prima facie* case of racially discriminatory use of peremptories: 1) "The defendant first must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96. 2) The defendant can assume that peremptory challenges allow persons to discriminate who wish to discriminate. 3) The defendant must establish using these facts and any other relevant facts an inference of race-based exclusion from the jury.

Once the defendant makes a *prima facie* showing, the burden shifts to the state to give a racially neutral explanation for challenging black jurors. This showing need not rise to the level justifying exercise of a challenge for cause. The prosecutor, however, cannot satisfy her burden merely by stating that she struck jurors of the defendant's race based on the assumption that the jurors would be biased in favor of the defendant because of their shared race.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court rejected a claim that Georgia administered its capital sentencing process in a racially discriminatory manner. A study alleged that defendants who murdered whites were much more likely to receive the death sentence than those who murdered blacks. The Court states that McCleskey's equal protection challenge would succeed only if he proved that the decision-makers in *his* particular case acted with discriminatory purpose in sentencing.

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Chapter 9
EQUAL RIGHTS FOR THE SEXES

Introduction [287]

Using the Equal Protection Clause, the Court fashioned a middle tier standard of scrutiny in the gender area.

§9.01 Changing Attitudes Toward Gender-Based Classifications [287-297]

For much of our Constitutional history, the Supreme Court did not construe the Equal Protection Clause as prohibiting gender discrimination. The Court applied heightened scrutiny to gender discrimination in *Reed v. Reed,* 404 U.S. 71 (1971). The Court has devised a middle tier analysis to invalidate a number of government programs. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down an Oklahoma statute that prohibited the sale of 3.2 percent beer to males under the age of 21 and to females under age 18. In *Craig*, the Court applied a middle tier standard: to survive scrutiny, a gender classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. In *Virginia v. United States*, 518 U.S. 515 (1996), the Court prohibited "Virginia from reserving exclusively to men the unique educational opportunities" [*id.* at 519] afforded by the Virginia Military Institute (VMI). "[T]he reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'... The State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 532-33.

§9.02 Employment Discrimination Based on Gender [297-300]

Personnel Administrator v. Feeney, 442 U.S. 256 (1979), upheld the Massachusetts Veterans Preference Statute requiring that all veterans who qualified for state civil service positions had to be considered for appointment ahead of qualifying non-veterans. Women applicants for civil service jobs alleged that the statute favored men because they historically had served in the military in far greater numbers than women. *Feeney* illustrates the effect of the intentional discrimination requirement in the gender context.

§9.03 Gender Discrimination in Government Benefit Programs [300-303]

Some government benefit programs are designed to discriminate in favor of women. The Court both upheld some of these programs and invalidated others. As in other areas of gender discrimination, cases involving government benefit programs have attempted to

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define the elusive line between the legitimate need to remedy past discrimination and the maintenance of stereotypical views of women.

§9.04 Discrimination Involving Pregnancy [303-306]

A final area that implicates gender discrimination involves pregnancy. Since the early constitutional decisions, this area of law has become dominated by statutes.

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Chapter 10
AFFIRMATIVE ACTION

Introduction [307-308]

The affirmative action cases examine the legitimacy of using race, ethnicity, or gender as criteria for preferring one candidate for a job or school over another. Constitutional and statutory affirmative action issues tend to overlap. Critics of affirmative action argue that it recognizes and utilizes racial, ethnic, and gender lines in a manner that the law has proscribed in other contexts. Proponents argue that these lines are justified, and indeed necessary, to redress past societal discrimination against minorities and women.

§10.01 Education [308-314]

In *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), the Court held that the use of race in admissions decisions by the University of Michigan Law School did not violate equal protection. Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978), required that government-imposed racial classifications must be "narrowly tailored to further compelling governmental interests." 123 S. Ct. at 2337-38. Justice Powell did find compelling the interest in attaining "a diverse student body." *Id.* The First Amendment has long been concerned with academic freedom. For the university to fulfill its mission of finding students who will contribute to the "robust exchange of ideas,'" [*id.* at 2336] the Court will presume its "'good faith'" absent a contrary showing. The Law School is not aiming to obtain a "specified percentage of a particular" ethnic group, [*id.* at 2367] [reference to Grutter or to Bakke?] which would be unconstitutional racial balancing. Rather, it is trying to capture a "critical mass" sufficient to generate the educational benefits that arise from diversity. Establishing a quota or a separate admission track for minorities would not be narrowly tailored. Universities may, however, consider race a "'plus'" in the individualized consideration of each applicant.

In *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), the Court struck down the University of Michigan's undergraduate admissions program. An applicant must receive 100 points to be guaranteed admission to the undergraduate program. An applicant that fell into the category of an "'underrepresented minority'" automatically received 20 points based solely on his/her race. A policy that granted one-fifth of the points needed to be guaranteed admission to an applicant based entirely on the applicant's race was "not narrowly tailored to achieve the interest in educational diversity." *Id.* at 2427. Justice Powell's opinion in *Bakke* stressed that a university should consider "each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Id.* at 2428. By distributing 20 points to an applicant based on his race, Michigan has made race a decisive factor "for virtually every minimally qualified underrepresented minority applicant." *Id.*

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§10.02 Employment [314-323]

[1] Title VII and the Equal Protection Clause

From the beginning, several factors have generally strongly influenced the result in affirmative action cases. For example, affirmative action in the layoff context is more difficult than in, for example, hiring or promotion. Another factor that strongly influences these cases is whether the Court perceives the program at issue as a goal or quota. Other influential factors include how flexible the remedy is, how long it will last, and how much weight is placed on race or gender in the employment decision.

[2] Government Set Asides

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court invalidated a Richmond requirement that prime contractors working for it award 30 percent of their subcontracts to minority contractors. For the first time, a majority of the Court applied a compelling state interest test to affirmative action cases. A plurality of four afforded guidance regarding what steps state and local governments had to follow in formulating appropriate plans. Findings necessary to underpin an affirmative action plan included:

1) direct evidence that nonminority contractors had systematically excluded minority contractors;

2) significant statistical differences between the number of qualified minority contractors available and interested in performing a particular service and the number actually doing work; or

3) individual instances of discrimination supported by statistical proof. Individual instances standing alone support individual remedies rather than an affirmative action plan. *Id.* at 509.

Even when appropriate findings existed, an affirmative action plan should be proposed only "in extreme cases." *Id.* The state or local government should first try anti-discrimination legislation or race-neutral measures such as helping to finance small businesses-which may include many minority businesses. Finally, any plan should be a temporary measure tailored in duration and scope to the injury described by the findings.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), extended strict scrutiny to a race-based affirmative action program established by the federal government.

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Chapter 11
EQUAL PROTECTION FOR OTHER GROUPS AND INTERESTS

Introduction [325-326]

The Equal Protection Clause of the Fourteenth Amendment, in conjunction with the equal protection aspects of the Fifth Amendment Due Process Clause, has been essential to remedying race and gender discrimination by the local, state, and federal governments. However, these are not the only identifiable classes of persons to which the Equal Protection Clause pertains.

§11.01 Discrete and Insular Minorities [326-335]

[1] Aliens

[a] Resident Aliens

Scrutiny for classifications based on alienage varies with several factors. First, as the title of this sub-section indicates, the Court generally only scrutinizes discrimination against resident aliens but not discrimination against illegal aliens. Second, the Court subjects discrimination against aliens by state or local government bodies to far more rigorous scrutiny than it applies to discrimination against aliens by the federal government.

[b] Illegal Aliens

Plyler v. Doe, 457 U.S. 202 (1982), held that a Texas law denying free public education to undocumented, school-age children violated the Equal Protection Clause.

[2] Illegitimate Children

Laws that treat illegitimate children differently from legitimate children must be "substantially related to permissible state interests." *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

[3] The Aged

Classifications based on age are subject to a rational-basis test.

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[4] The Mentally Retarded

In *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), a Texas city denied a special use permit to establish a group home for the mentally retarded. Despite holding that mentally retarded individuals were not a quasi-suspect class, the Court struck down the challenged law because it did not pass the required rationality test.

[5] Sexual Orientation

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a Colorado state constitutional amendment (Amendment 2) that precluded all laws prohibiting "discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'" *Id.* at 624. The Constitution demands neutrality in the law and bans "'classes among citizens.'" *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

Amendment 2 not only repealed existing local ordinances prohibiting discrimination against homosexual persons but also prohibited all future "legislative, executive or judicial action at any level of state or local government designed to protect" these individuals. *Romer*, 517 U.S. at 624. Rejecting Colorado's argument that Amendment 2 simply put homosexuals in the same position as all other persons, the Court stated that Amendment 2 placed homosexuals in a class by themselves, depriving only them of protection against discrimination.

§11.02 Equal Protection for the Poor [335-344]

[1] Wealth as a Suspect Classification; Fundamental Rights to Necessities

The Court has not regarded the poor as a discrete and insular minority. Accordingly, laws differentiating on the basis of wealth are not subject to heightened scrutiny. Affording heightened scrutiny to laws that distinguish on the basis of wealth would call into question a wide range of social programs.

One of the most important areas in which the Court has examined the equal protection rights of the poor is public education. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court examined the method of funding public schools in Texas. Edgewood Independent School District and the Alamo Heights Independent School District were the poorest and richest districts respectively. Edgewood received $222 per pupil from the state fund, $108 per pupil in federal funds, and contributed an additional $26 per pupil from local taxes, for a total of $356 per pupil. The same numbers for the Alamo Heights district were $225, $36, and $333, respectively, for a total of $594 per

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pupil. The lower court had subjected the funding system to strict scrutiny, finding that wealth was a suspect classification and that education was a fundamental right. The Supreme Court rejected both conclusions.

The *Rodriguez* Court was concerned with the many difficulties and implications of applying strict scrutiny to educational funding. The Court noted that equality of education could not be precisely determined, and therefore could only be implemented in the most relative sense. The Court also feared that accepting appellee's fundamental rights argument would require the Court to find an infinite number of fundamental rights based on the same rationale. For example, it might be that those who do not have adequate food and clothing are the least effective at utilizing their free speech and voting rights. Therefore, food and clothing would have to be recognized as fundamental constitutional rights. The Court emphasized that the case required expertise in taxing, spending, and educational policy, areas that traditionally have been the province of legislative bodies and that pose serious problems of creating judicially manageable standards.

[2] Access to the Justice System

Access to the courts, both criminal and civil, has become very expensive. On several occasions, the Court has addressed constitutional challenges to barriers erected by cost.

§11.03 Equality in the Political Process [344-353]

[1] Distinctions Based on Wealth

The centrality of voting rights in a democracy makes it essential that arbitrary restrictions not be allowed. Accordingly, the Court has given strict scrutiny to laws that make it difficult to exercise voting rights or dilute the value of a vote.

[2] Other Barriers to Political Participation: Apportionment, Ballot Access for Minority Parties, Gerrymandering

In *Reynolds v. Sims*, 377 U.S. 533 (1964), which established the rule of one-person-one-vote, the plaintiffs challenged Alabama's apportionment of the state legislature. In *Bush v. Gore*, 531 U.S. 98 (2000), seven Justices agreed that the recount raised constitutional problems "that demand a remedy." *Id.* at 111. The disagreement among these Justices concerned the specific nature of the remedy. For example, Justice Breyer proposed remanding the case and extending the certification deadline until December 18.

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§11.04 The Right to Travel [353-356]

[1] Domestic Travel

In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court struck down as against the right to travel a California statute that denied new residents the same level of welfare benefits available to those who had been California citizens for more than 12 months.

[2] International Travel

Regan v. Wald, 468 U.S. 222 (1984), upheld restrictions issued by the executive branch that prohibited business transactions with Cuba.

§11.05 "Economic and Social Legislation" [356-358]

The Court has afforded considerable scrutiny to government regulations that discriminate against suspect classifications or that discriminatorily distribute certain fundamental rights. In contrast, economic and social legislation has received "*de minimis*" scrutiny. For example, in *Railway Express Agency v. New York*, 336 U.S. 106 (1949), the Court upheld, against due process and equal protection challenges, a New York City traffic regulation that prohibited advertising on commercial vehicles unless the ads were for the business of the vehicle's owner. Addressing the due process claim, Justice Douglas found the regulation unnecessary and refused to pass judgment on the City's finding that the law reduced traffic hazards caused by distracting advertisements. On the equal protection claim, Justice Douglas concluded that even if the City's opinion that the classification reduced traffic hazards was incorrect, it "does not contain the kind of discrimination against which the Equal Protection Clause affords protection." *Id.* at 110. The Court also was not troubled by the fact that the City prohibited certain signs but allowed others. The Court said that equal protection did not require the eradication of all evils of the same sort.

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Chapter 12
POLITICAL SPEECH AND ASSOCIATION

Introduction [359-360]

While the First Amendment only explicitly restricts Congress, there has never been any serious challenge to its applicability to all branches of the federal government.

§12.01 Advocacy of Unlawful Objectives [360-370]

Many older cases in the free speech area are no longer good law. For example, in *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes first articulated his famous but overruled "clear and present danger" test. In a classic illustration that free speech is not absolute, Justice Holmes wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Id.* at 52. The far less than absolute standard for protecting the subversive speech at issue in this case was the famous "clear and present danger" test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

In *Whitney v. California*, 274 U.S. 357 (1927), the Court upheld the conviction of Anita Whitney for conspiring to overthrow the government under California's Criminal Syndicalism Act. Justice Brandeis' concurrence in *Whitney* actually was written as a dissent in another case involving a more violent-leaning member of the Communist Party. The case became moot, however, when the defendant died before the Court had finished its review. Joined by Justice Holmes, Justice Brandeis concurred with the result in *Whitney* because the petitioner had failed to raise the proper constitutional objection below. Justice Brandeis criticized the Court's application of the clear and present danger test as ambiguous.

Justice Brandeis' opinion contained most of the modern rationales for the modern Court's strong protection for freedom of political speech. The key rationale was that of allowing people to develop their own personalities, and to enable decisions to be made by a democratic deliberative process rather than by the arbitrary exercise of authority. Free speech was the key to liberty that the Founders valued as both an end and as a means. Freedom of speech advanced the pursuit of truth. It also provided an avenue for dissent, which preserved societal stability. Permitting freedom of speech actually was conservative. By fostering gradual societal change and by allowing everyone to have their say, it actually helped to prevent revolution.

Justice Brandeis' rationales for protecting free speech, particularly the promotion of democracy and self-fulfillment, were embraced and elaborated on by noted First

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Amendment scholars Alexander Meiklejohn and Thomas Emerson. According to Alexander Meiklejohn, the essential reason for protecting speech was that the free exchange of different ideas was necessary for a democratic society. *See* A. Meiklejohn, *Freedom of Speech and Its Relation to Self-Government* (1948); A. Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245. If the people were truly to be the ultimate decision-makers, they had to be informed enough to exercise effective choice in voting and influencing government. To be informed decision-makers, the public required not only speech about political ideas but also literary, scientific and educational speech. All were necessary in shaping political discourse. Meiklejohn predicated broad protection of free speech on the public's right to know and the audience's right to receive information. Thomas Emerson, on the other hand, focused on the speaker's right to speak.

In contrast to Meiklejohn, Thomas Emerson offered four rationales for protecting free speech: (1) individual self-fulfillment; (2) the pursuit of knowledge and truth; (3) participation in democracy and in other aspects of our culture; and (4) political dissent to effect social change. T. Emerson, The System of Freedom of Expression 6-7 (1970). In addition to these important rationales for protecting free speech, Emerson elaborated the speech-action continuum.

Emerson's speech-action continuum had pure speech on one end and pure conduct on the other. Most forms of expression that people engaged in fell somewhere in-between the two extremes. Emerson interpreted the First Amendment to afford greater protection that more closely resembled speech and less protection for expression that resembled conduct. Again, indicating the importance of Justice Brandeis' opinion in *Whitney*, the speech-action continuum has important similarities with the distinction that Justice Brandeis made between advocacy and incitement.

Brandenburg v. Ohio, 395 U.S. 444 (1969), is emblematic of the bright lines approach that characterized the free speech jurisprudence of the Warren Court and continues to exert considerable influence on free speech doctrine. The Court declared that the First Amendment did "not permit a State to forbid or proscribe advocacy ... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. This was a "bright lines" or categorical approach to free speech issues, at least in the political context. To meet the *Brandenburg* test, the speech must fit within certain categories. First, the speech must be an incitement. The *Brandenburg* Court also required that the speech be objectively likely to produce imminent lawless action, and that the speaker subjectively intended to produce such imminent lawless action. The speech must meet all three of these criteria before government can proscribe it. To illustrate the test, the Court contrasted teaching the moral necessity of using force, with preparing or steeling a group for violent action. The Court held the Ohio Criminal Syndicalism statute unconstitutional on its face. As the Ohio statute was similar to the one upheld in *Whiney*, the Court overruled *Whitney.*

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Justice Douglas' concurring opinion rejected the clear and present danger test outright. The test's flexibility allowed it to be easily manipulated by judges, who represented the *status quo*, to squash small threats.

§12.02 Membership in Political Organizations as a Basis for Government Sanctions [370-372]

The right of association is not explicitly mentioned in the First Amendment but has been derived from the right to free speech. The right to speak lacks meaning without the right to associate with others to exchange ideas. In *United States v. Robel*, 389 U.S. 258 (1967), the Court upheld an overbreadth challenge to the provision of the statute that prohibited members of the Communist Party from being employed in defense plants. Chief Justice Warren's majority opinion emphasized that the Court was not denying Congress the power to keep Communists out of sensitive defense positions. In a footnote, Chief Justice Warren explicitly declined to use an approach that balanced the Congressional and First Amendment interests. Instead, he required Congress to tailor legislation narrowly to avoid the conflict. Justice Brennan's concurrence stated that Congress could exclude Communist Party members from sensitive defense facilities.

§12.03 Compulsory Disclosure of Political Affiliations [372-374]

In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Legislative Investigation Committee of Florida ordered the President of the Miami branch of the NAACP to appear before it, answer questions, and bring membership records. The inquiry purportedly sought to examine Communist infiltration of the organization. Acknowledging the legislature's inherent power to conduct investigations, the Court emphasized that the inquiry at issue infringed on the right of association.

§12.04 Associational Rights in Other Contexts [374-377]

In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), a unanimous Court invalidated, on freedom of association grounds, sections of the California Election Code that regulated the internal organization of political parties in the state.

§12.05 Free Speech Problems of Government Employees [377-391]

[1] Patronage Dismissals

Branti v. Finkel, 445 U.S. 507 (1980), restricted patronage dismissals of government employees. In *Branti*, two assistant public defenders were awarded a permanent injunction restricting their newly appointed boss from firing them simply because they were Republicans and their boss was a Democrat. The Court concluded that, while public employment was not a right, once the government

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provided certain benefits like public employment, it must allocate this legislated entitlement according to constitutional criteria, not strictly by political affiliation. In *Rutan v. Republican Party*, 497 U.S. 62 (1990), the Court extended *Branti* to hold that party patronage practices may not affect "promotion, transfer, recall and hiring decisions involving low-level public employees." *Id.* at 64.

[2] Restraints on Political Activity

In free speech cases, overbreadth and vagueness challenges are often asserted together even though overbreadth is a First Amendment challenge and vagueness is a Fifth or Fourteenth Amendment due process challenge, not confined to speech cases. A vagueness challenge simply asserts that the law fails to give adequate notice. Overbreadth is another facial challenge to a law, asserting that the law regulates protected speech as well as unprotected conduct. The doctrine requires that an entire statute be invalidated because of its chilling effect on protected speech. Unlike vagueness, overbreadth will invalidate an entire statute even though, in the case at issue, the statute may affect only unprotected conduct.

[3] Employee's Rights to Criticize Government

Connick v. Meyers, 461 U.S. 138 (1983), said a public employee's criticism of the government lacked constitutional protection if it did not involve a matter of public concern.

[4] Special Protection for Legislators and Other Government Employees

Article I, Section 6, Clause 1 of the Constitution is the Speech and Debate Clause. It exempts members of Congress from legal action for what they have said in speeches or debates.

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Chapter 13
GOVERNMENT AND THE MEDIA: PRINT AND ELECTRONIC

Introduction [393]

While freedom of speech and of the press are each explicitly specified in the First Amendment, the Court treats both of these freedoms in the same way. Still, certain doctrines in First Amendment jurisprudence have particular applicability to the press.

§13.01 The Doctrine Against Prior Restraints [393-398]

Governments have long sought to impose restrictions on the press. Sir William Blackstone suggested that the common law looked with considerable disdain on governments imposing prior restraints on publication. *New York Times Co. v. United States,* 403 U.S. 713 (1971)–often referred to as the *Pentagon Papers* case–illustrates the stringency of the modern Court's protection against prior restraints. Shortly after the *New York Times* and *Washington Post* published the first in a series of classified government documents on the Vietnam War (the Pentagon Papers), the United States sued to enjoin publication. The Supreme Court, in a *per curiam* opinion, stated that any prior restraint bore "'a heavy presumption against its constitutional validity.'" *Id.* at 714. As the government failed to meet its burden, the Court refused to impose any prior restraints in this case. Beyond the general and vague *per curiam* opinion, each of the six Justices in the majority penned separate, and analytically different, concurring opinions. Justice Stewart, joined by Justice White, cautioned that informed citizenry was needed to restrain the tremendous powers of the Executive over national defense and international relations. While Justice Stewart was convinced that some of the documents at issue should remain secret, the government had not established that disclosing "any of them will surely result in direct, immediate, and irreparable damage to our nation or its people." *Id.* at 730.

In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the Court declined to apply prior restraint analysis to a broad-ranging injunction issued by a Florida court against abortion protestors and instead inquired whether the injunction burdened no more speech than necessary to serve a significant government interest.

§13.02 The Right to Report Governmental Affairs [398-402]

Related to the doctrine of prior restraints is the ability to disseminate information acquired in ongoing trials or other government investigations. The specific issue is whether a judge or other official conducting an inquiry can suppress, or at least delay, the dissemination of information about it. The issue arises most prominently in the context of a gag order stopping the press from reporting on a specific case. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976), demonstrated the difficulty of actually obtaining a pretrial gag order. The trial judge only found that pretrial publicity "'could impinge'" on a fair

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trial. *Id.* at 562. Moreover, the record contained little evidence that the lower courts considered the availability of adequate alternative measures. Questioning the efficacy of the trial court's order, Chief Justice Burger also noted that it lacked personal jurisdiction to restrain publication in another state. At bottom, the record did not clearly establish that additional publicity would render impossible finding 12 jurors who would follow instructions to decide the case based on the evidence presented in court. The speculative findings made by the trial court did not rise to the level of certainty required to issue a prior restraint.

§13.03 Access by the Media to Government Activity [402-405]

While government can rarely impose a prior restraint to stop the dissemination of information already known, government can block the flow of information at an earlier stage by denying access to the activities. In *Houchins v. K.Q.E.D., Inc.*, 438 U.S. 1 (1978), government officials refused KQED permission to inspect and take pictures in a prison facility. KQED filed suit. A majority of the Court denied the station access to the prison. *Richmond Newspaper, Inc. v. Virginia,* 448 U.S. 555 (1980), upheld a right of access to a judicial proceeding.

§13.04 Regulation and Taxation [405-418]

[1] Right of Access to the Media

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), upheld the Federal Communications Commission's (FCC's) Fairness Doctrine. The doctrine afforded a free opportunity to reply to persons who have been personally attacked on a particular radio or television station in political editorials or in discussions of controversial public issues. While the FCC has since abrogated the doctrine, the constitutional doctrine enunciated in the case remains good law. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), rejected a right of access to the print media.

[2] Taxation

Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), held that Minnesota's imposition of a special tax on newspapers violated the First Amendment.

[3] Special Problems of the Electronic Media

In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down (5-4) that part of the Public Broadcasting Act which forbade any public broadcasting stations that received a government grant from engaging in editorializing. In *Turner Broadcasting System, Inc. v. FCC*, 513 U.S. 622 (1994),

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the Court provided guidance about the standards for scrutinizing regulations of cable television. In *Turner*, the Court upheld the constitutionality of the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. These must carry provisions required cable television systems to carry local broadcast stations.

Writing for the Court, Justice Kennedy rejected any broad-based application of *FCC v. League of Women Voters,* 468 U.S. 364 (1984), to cable television. The middle tier standard in that case stemmed from the frequency scarcity of the broadcast media, a technological limitation that did not burden cable television. Nor would any structural dysfunction in the cable market justify a broad-based middle tier standard.

In the free speech area, the Court imposed strict scrutiny for content-based regulations and middle tier scrutiny for non-content-related restrictions, such as, the one at issue. The must carry rules were simply designed to protect cable access for local broadcasters and their viewers against the economic power of cable operators.

The cable operators maintained that the regulations should receive strict scrutiny because the regulations forced speech on cable that the operators would not have chosen to carry. This problem did not demand strict scrutiny as ideas were not being forced on the operators based on their content as they had been in *Miami Herald Co. v. Tornillo*. Nor did Congress favor one class of speakers, broadcasters, over another, cable operators. Congress merely wished to protect access for local broadcasters and their audiences.

Applying the middle tier standard in *United States v. O'Brien*, 391 U.S. 367 (1968), the regulations had to advance a substantial governmental interest which was unrelated to the suppression of speech, and not burden substantially more speech than required to advance that interest. The government's proffered interests of preserving free local broadcast television, furthering program diversity, and advancing competition, were both substantial and unrelated to the suppression of speech.

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court struck down the Communications Decency Act of 1996 (CDA) which was designed to safeguard minors from "indecent" and "patently offensive" transmissions on the Internet.

§13.05 Protecting the Newsgathering Process [418-421]

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court was asked to afford reporters a First Amendment privilege against revealing their sources to a grand jury. The *Branzburg* case did not seek to prohibit confidential sources or require their indiscriminate

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disclosure. The case only involved whether reporters were, like other citizens, obliged to comply with grand jury subpoenas and respond to questions relevant to a criminal investigation. The Court found that the important workings of the grand jury outweighed any uncertain burden resulting on the news-gathering process.

§13.06 Injury to Reputation and Invasions of Privacy: Tort Actions as a Restraint on the Media [421-430]

[1] Defamation

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court held that the First Amendment constrained common law defamation actions. The Court held that a public official plaintiff in a defamation action relating to his official conduct must prove that the defendant published the defamatory falsehood with actual knowledge of its falsity or with reckless disregard as to its truth or falsity. Under this standard, the plaintiff must prove falsity, altering the common law doctrine that truth was a defense. Moreover, the Court required plaintiff to prove this standard with "convincing clarity," or as later decisions have indicated, with clear and convincing evidence. The standard applied to media and non-media defendants, which were both involved in this case.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), when defamation of private plaintiffs by media defendants was at issue, the states were able to define the standard so long as it was not strict liability.

[2] Invasions of Privacy

Separate from protection against damage to reputation is protection against public revelation of private facts. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a reporter trainee published the name of a rape victim, violating both police policy and the newspaper's own policy. The Court denied the action.

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Chapter 14
SPEECH IN PUBLIC PLACES

Introduction [431]

First Amendment jurisprudence has long extended a right to speak on certain government property that qualifies as a public forum. This right to speak in the public forum permits everyone to introduce their views for free. The public forum is particularly important for those who would otherwise lack adequate resources to access the marketplace of ideas. Without such free access, the right to free speech for many would be illusory.

This right of access is not absolute, however. An unlimited right of access to the public forum would jeopardize the First Amendment rights of everyone. If everyone spoke at the same time in the same public forum, the resulting chaos would prevent all speakers from communicating their respective messages. The Constitution permits the government to place limited time, place, and manner restrictions on the right to speak in a public forum to ensure that those who wish to speak can be heard. These restrictions must be content neutral because by arbitrarily dictating where, when, or under what circumstances people can speak, the government could effectively suppress speech. For example, government could advise a speaker whom it disfavored that she could speak only at 4 a.m. in a deserted area. On the other hand, it could allow a preferred speaker access to the town square at noon. Such abuses of time, place, and manner restrictions could result in the suppression of speech just as effectively as more direct methods of censorship.

§14.01 Offensive Speech in Public Places [431-441]

[1] General Principles

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court rejected constitutional protection for what it referred to as "fighting words."

[2] Hate Speech

In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), several teenagers were convicted under an ordinance that prohibited placing symbols on public or private property so as to arouse anger based on race, religion, or gender. The *R.A.V.* Court found the ordinance invalid on its face because it prohibited speech solely on the basis of content. Although the Minnesota Supreme Court construed the ordinance at issue to prohibit only fighting words, the ordinance only applied to fighting words that insulted or provoked violence based on race, religion, or gender.

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[3] Sexually Offensive Speech

Sexually obscene speech is not protected by the First Amendment. What about speech that does not meet the Court's definition of obscenity but is arguable still offensive?

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), the Court upheld a Detroit zoning ordinance that forbade adult motion picture theaters from locating within 1,000 feet of any two other regulated uses or within 500 feet of residential areas. Regulated uses referred to 10 different kinds of establishments in addition to adult theaters.

§14.02 Speech in Traditional Public Forums: Streets, Sidewalks, Parks [441-445]

Certain public property–such as streets, sidewalks, and parks–are so historically associated with the exercise of free speech rights that denial of access to anyone is constitutionally forbidden. However, unlimited access to such public forums would likely lead to chaos and thereby decrease First Amendment protection. Consequently, the Constitution permits the state to place reasonable time, place, and manner restrictions on access to public forums.

§14.03 The Civil Rights Movement, Mass Demonstrations, and New Rules for New Public Forums [445-446]

Cases involving mass demonstrations brought new pressures on public forum analysis, more severe than the single-speaker or small-group forms of expression. For example, in *Brown v. Louisiana*, 383 U.S. 131 (1966), the Court protected a right to conduct a peaceful, quiet sit-in a public library.

§14.04 The Modern Approach: Limiting Speech According to the Characters of the Property [446-461]

[1] Public Property

The modern Court's public forum analysis is confined to public or government property. Even within the category of government property, there are public forums and non-public forums. Among public forums, there are different types affording different speech rights. *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), separated public property into various categories of public fora. Traditional public forums included streets, sidewalks, and parks. The government could not close these forums off to the public. Content-based exclusions based on the speaker's viewpoint or based on the subject matter of the speech must be "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Id.* at 45. Finally, "regulations

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of the time, place, and manner must be content-neutral and narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

The state opened up public forum by designation for expressive activity. There were two categories of public forums by designation, general and limited. General public forums by designation were those that the state had opened up for all types of expressive activity. The state could close off public forums by designation at any time. However, as long as it kept them open, the same constitutional restriction on regulations of speech that pertained to traditional public forums also pertained to public forums by designation. Limited public forums by designation were places that government had opened for speech by certain groups or for certain subjects.

[2] Private Property as a Public Forum: Shopping Centers and Company Towns

For private property open to the public to be considered a public forum, state action must be present. First Amendment guarantees applied to a company town. *Hudgens v. NLRB,* 424 U.S. 507 (1976), concluded that shopping centers were not public forums because no state action existed.

§14.05 Speech in Public Schools [461-463]

The extent of protection granted to speech in the public school setting varies. Greater protection has been extended to student expression that is *not* related to curricular or extracurricular activities. Thus, students may express their own opinions as long as they do not "materially and substantially interfere with" the operation or requirements of the school or impinge on the rights of others. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

§14.06 Religious Speech in Public Places [463-466]

The additional concerns and issues raised by the Establishment Clause make religious speech in public places more complicated than other speech. In two school cases, the Court reasoned that allowing religious speech on public property did not violate the Establishment Clause.

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Chapter 15
SPECIAL DOCTRINES IN THE SYSTEM OF FREEDOM OF EXPRESSION

Introduction [467]

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court sketched a two-tiered approach to protection for freedom of expression, dividing speech into two categories: that which received constitutional protection and that which did not. *New York Times v. Sullivan,* 376 U.S. 254 (1964), invited a transition from a comparatively narrow scope of First Amendment protection to a more diffuse and creative application of guarantees for freedom of expression. Citizens sought constitutional protection for such diverse areas as symbolic expression, funding of political campaigns, unconstitutional conditions on government funding, commercial advertising, and obscenity. The Supreme Court of the United States has addressed these issues using the paradigm fashioned in *New York Times v. Sullivan*. Rather than classify these areas as protected or unprotected speech, the Court has fashioned tests, tailored to each of these areas, that have protected a considerable amount of expressive behavior.

§15.01 Expressive Conduct [468-472]

In simple terms, "expressive conduct," often used interchangeably with the term "symbolic speech," refers to the communication of ideas through one's conduct. Expressive conduct raises some interesting constitutional questions because it combines expression, which typically receives First Amendment protection, and conduct, which typically does not. This dualistic nature may account for the Court's posture of affording expressive conduct some constitutional protection but substantially less protection than pure speech.

A government regulation of expressive conduct is justified:

(1) if it is within the constitutional power of the Government;

(2) if it furthers an important or substantial government interest;

(3) if the governmental interest is unrelated to the suppression of free expression;

(4) and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

§15.02 Expenditures of Money in the Political Arena [472-479]

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court decided the constitutionality of certain provisions of the Federal Election Campaign Act of 1971, amended in 1974 in

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the wake of the Watergate scandal. The Court upheld the Act's limitation on contributions to political campaigns. However, the Court struck down the Act's provisions limiting a candidate's total campaign expenditures, and limiting the candidate's personal contribution to her own campaign. The Court also invalidated the limits on expenditures by others that advanced a particular candidate but were not made directly to the campaign.

§15.03 Government Spending on Speech Related Activities [479-482]

Another series of questions involves whether the First Amendment might restrict government spending to advance particular ideas or viewpoints. To this point, the Court has taken a relatively hands off approach.

§15.04 Commercial Speech [482-494]

[1] Protection for Commercial Speech: General Principles

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976), the Court extended constitutional protection to commercial speech, or commercial advertising. Writing for the majority, Justice Blackmun concluded that commercial speech simply proposes a commercial transaction. The pharmacist did not wish to express an opinion, relate some newsworthy fact, or even make general comments about commercial matters. He simply wished to communicate the idea that, "I will sell you the X prescription drug at the Y price."

[2] Lawyer Advertising

The Supreme Court extended First Amendment protection under the commercial speech doctrine to advertising by lawyers in *Bates v. State Bar,* 433 U.S. 350 (1977). Relying heavily on *Virginia Pharmacy*, the Court in *Bates* struck down a state disciplinary rule prohibiting lawyer advertising.

§15.05 Obscenity [494-503]

[1] The Constitutional Standard

The current test for obscenity was delineated in *Miller v. California,* 413 U.S. 15 (1973). The Court set out the following test:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

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(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

[2] Procedural Issues in Obscenity Cases: "Prior Restraints" and Seizure of Materials

Prior restraints on expressive conduct are serious intrusions on First Amendment rights, but they have sometimes been sustained in the case of obscene materials, provided there is an opportunity for prompt judicial determination of the obscenity allegations. In *Freedom v. Maryland*, 380 U.S. 51 (1965), the Supreme Court established that prior restraints must comply with the following requirements:

(1) the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor;

(2) any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo;

(3) a prompt final judicial determination on the merits must be assured. *Id.* at 58-59.

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Chapter 16
GOVERNMENT AND RELIGIOUS FREEDOM

Introduction [505-506]

The Bill of Rights begins with the command that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The textual position of the religion clauses serves as a commentary on the central role religion freedom plays in our society and democracy generally. James Madison, author of the Bill of Rights, viewed the free exercise of religion as a right "precedent both in order of time and degree of obligation to the claims of Civil Society." James Madison, Memorial and Remonstrance, *reprinted in Everson v. Board of Education*, 330 U.S. 1 (1947). Indeed, the institution of democracy itself relies on the existence of a public free to choose "according to the dictates of conscience." *See id.*

The religion clauses work in tandem to preserve a single ideal, religious freedom. The Establishment Clause mandates a kind of mutual noninterference by church and state in each other's affairs. This mutual noninterference helps to foster the freedom of religious belief and practice mandated by the Free Exercise Clause. The application of this singular ideal has proven to be a complex matter, however. While the clauses may be mutually sustaining, there exists a certain tension between them as well. Over time, the ebbs and flows in the Supreme Court's religion clause jurisprudence reflect this tension between the clauses.

§16.01 Competing Approaches: Wall of Separation Versus Accommodation [506-510]

In the 1940s and 1950s, the Court handed down a series of decisions developing two competing approaches to interpretation of the religion clauses. These approaches–the wall of separation between church and state, and the accommodation of religion–continue to dominate the Court's decisions today.

§16.02 The Establishment Clause and Aid to Religious Institutions [510-529]

[1] Tension Between Burdening Free Exercise and Promoting Establishment

Many of the Court's attempts to reconcile the values embodied in free exercise and establishment have been in circumstances where the government has provided some form of aid to religious institutions. Often, such cases require the Court to choose, in some measure, between burdening free exercise or promoting establishment.

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[2] Aid to Religious Schools

Cases involving government aid to religious schools have proved particularly fractious for the Court. *Agostini v. Felton,* 521 U.S. 203 (1997), upheld a program sending public school teachers into parochial school classrooms to offer federally mandated remedial education. The Court found that the program "does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234-35. Nor did the program endorse religion in any way.

[3] Government Support to Religious Institutions in Contexts Other Than Religious Schools

A number of cases involve government support for religious institutions other than parochial schools. In this context, the Court has not been quite as rigid in enforcing stringent separation.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court upheld the Adolescent Family Life Act, which allowed the government directly to fund educational programs undertaken by a broad usage of organizations, including religious institutions. The Act specifically provided federal funds for educational programs addressing problems relating to family life and adolescent sexual relations.

§16.03 Government Support of Religious Practices [529-542]

The modern Court has generally not tolerated much government support for religious practices or displays. As in other areas of the Court's religion jurisprudence, however, many cases exhibit the same tension between separationist and accommodationist positions. The watershed modern case is *Engel v. Vitale*, 370 U.S. 421 (1962), in which the Court struck down state-mandated prayer in public school classrooms.

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court used the secular purpose prong of the *Lemon* test to strike down a state law allowing a moment of silence for "'voluntary prayer'" in public school classrooms. Justice Stevens' opinion suggested, as Justices Powell and O'Connor strongly advanced, that each would uphold some kind of moment of silence statute. Obviously, the three dissenters would also uphold a true moment of silence statute as they would have upheld the prayer and moment of silence statute at issue.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court allowed a municipality to display in a private park a Christmas nativity scene that it owned. For Chief Justice Berger, who wrote for the majority, the creche at issue was displayed to celebrate the national holiday

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of Christmas and to depict the origins of that holiday. These amounted to legitimate secular purposes under the highly deferential standard used by the Court. Several times the Chief Justice referred to the creche in the context of the overall display. Some have wondered whether the outcome was conditioned in part on the creche's having been part of an overall holiday display which included reindeer, a Santa Claus house, and other secular symbols of Christmas.

§16.04 Establishment of Religion Through Religious Institutions Becoming Involved in Governmental Decisions [542-546]

Religious values may properly inform public policy, provided that such laws were not enacted solely for the purpose of advancing religion. This view takes account of the reality that, as long as legislatures hold religiously-founded values and as long as legislators' values are reflected in public policy, religion will indirectly impact the content of our laws. However, the Court has invalidated more direct links where religious organizations themselves have control over public policy.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), an 8-1 majority struck down a law that allowed religious institutions the power to veto government decisions. A Massachusetts General Law provided that premises within five hundred feet of a church or school could not receive a liquor license if the governing body of the church or school filed a written objection to the granting of such a license.

§16.05 Free Exercise of Religion [546-558]

Establishment and free exercise jurisprudence developed somewhat concurrently. Like the Establishment Clause, the Free Exercise Clause was seldom the subject of litigation prior to the mid-twentieth century. Early Supreme Court cases where the Free Exercise Clause was implicated invariably resulted in a rejection of the free exercise claim. The nature of a typical free exercise claim may help to explain this result. Laws that are typically the objects of a free exercise challenge do not directly prohibit religious beliefs or practices. Instead, such laws are usually facially neutral, generally applicable laws that burden the free exercise of a particular sect. The challenger, in effect, is put in the position of seeking an exemption on religious grounds from an otherwise proper expression of the popular will. The Court's willingness to recognize such exemptions has vacillated through the years.

In *Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Oregon Supreme Court interpreted the state's controlled substance laws to prohibit the ingestion of peyote, even for sacramental purposes. *Smith* involved a neutral, generally applicable statute. Oregon's prohibition of peyote use was a generally applicable law that easily passed constitutional muster.

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