FIFTH AMENDMENT

RIGHTS OF PERSONS

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RIGHTS OF PERSONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INDICTMENT BY GRAND JURY

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.[1] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[2] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on

[1] Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101 (1931).

[2] 1 Bernard Schwartz, The Bill of Rights: A Documentary History 162, 166 (1971). The provision read: "That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence. . . ."

such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[3]

The prescribed constitutional function of grand juries in federal courts[4] is to return criminal indictments, but the juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, not bound by many evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it.[5] The exclusionary rule is inapplicable in grand jury

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[3] Costello v. United States, 350 U.S. 359, 362 (1956). "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges . . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion). *See* id. at 589–91 (Justice Brennan concurring).

[4] This provision applies only in federal courts and is not applicable to the states, either as an element of due process or as a direct command of the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

[5] Witnesses are not entitled to have counsel present in the room. FED. R. CIV. P. 6(d). The validity of this restriction was asserted in dictum in *In re* Groban, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. Id. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in Coleman v. Alabama, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See* id. at 25 (Chief Justice Burger dissenting). In United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), Chief Justice Burger wrote: "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." By

proceedings, with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally seized evidence.[6] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, although free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration.[7] A witness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry[8] and the commission of perjury by a

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emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice Brennan argued that access to counsel was essential and constitutionally required for the protection of constitutional rights; Brennan accepted the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness' rights, id. at 602–09 (with Justice Marshall). Justices Stewart and Blackmun reserved judgment. Id. at 609. The dispute appears ripe for revisiting.

[6] United States v. Calandra, 414 U.S. 338 (1974). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit use of unlawful wiretap information as a basis for questioning witnesses before grand juries. Gelbard v. United States, 408 U.S. 41 (1972).

[7] "Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid . . . , the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment. Hale v. Henkel, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." United States v. Calandra, 414 U.S. 338, 346 (1974). *See also* United States v. Dionisio, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Hale v. Henkel, 201 U.S. 43, 76–77 (1906), but not more so either. United States v. Dionisio, 410 U.S. 1 (1973) (subpoena to give voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment's Self-Incrimination Clause must be respected. Blau v. United States, 340 U.S. 159 (1950); Hoffman v. United States, 341 U.S. 479 (1951). On common-law privileges, *see* Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); Alexander v. United States, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), *with* Dennis v. United States, 384 U.S. 855 (1966). *See* Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).

[8] United States v. Washington, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer

witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may already be a putative defendant when he is called.[9]

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[10] According to the Court, the issue turned on a dual inquiry—"whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."[11] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront than did an arrest or an investigative stop, and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[12] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[13] Because the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

Besides indictments, grand juries may also issue reports that may indicate nonindictable misbehavior, mis- or malfeasance of pub-

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questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses . . . ." Id. at 186.

[9] United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no *Miranda* warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id. at 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution.

[10] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

[11] *Dionisio*, 410 U.S. at 9.

[12] 410 U.S. at 9–13.

[13] 410 U.S. at 13–15. The privacy rationale proceeds from Katz v. United States, 389 U.S. 347 (1967).

lic officers, or other objectionable conduct.[14] Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.[15]

Within the meaning of this article a crime is made "infamous" by the quality of the punishment that may be imposed.[16] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[17] Imprisonment in a state prison or penitentiary, with or without hard labor,[18] or imprisonment at hard labor in the workhouse of the District of Columbia,[19] falls within this category. The pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial. "When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."[20] Thus, an act that authorized imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, created an offense that could be tried only upon indictment.[21] Counterfeiting,[22] fraudulent alteration of poll books,[23] fraudulent voting,[24] and embezzlement,[25] have been declared to be infamous crimes. It is immaterial how Congress has classified the offense.[26] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six months is a misdemeanor, which can be tried without indictment, even though

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[14] The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, *see In re* Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970), and Report of the January 1970 Grand Jury (Black Panther Shooting) (N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

[15] Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place, and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861–68. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts. *See* discussion under "Juries," *infra*.

[16] *Ex parte* Wilson, 114 U.S. 417 (1885).

[17] 114 U.S. at 427.

[18] Mackin v. United States, 117 U.S. 348, 352 (1886).

[19] United States v. Moreland, 258 U.S. 433 (1922).

[20] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

[21] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[22] *Ex parte* Wilson, 114 U.S. 417 (1885).

[23] Mackin v. United States, 117 U.S. 348 (1886).

[24] Parkinson v. United States, 121 U.S. 281 (1887).

[25] United States v. DeWalt, 128 U.S. 393 (1888).

[26] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

the punishment exceeds that specified in the statutory definition of "petty offenses." [27]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument.[28] A change in the indictment that does not narrow its scope deprives the court of the power to try the accused.[29] Although additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, for example, a lesser included offense.[30] There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.[31] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.[32]

The protection of indictment by grand jury extends to all persons except those serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury.[33] The exception's limiting words "when in actual service in time of war or public danger" apply only to members of the militia, not to members of the regular armed forces. In 1969, in *O'Callahan v. Parker*, the Court held that offenses that are not "service connected" may not be punished under military law, but instead must be tried in the civil courts in the jurisdiction where

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[27] Duke v. United States, 301 U.S. 492 (1937).

[28] *See* Stirone v. United States, 361 U.S. 212 (1960), which held that a variation between pleading and proof deprived petitioner of his right to be tried only upon charges presented in the indictment.

[29] *Ex parte* Bain, 121 U.S. 1, 12 (1887). *Ex parte* Bain was overruled in United States v. Miller, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. *Ex parte* Bain was also overruled to the extent that it held that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 535 U.S. 625 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. 535 U.S. at 631 (2002).

[30] United States v. Miller, 471 U.S. 130, 144 (1985).

[31] Breese v. United States, 226 U.S. 1 (1912).

[32] Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966). *Cf.* Gelbard v. United States, 408 U.S. 41 (1972).

[33] Johnson v. Sayre, 158 U.S. 109, 114 (1895). *See also* Lee v. Madigan, 358 U.S. 228, 232–35, 241 (1959).

the acts took place.[34] In 1987, however, this decision was overruled, with the Court emphasizing the "plain language" of Article I, § 8, clause 14,[35] and not directly addressing any possible limitation stemming from the language of the Fifth Amendment.[36] "[T]he requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[37] Even under the service connection rule, it was held that offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, could be tried by a military commission.[38]

DOUBLE JEOPARDY

Development and Scope

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[39] A second "vitally important interest[ ]" embod-

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[34] 395 U.S. 258 (1969); *see also* Relford v. Commandant, 401 U.S. 355 (1971) (offense committed on military base against persons lawfully on base was service connected). But courts-martial of civilian dependents and discharged servicemen have been barred. Id. *See* "Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents" under Article I.

[35] This clause confers power on Congress to "make rules for the government and regulation of the land and naval forces."

[36] Solorio v. United States, 483 U.S. 435 (1987). A 5–4 majority favored overruling *O'Callahan*: Chief Justice Rehnquist's opinion for the Court was joined by Justices White, Powell, O'Connor, and Scalia. Justice Stevens concurred in the judgment but thought it unnecessary to reexamine *O'Callahan*. Dissenting Justice Marshall, joined by Justices Brennan and Blackmun, thought the service connection rule justified by the language of the Fifth Amendment's exception, based on the nature of cases (those "*arising in* the land or naval forces") rather than the status of defendants.

[37] 483 U.S. at 450–51.

[38] *Ex parte* Quirin, 317 U.S. 1, 43, 44 (1942).

[39] Green v. United States, 355 U.S. 184, 187–88 (1957). The passage is often quoted with approval by the Court. *E.g.*, Crist v. Bretz, 437 U.S. 28, 35 (1978); United States v. DiFrancesco, 449 U.S. 117, 127–28 (1980); Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 7 (2009). For a comprehensive effort to assess the purposes of application of the clause, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

ied in the Double Jeopardy Clause "is the preservation of 'the finality of judgments.'" [40]

The concept of double jeopardy goes far back in history, but its development was uneven and its meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[41] In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction. The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.[42] Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." [43] Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike "or trial" from the clause failed.[44] As approved by the Senate, however, and accepted by the House for referral to the states, the present language of the clause was inserted.[45]

Throughout most of its history, this clause was binding only against the Federal Government. In *Palko v. Connecticut*,[46] the Court re-

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[40] Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 6, 7 (2009), quoting Crist v. Bretz, 437 U.S. 28, 33 (1978).

[41] M. Friedland, Double Jeopardy part 1 (1969); Crist v. Bretz, 437 U.S. 28, 32–36 (1978), and id. at 40 (Justice Powell dissenting); United States v. Wilson, 420 U.S. 332, 340 (1975).

[42] J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 21–27 (1969). The first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, *The Federal and State Constitution*, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. Id. at 3100.

[43] 1 Annals of Congress 434 (June 8, 1789).

[44] Id. at 753.

[45] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1149, 1165 (1971). In Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." Id. at 34 n.10.

[46] 302 U.S. 319 (1937).

jected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the states and enunciated the due process theory under which most of those Amendments do now apply to the states. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so fundamental that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[47] But the Double Jeopardy Clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant's due process rights, absent double jeopardy consideration *per se*, might be violated if the state "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the case in *Palko*.[48] In *Benton v. Maryland*, however, the Court concluded "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments."[49] Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.[50]

In a federal system, different units of government[51] may have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct that will violate the laws of more than one unit.[52] Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy, it was not until *United States v. Lanza*[53] that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. "We

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[47] 302 U.S. at 325, 326.

[48] 302 U.S. at 328.

[49] 395 U.S. 784, 795, 795 (1969) (citation omitted).

[50] Crist v. Bretz, 437 U.S. 28, 37–38 (1978). *But see* id. at 40 (Justices Powell and Rehnquist and Chief Justice Burger dissenting) (standard governing states should be more relaxed).

[51] Id. *See also* cases cited in Bartkus v. Illinois, 359 U.S. 121, 132 n.19 (1959), and Abbate v. United States, 359 U.S. 187, 192–93 (1959).

[52] The problem was recognized as early as Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), and the rationale of the doctrine was confirmed within thirty years. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

[53] 260 U.S. 377 (1922).

have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[54] The "dual sovereignty" doctrine is not only tied into the existence of two sets of laws often serving different federal-state purposes and the now overruled principle that the Double Jeopardy Clause restricts only the national government and not the states,[55] but it also reflects practical considerations that undesirable consequences could follow an overruling of the doctrine. Thus, a state might preempt federal authority by first prosecuting and providing for a lenient sentence (as compared to the possible federal sentence) or acquitting defendants who had the sympathy of state authorities as against federal law enforcement.[56] The application of the clause to the states has therefore worked no change in the "dual sovereign" doctrine.[57] The dual sovereignty doctrine has also been applied to permit successive prosecutions by two states for the same conduct,[58] and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[59] Of course, when in fact two different units of the government are subject to the same sovereign, the Double Jeop-

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[54] 260 U.S. at 382. *See also* Hebert v. Louisiana, 272 U.S. 312 (1924); Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101 (1943).

[55] Benton v. Maryland, 395 U.S. 784 (1969), extended the clause to the states.

[56] Reaffirmation of the doctrine against double jeopardy claims as to the Federal Government and against due process claims as to the states occurred in Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959), both cases containing extensive discussion and policy analyses. The Justice Department follows a policy of generally not duplicating a state prosecution brought and carried out in good faith, *see* Petite v. United States, 361 U.S. 529, 531 (1960); Rinaldi v. United States, 434 U.S. 22 (1977), and several provisions of federal law forbid a federal prosecution following a state prosecution. *E.g.*, 18 U.S.C. §§ 659, 660, 1992, 2117. The Brown Commission recommended a general statute to this effect, preserving discretion in federal authorities to proceed upon certification by the Attorney General that a United States interest would be unduly harmed if there were no federal prosecution. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 707 (1971).

[57] United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine permits federal prosecution of an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both charges involving the same conduct; tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government).

[58] Heath v. Alabama, 474 U.S. 82 (1985) (defendant who crossed state line in the course of a kidnap and murder was prosecuted for murder in both states).

[59] United States v. Lara, 541 U.S. 193 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

ardy Clause does bar separate prosecutions by them for the same offense.[60]

The clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the possibility of capital punishment upon conviction, but it is now settled that the clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."[61] Despite the clause's literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes "punishment."[62] Ordinarily, however, civil *in rem* forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis.[63] and the same is true of civil commitment following expiration of a prison term.[64]

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[60] *See, e.g.*, Waller v. Florida, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court); Grafton v. United States, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court). More recently, in *Puerto Rico v. Sanchez Valle*, the Court held that the separate prosecution of an individual by the United States and Puerto Rico for the same underlying conduct ran afoul of the Double Jeopardy Clause because the two governments are not "separate sovereigns." *See* 579 U.S. ___, No. 15–108, slip op. at 17–18 (2016). Even though Puerto Rico came to exercise self-rule through a popularly ratified constitution in the mid-twentieth century, the Court concluded that the "original source" for its authority to prosecute crimes ultimately derived from Congress and, specifically, a federal statute which authorized the people of Puerto Rico to draft their own constitution, meaning that the challenged prosecution amounted to a reprosecution by the same sovereign. *See id.* at 14–16 (2016).

[61] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1874). The clause generally has no application in noncriminal proceedings. Helvering v. Mitchell, 303 U.S. 391 (1938).

[62] The clause applies in juvenile court proceedings that are formally civil. Breed v. Jones, 421 U.S. 519 (1975). *See also* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Halper, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). *But see* Seling v. Young, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis. 531 U.S. at 263.

[63] United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof"

Because a prime purpose of the clause is to protect against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling; this is a rare exception to the general rule prohibiting appeals from nonfinal orders.[65]

During the 1970s, the Court decided an uncommonly large number of cases raising double jeopardy claims.[66] Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into a state of "confusion," with the Court acknowledging that its decisions "can hardly be characterized as models of consistency and clarity."[67] In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had early in our jurisprudence become confused with the Double Jeopardy Clause. Although they accept the present understanding, they do so as part of the Court's superintending of the federal courts and not because the understanding is part and parcel of the clause; in so doing, of course, they are likely to find more prosecutorial discretion in the trial process.[68] Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of gov-

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that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, 465 U.S. at 366.

[64] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under state's Sexually Violent Predator Act).

[65] Abney v. United States, 431 U.S. 651 (1977).

[66] *See* United States v. DiFrancesco, 449 U.S. 117, 126–27 (1980) (citing cases).

[67] Burks v. United States, 437 U.S. 1, 9, 15 (1978). One result is instability in the law. Thus, *Burks* overruled, to the extent inconsistent, four cases decided between 1950 and 1960, and United States v. Scott, 437 U.S. 82 (1978), overruled a case decided just three years earlier, United States v. Jenkins, 420 U.S. 358 (1975).

[68] *See* Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that, with the Double Jeopardy Clause so interpreted, the Due Process Clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id. at 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. *E.g.*, United States v. Scott, 437 U.S. 82, 92–94 (1978); Oregon v. Kennedy, 456 U.S. 667 (1982) (but narrowing scope of concept).

ernment to convict.[69] Still other Justices have engaged in a form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[70] Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

Reprosecution Following Mistrial

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.[71] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.[72] The reasons the Court has given for fixing the attachment of jeopardy at a point prior to judgment and thus making some terminations of trials before judgment final insofar as the defendant is concerned

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[69] United States v. Scott, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens).

[70] Thus, Justice Blackmun has enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, Crist v. Bretz, 437 U.S. 28, 38 (1978) (concurring), and he joined Justice Stevens' concurrence in Oregon v. Kennedy, 456 U.S. 667, 681 (1982), but he also joined the opinions in United States v. Scott, 437 U.S. 82 (1978), and Arizona v. Washington, 434 U.S. 497 (1978) (Justice Blackmun concurring only in the result).

[71] The rule traces back to United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See also* Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In Crist v. Bretz, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the clause and it therefore binds the States. *But see* id. at 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. *E.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial *de novo* and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

[72] *Cf.* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Arizona v. Washington, 434 U.S. 497, 503–05 (1978).

is that a defendant has a "valued right to have his trial completed by a particular tribunal."[73] The reason that the defendant's right is so "valued" is that he has a legitimate interest in completing the trial "once and for all" and "conclud[ing] his confrontation with society,"[74] so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.[75] These reasons both inform the determination when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial's premature termination.

A second trial may be permitted where a mistrial is the result of "manifest necessity,"[76] as when, for example, the jury cannot reach a verdict[77] or circumstances plainly prevent the continuation of the trial.[78] The question of whether there is double jeopardy becomes more difficult, however, when the doctrine of "manifest necessity" is called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor's control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant's right in having the trial completed against the public interest in fair trials designed to end in just judgments.[79] Thus, when, after jeopardy attached, a mistrial was granted because of a defective indictment, the Court held that retrial was not barred; a trial judge "properly exercises his discretion" in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error. "If an error could make reversal on appeal a cer-

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[73] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[74] United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion).

[75] Arizona v. Washington, 434 U.S. 497, 503–05 (1978); Crist v. Bretz, 437 U.S. 28, 35–36 (1978). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 86–97.

[76] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[77] United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892). *See* Renico v. Lett, 559 U.S. ___, No. 09–338, slip op. (2010) (in a habeas review case, discussing the broad deference given to trial judge's decision to declare a mistrial because of jury deadlock). *See also*, Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 7 (2009); Blueford v. Arkansas, 566 U.S. ___, No. 10–1320, slip op. (2012) (reprosecution for a greater offense allowed following jury deadlock on a lesser included offense).

[78] Simmons v. United States, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); Thompson v. United States, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury that had indicted defendant and was therefore disqualified); Wade v. Hunter, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

[79] Illinois v. Somerville, 410 U.S. 458, 463 (1973).

tainty, it would not serve 'the ends of public justice' to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."[80] On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable.[81] Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a "manifest necessity" for terminating the trial, *Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance that the prosecutor could use to abort a trial that was not proceeding successfully and obtain a new trial that would be to his advantage.[82]

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,[83] defense counsel in his opening statement made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. Granting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.[84]

Emphasis upon the trial judge's discretion has an impact upon the cases in which it is the judge's error, in granting *sua sponte* a mistrial or granting the prosecutor's motion. The cases are in doc-

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[80] 410 U.S. at 464.

[81] Downum v. United States, 372 U.S. 734 (1963).

[82] Illinois v. Somerville, 410 U.S. 458, 464–65, 468–69 (1973).

[83] 434 U.S. 497 (1978).

[84] "Manifest necessity" characterizes the burden the prosecutor must shoulder in justifying retrial. 434 U.S. at 505–06. But "necessity" cannot be interpreted literally; it means rather a "high degree" of necessity, and some instances, such as hung juries, easily meet that standard. Id. at 506–07. In a situation like that presented in this case, great deference must be paid to the trial judge's decision because he was in the best position to determine the extent of the possible bias, having observed the jury's response, and to respond by the course he deems best suited to deal with it. Id. at 510–14. Here, "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. . . . [H]e exercised 'sound discretion.' . . . " Id. at 516.

trinal disarray. Thus, in *Gori v. United States*,[85] the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought that the judge's action was an abuse of discretion, it approved retrial on the grounds that the judge's decision had been taken for defendant's benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.[86] Refusing to permit retrial, the Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[87] The later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly." But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[88]

Of course, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."[89] "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[90] In *United States v. Dinitz*,[91] the trial judge had excluded defendant's principal attor-

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[85] 367 U.S. 364 (1961). *See also* United States v. Tateo, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

[86] United States v. Jorn, 400 U.S. 470, 483 (1971).

[87] 400 U.S. at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the government's appeal.

[88] Arizona v. Washington, 434 U.S. 497, 514, 515–16 (1978). *See also* Illinois v. Somerville, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*.)

[89] United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

[90] United States v. Scott, 437 U.S. 82, 93 (1978).

[91] 424 U.S. 600 (1976). *See also* Lee v. United States, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after

ney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel. Holding that the defendant could be retried after he chose a mistrial, the Court reasoned that, although the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal. The defendant's choice, even though difficult, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal, which if successful would lead to a new trial, and neither the public interest nor the defendant's interests would thereby be served.

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching,[92] but, in *Oregon v. Kennedy*,[93] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

Reprosecution Following Acquittal

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence."[94] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high

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opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

[92] *Compare* United States v. Dinitz, 424 U.S. 600, 611 (1976), *with* United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

[93] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that reprosecution would be barred. Id. at 676–77. The defendant had moved for mistrial after the prosecutor had asked a key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. Id. at 681.

[94] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"[95] Although, in other areas of double jeopardy doctrine, consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous."[96] Thus, an acquittal resting on the trial judge's misreading of the elements of an offense precludes further prosecution.[97]

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,[98] which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge's decision, and enter a judgment of conviction.[99] Previously, under the Due Process Clause, there was no barrier to state provision for prosecutorial appeals from acquittals.[100] But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rul-

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[95] United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)). For the conceptually related problem of trial for a "separate" offense arising out of the same "transaction," *see* discussion under "The 'Same Transaction' Problem," *infra*.

[96] Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122–37.

[97] Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

[98] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 346 n.15 (1975); United States v. DiFrancesco, 449 U.S. 117, 113 n.13 (1980).

[99] In dissent, Justice Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, Green v. United States, 355 U.S. 184, 192 (1957); United States v. Wilson, 420 U.S. 332, 351–53 (1975); Breed v. Jones, 421 U.S. 519, 533–35 (1975).

[100] Palko v. Connecticut, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf.* Greene v. Massey, 437 U.S. 19 (1978).

ings,[101] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the Double Jeopardy Clause prohibits further prosecution.[102] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

Acquittal by Jury.—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecution, place the defendant on trial again.[103] Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.[104]

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[101] The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . . , a most unruly child that has not improved with age." United States v. Sisson, 399 U.S. 267, 307 (1970). *See also* United States v. Oppenheimer, 242 U.S. 85 (1916); Fong Foo v. United States, 369 U.S. 141 (1962).

[102] Title III of the Omnibus Crime Control Act, Pub. L. 91–644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. United States v. Wilson, 420 U.S. 332, 337 (1974). *See* Sanabria v. United States, 437 U.S. 54, 69 n.23 (1978), and id. at 78 (Justice Stevens concurring).

[103] What constitutes a jury acquittal may occasionally be uncertain. In Blueford v. Arkansas, 566 U.S. ___, No. 10–1320, slip op. (2012), the defendant was charged with capital murder in an "acquittal-first" jurisdiction, in which the jury must unanimously agree that a defendant is not guilty of a greater offense before it may begin to consider a lesser included offense. After several hours of deliberations, the foreperson of the jury stated in open court that the jury was unanimously against conviction for capital murder and the lesser included offense of first degree murder, but was deadlocked on manslaughter, the next lesser included offense. After further deliberations, the judge declared a mistrial because of a hung jury. Six Justices of the Court subsequently held that the foreperson's statement on capital murder and first degree murder lacked the necessary finality of an acquittal, and found that Double Jeopardy did not bar a subsequent prosecution for those crimes. Three dissenting Justices held that Double Jeopardy required a partial verdict of acquittal on the greater offenses under the circumstances.

In Schiro v. Farley, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

[104] In United States v. Ball, 163 U.S. 662 (1896), three defendants were placed on trial, Ball was acquitted and the other two were convicted, the two appealed and obtained a reversal on the ground that the indictment had been defective, and all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action. Similarly, in Benton v. Maryland, 395 U.S. 784 (1969), the defendant was convicted

Acquittal by the Trial Judge.—When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[105] There is no possibility of retrial for the same offense.[106] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.[107] The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." [108] Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.[109] Even if, as happened in *Sanabria v. United States*,[110] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[111]

Some limited exceptions exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the Due Process Clause is the prevention of successive trials and not of prosecution appeals *per se*, it is apparently the case that, if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon

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of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the Double Jeopardy Clause. On the doctrine of "constructive acquittals" by conviction of a lesser included offense, *see* discussion *infra* under "Reprosecution After Reversal on Defendant's Appeal."

[105] United States v. Martin Linen Supply Co., 430 U.S. 564, 570–72 (1977); Sanabria v. United States, 437 U.S. 54, 63–65 (1978); Finch v. United States, 433 U.S. 676 (1977).

[106] In Fong Foo v. United States, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. Id. at 143.

[107] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

[108] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[109] 430 U.S. at 570–76. *See also* United States v. Scott, 437 U.S. 82, 87–92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[110] 437 U.S. 54 (1978).

[111] *See also* Smith v. Massachusetts, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury's verdict and the judgment thereon.[112] Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, then the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.[113]

Trial Court Rulings Terminating Trial Before Verdict.— If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;[114] if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as insanity or entrapment, the defendant is not subject to retrial.[115] This is so even where the trial court's ruling on the sufficiency of the evidence is based on an erroneous interpretation of the statute defining the elements of the offense.[116] However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.[117] The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime

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[112] In United States v. Wilson, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In United States v. Jenkins, 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson*, that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in United States v. Scott, 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. Id. at 91 n.7.

[113] Serfass v. United States, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); United States v. Sanford, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status).

[114] *See* "Reprosecution After Reversal on Defendant's Appeal," *supra*.

[115] *See* "Acquittal by the Trial Judge," *supra*.

[116] *See* Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013).

[117] United States v. Wilson, 420 U.S. 332 (1975) (preindictment delay); United States v. Jenkins, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); United States v. Scott, 437 U.S. 82 (1978) (preindictment delay).

Control Act in 1971.[118] That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.[119] In the second place, because the Justices have such differing views about the policies underlying the Double Jeopardy Clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;[120] if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted.[121] Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to the defendant's factual guilt or innocence.[122] Such dismissals relating to guilt

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[118] *See* United States v. Scott, 437 U.S. 82, 84–86 (1978); United States v. Sisson, 399 U.S. 267, 291–96 (1970).

[119] *Cf.* Lee v. United States, 432 U.S. 23 (1977).

[120] United States v. Wilson, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

[121] United States v. Jenkins, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

[122] United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. Id. at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." Id. at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They

or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Reprosecution Following Conviction

A basic purpose of the Double Jeopardy Clause is to protect a defendant "against a second prosecution for the same offense after conviction." [123] It is "settled" that "no man can be twice lawfully punished for the same offense." [124] Of course, the defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.[125] The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

Reprosecution After Reversal on Defendant's Appeal.—Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that, by appealing, a defendant has "waived" his objection to further prosecution by challenging the original conviction.[126] Although it has characterized the "waiver" theory as "totally unsound and indefensible," [127] the Court has been hesitant in formulating a new theory in maintaining the practice.[128]

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would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

[123] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[124] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[125] A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf.* Ciucci v. Illinois, 356 U.S. 571 (1958) (under Due Process Clause, Double Jeopardy Clause not then applying to states).

[126] United States v. Ball, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Story adopted that view. United States v. Gilbert, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Frankfurter's dissent in Green v. United States, 355 U.S. 184, 200–05 (1957).

[127] Green v. United States, 355 U.S. 184, 197 (1957). The more recent cases continue to reject a "waiver" theory. *E.g.*, United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976); United States v. Scott, 437 U.S. 82, 99 (1978).

[128] Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100, 134 (1904), rejected the "waiver" theory and propounded a theory of "continuing jeopardy," which also continues to be rejected. *See* discussion, *supra*. In some cases, a concept of "election" by the defendant has been suggested, United States v. Scott, 437 U.S. 82, 93 (1978); Jeffers v. United States, 432 U.S. 137, 152–54 (1977), but it is not clear how this formulation might differ from "waiver." Chief Justice Burger has suggested that "probably a more satisfactory explanation" for permissibility of retrial in this situation "lies in analysis of the respective interests involved," Breed v. Jones, 421 U.S. 519, 533–35 (1975), and a determination that on balance the interests of both prosecution and defense are well served by the rule. *See* United States v. Tateo, 377 U.S. 463, 466 (1964); Tibbs v. Florida, 457 U.S. 31, 39–40 (1982).

An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green v. United States*,[129] the defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge.[130] Even though the Court thought the jury's action in the first trial was clearly erroneous, the Double Jeopardy Clause required that the jury's implicit acquittal be respected.[131]

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,[132] the appellate court set aside the defendant's conviction on the basis that the prosecution had failed to rebut defendant's proof of insanity. In directing that the defendant could not be retried, the Court observed that if the trial court "had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. . . . [I]t should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient."[133] The policy underlying the clause of not allowing the prosecution to make repeated efforts to convict fore-

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[129] 355 U.S. 184 (1957).

[130] The decision necessarily overruled Trono v. United States, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. Green v. United States, 355 U.S. 184, 194–97 (1957). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

[131] *See also* Price v. Georgia, 398 U.S. 323 (1970). The defendant was tried for murder and was convicted of involuntary manslaughter. He obtained a reversal, was again tried for murder, and again convicted of involuntary manslaughter. Acknowledging that, after reversal, Price could have been tried for involuntary manslaughter, the Court nonetheless reversed the second conviction because he had been subjected to the hazard of twice being tried for murder, in violation of the Double Jeopardy Clause, and the effect on the jury of the murder charge being pressed could have prejudiced him to the extent of the second conviction. *But cf.* Morris v. Mathews, 475 U.S. 237 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-jeopardy-barred conviction for first degree murder). "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." Id. at 247.

[132] 437 U.S. 1 (1978).

[133] Id. at 10–11. *See also* Greene v. Massey, 437 U.S. 19 (1978) (remanding for determination whether appellate majority had reversed for insufficient evidence or whether some of the majority had based decision on trial error); Hudson v. Louisiana, 450 U.S. 40 (1981) (*Burks* applies where appellate court finds some but insufficient evidence adduced, not only where it finds no evidence). *Burks* was distinguished in Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984), which held that a defendant who had elected to undergo a bench trial with no appellate review

closes giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement on the *weight* rather than the *sufficiency* of the evidence, retrial is permitted; the appellate court's decision does not mean that acquittal was the only proper course, hence the deference required for acquittals is not merited.[134] Also, the *Burks* rule does not bar reprosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict.[135]

Sentence Increases.—The Double Jeopardy Clause protects against imposition of multiple punishment for the same offense.[136] The application of the principle leads, however, to a number of complexities. In a simple case, it was held that where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized one or the other but not both, it could not, after the fine had been paid and the defendant had entered his short term of confinement, recall the defendant and change its judgment by sentencing him to imprisonment only.[137] But the Court has held that the imposition of a sentence does not from the moment of imposition have the finality that a judgment of acquittal has. Thus, it has long been recognized that in the same term of court and before the defendant has begun serving the sentence the court may recall him and increase his sentence.[138] Moreover, a defendant who is retried

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but with the right of trial *de novo* before a jury (and with appellate review available) could not bar trial *de novo* and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

[134] Tibbs v. Florida, 457 U.S. 31 (1982). The decision was 5-to-4, the dissent arguing that weight and insufficiency determinations should be given identical Double Jeopardy Clause treatment. Id. at 47 (Justices White, Brennan, Marshall, and Blackmun).

[135] Lockhart v. Nelson, 488 U.S. 33 (1988) (state may reprosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).

[136] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[137] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

[138] Bozza v. United States, 330 U.S. 160 (1947). *See also* Pollard v. United States, 352 U.S. 354, 359–60 (1957) (imposition of prison sentence two years after court imposed an invalid sentence of probation approved). Dicta in some cases had cast doubt on the constitutionality of the practice. United States v. Benz, 282 U.S. 304, 307 (1931). However, United States v. DiFrancesco, 449 U.S. 117, 133–36, 138–39 (1980), upholding a statutory provision allowing the United States to appeal a sentence imposed on a "dangerous special offender," removes any doubt on that score. The Court there reserved decision on whether the government may appeal a sentence that the defendant has already begun to serve.

after he is successful in overturning his first conviction is not protected by the Double Jeopardy Clause against receiving a greater sentence upon his second conviction.[139] An exception exists with respect to capital punishment, the Court having held that government may not again seek the death penalty on retrial when on the first trial the jury had declined to impose a death sentence.[140]

Applying and modifying these principles, the Court narrowly approved the constitutionality of a statutory provision for sentencing of "dangerous special offenders," which authorized prosecution appeals of sentences and permitted the appellate court to affirm, reduce, or increase the sentence.[141] The Court held that the provision did not offend the Double Jeopardy Clause. Sentences had never carried the finality that attached to acquittal, and its precedents indicated to the Court that imposition of a sentence less than the maximum was in no sense an "acquittal" of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase. Similarly upheld as within the allowable range of punishment contemplated by the legislature was a remedy for invalid multiple punishments under consecutive sentences: a shorter felony conviction was vacated, and time served was credited to the life sentence imposed for felony-murder. Even though the first sentence had been commuted and

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[139] North Carolina v. Pearce, 395 U.S. 711, 719–21 (1969). *See also* Chaffin v. Stynchcombe, 412 U.S. 17, 23–24 (1973). The principle of implicit acquittal of an offense drawn from Green v. United States, 355 U.S. 184 (1957), does not similarly apply to create an implicit acquittal of a higher sentence. *Pearce* does hold that a defendant must be credited with the time served against his new sentence. 395 U.S. at 717–19.

[140] Bullington v. Missouri, 451 U.S. 430 (1981). Four Justices dissented. Id. at 447 (Justices Powell, White, Rehnquist, and Chief Justice Burger). The Court disapproved Stroud v. United States, 251 U.S. 15 (1919), although formally distinguishing it. *Bullington* was followed in Arizona v. Rumsey, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. *Rumsey* was decided by 7–2 vote, with only Justices White and Rehnquist dissenting. In Monge v. California, 524 U.S. 721 (1998), the Court refused to extend the "narrow" *Bullington* exception outside the area of capital punishment. *But see* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

[141] United States v. DiFrancesco, 449 U.S. 117 (1980). Four Justices dissented. Id. at 143, 152 (Justices Brennan, White, Marshall, and Stevens).

hence fully satisfied at the time the trial court revised the second sentence, the resulting punishment was "no greater than the legislature intended," hence there was no double jeopardy violation.[142]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an "offense" that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. "Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction." [143]

"For the Same Offence"

Sometimes as difficult as determining when a defendant has been placed in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns, and a defendant may be proceeded against by both because each may have different interests to serve.[144] The same conduct may transgress two or more different statutes, because laws reach lesser and greater parts of one item of conduct, or may violate the same statute more than once, as when one robs several people in a group at the same time.

Legislative Discretion as to Multiple Sentences.—It frequently happens that one activity of a criminal nature will violate one or more laws or that one or more violations may be charged.[145]

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[142] Jones v. Thomas, 491 U.S. 376, 381–82 (1989).

[143] United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). *See also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (Congress's decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 524 U.S. 721 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in *Almendarez-Torres* argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (523 U.S. at 248), answered that question affirmatively in his dissent in *Monge*. 524 U.S. 740–41.

[144] *See* discussion *supra* under "Development and Scope."

[145] There are essentially two kinds of situations here. There are "double-description" cases in which criminal law contains more than one prohibition for conduct arising out of a single transaction. *E.g.*, Gore v. United States, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (1) sale of drugs not in pursuance of a written order, (2) sale of drugs not in the original stamped package, and (3) sale of drugs with knowledge that they had been unlawfully imported). And there are "unit-of-prosecution" cases in which the same conduct may

Although the question is not totally free of doubt, it appears that the Double Jeopardy Clause does not limit the legislative power to split a single transaction into separate crimes so as to give the prosecution a choice of charges that may be tried in one proceeding, thereby making multiple punishments possible for essentially one transaction.[146] "Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial." [147]

The clause does, however, create a rule of construction—a presumption against the judiciary imposing multiple punishments for the same transaction unless Congress has "spoken in language that is clear and definite" [148] to pronounce its intent that multiple punishments indeed be imposed. The commonly used test in determining whether Congress would have wanted to punish as separate offenses conduct occurring in the same transaction, absent otherwise clearly expressed intent, is the "same evidence" rule. The rule, announced in *Blockburger v. United States*,[149] "is that where the same act or transaction constitutes a violation of two distinct statutory

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violate the same statutory prohibition more than once. *E.g.*, Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111–22.

[146] Albernaz v. United States, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana, both charges relating to the same marijuana.) The concurrence objected that the clause does preclude multiple punishments for separate statutory offenses unless each requires proof of a fact that the others do not. Id. at 344. Because the case involved separate offenses that met this test, *Albernaz* strictly speaking is not a square holding and previous dicta is otherwise, but *Albernaz's* dicta is well-considered in view of the positions of at least four of its Justices who have objected to the dicta in other cases suggesting a constitutional restraint by the clause. Whalen v. United States, 445 U.S. 684, 695, 696, 699 (1980) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger).

[147] Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (separate offenses of "first degree robbery," defined to include robbery under threat of violence, and "armed criminal action"). Only Justices Marshall and Stevens dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

[148] United States v. Universal C.I.T. Corp., 344 U.S. 218, 221–22 (1952).

[149] 284 U.S. 299, 304 (1932). This case itself was not a double jeopardy case, but it derived the rule from Gavieres v. United States, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* Carter v. McClaughry, 183 U.S. 365 (1902); Morgan v. Devine, 237 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Thus, in *Gore v. United States*,[150] the Court held that defendant's one act of selling narcotics had violated three distinct criminal statutes, each of which required proof of a fact not required by the others; prosecuting him on all three counts in the same proceeding was therefore permissible.[151] So too, the same evidence rule does not upset the "established doctrine" that, for double jeopardy purposes, "a conspiracy to commit a crime is a separate offense from the crime itself," [152] or the related principle that Congress may prescribe that predicate offenses and "continuing criminal enterprise" are separate offenses.[153] On the other hand, in *Whalen v. United States*,[154] the Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not, and no indication existed in the statutes and the legislative history that Congress wanted the separate offenses punished.[155] In this as in other areas, a guilty plea ordinarily precludes collateral attack.[156]

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[150] 357 U.S. 386 (1958).

[151] *See also* Albernaz v. United States, 450 U.S. 333 (1981); Iannelli v. United States, 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive offense, one of conspiracy to commit the substantive offense; defense raised variation of *Blockburger* test, Wharton's Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton's Rule as a double-jeopardy inspired presumption of legislative intent but held that congressional intent in this case was "clear and unmistakable" that both offenses be punished separately).

[152] United States v. Felix, 503 U.S. 378, 391 (1992). *But cf.* Rutledge v. United States, 517 U.S. 292 (1996) (21 U.S.C. § 846, prohibiting conspiracy to commit drug offenses, does not require proof of any fact that is not also a part of the continuing criminal enterprise offense under 21 U.S.C. § 848, so there are not two separate offenses).

[153] Garrett v. United States, 471 U.S. 773 (1985) ("continuing criminal enterprise" is a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

[154] 445 U.S. 684 (1980).

[155] The Court reasoned that a conviction for killing in the course of rape could not be had without providing all of the elements of the offense of rape. *See also* Jeffers v. United States, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both for conspiring to distribute drugs and for distributing drugs in concert with five or more persons); Simpson v. United States, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); Bell v. United States, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

[156] United States v. Broce, 488 U.S. 563 (1989) (defendant who pled guilty to two separate conspiracy counts is barred from collateral attack alleging that in fact there was only one conspiracy and that double jeopardy applied).

Successive Prosecutions for "the Same Offense".—Successive prosecutions raise fundamental double jeopardy concerns extending beyond those raised by enhanced and multiple punishments. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings are strung out over a lengthy period the defendant is forced to live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies through successive attempts at conviction.[157] In *Brown v. Ohio*,[158] the Court, apparently for the first time, applied the same evidence test to bar successive prosecutions in state court for different statutory offenses involving the same conduct. The defendant had been convicted of "joyriding," defined as operating a motor vehicle without the owner's consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned.[159] Application of the same principles resulted in a holding that a prior conviction of failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter, because failing to reduce speed was not a necessary element of the statutory offense of manslaughter, unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense.[160] In 1990, the Court modified the *Brown* approach, stating that the appropriate focus is on same conduct rather than same evidence.[161] That interpretation held sway only three years, however, before being repudiated as "wrong

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[157] *See* Grady v. Corbin, 495 U.S. 508, 518–19 (1990).

[158] 432 U.S. 161 (1977). *Cf. In re* Nielsen, 131 U.S. 176 (1889) (prosecution of Mormon for adultery held impermissible following his conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

[159] *See also* Harris v. Oklahoma, 433 U.S. 682 (1977) (defendant who had been convicted of felony murder for participating in a store robbery with another person who shot a store clerk could not be prosecuted for robbing the store, since store robbery was a lesser-included crime in the offense of felony murder).

[160] Illinois v. Vitale, 447 U.S. 410 (1980).

[161] Grady v. Corbin, 495 U.S. 508 (1990) (holding that the state could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted—driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

in principle [and] unstable in application." [162] The *Brown* Court had noted some limitations applicable to its holding,[163] and more have emerged subsequently. Principles appropriate in the "classically simple" lesser-included-offense and related situations are not readily transposable to "multilayered conduct" governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that "a substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes." [164] For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[165] Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the "same" prior offense, but instead is a stiffened penalty for the later crime.[166]

The "Same Transaction" Problem.— The Supreme Court has also interpreted the Double Jeopardy Clause to incorporate the doctrine of "collateral estoppel" or "issue preclusion" [167] –that is, the general legal principle that prohibits the relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment.[168] The Court first recognized the Double Jeopardy Clause's issue-

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[162] United States v. Dixon, 509 U.S. 688, 709 (1993) (applying *Blockburger* test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

[163] The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner's consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. Brown v. Ohio, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the State is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. Id. at 169 n.7. *See also* Jeffers v. United States, 432 U.S. 137, 150–54 (1977) (plurality opinion) (exception where defendant elects separate trials); Ohio v. Johnson, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

[164] United States v. Felix, 503 U.S. 378, 389 (1992). The fact that *Felix* constituted a "large exception" to *Grady* was one of the reasons the Court cited in overruling *Grady*. United States v. Dixon, 509 U.S. 688, 709–10 (1993).

[165] Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

[166] Monge v. California, 524 U.S. 721, 728 (1998).

[167] *See* Ashe v. Swenson, 397 U.S. 436, 445 (1970). Collateral estoppel and issue preclusion are synonymous terms. *See* BLACK'S LAW DICTIONARY 312 (10th ed. 2014) (defining "collateral estoppel").

[168] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (Am. Law Inst. 1981).

preclusion component in *Ashe v. Swenson*.[169] *Ashe* involved a robbery of six poker players.[170] The defendant in *Ashe*, after being acquitted of robbing *one* of the players because of insufficient evidence, was tried and convicted of robbing *another* player.[171] The Court held that because the sole issue in dispute in the first trial was whether Ashe had been one of the robbers, "[o]nce a jury had determined . . . that there was at least a reasonable doubt" as to that issue, the Constitution protected a "man who has been acquitted from having to 'run the gantlet' a second time."[172] In so holding, *Ashe* explained that issue preclusion in criminal cases must be applied with "realism and rationality" with a close examination of the underlying record to determine what was "actually decided" by the prior jury's verdict of acquittal.[173] If a criminal judgment does not depend on a jury's determination of a particular factual issue, relitigation of that issue *can* occur.[174]

Then in *United States v. Powell*, the Court rejected the argument that issue preclusion barred the acceptance of an "inconsistent" jury verdict that included an acquittal on a drug charge but guilty verdicts of using a telephone to "caus[e] and faciliat[e]" that same drug offense.[175] Reaffirming a precedent from more than a half a century before,[176] the *Powell* Court held that the "Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity" by the jury cautioned against allowing defendants to challenge inconsistent verdicts on issue preclusion grounds.[177]

Several decades later, the Court extended the logic of *Powell* in *Bravo-Fernandez v. United States*.[178] In that case, a jury had returned inconsistent verdicts of conviction and acquittal with respect to two criminal defendants, but their convictions were later vacated for legal errors unrelated to the inconsistency.[179] The Court,

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[169] 397 U.S. at 445. Previously, the Court in *Hoag v. New Jersey*, concluded that successive trials arising out of a tavern hold-up in which five customers were robbed did not violate the Due Process Clause of the Fourteenth Amendment. See 356 U.S. 464, 466 (1958).

[170] 397 U.S. at 437.

[171] 397 U.S. at 439–40.

[172] *Id*. at 446 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

[173] *Id*. at 444.

[174] *See* Bobby v. Bies, 556 U.S. 825, 834 (2009) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h).

[175] *See* United States v. Powell, 469 U.S. 57, 68 (1984).

[176] *See* Dunn v. United States, 284 U.S. 390, 392 (1932).

[177] 469 U.S. at 68–69.

[178] 580 U.S. ___, No. 15–537, slip op. at 2 (2016) ("We therefore bracket this case with *Powell*. . .").

[179] *Id*. at 9–10. Had the convictions been overturned because of lack of evidence, the government would have been prohibited from retrying the defendants, as

recognizing *Powell's* conclusion that inconsistent verdicts do not indicate whether the acquittal was the result of "mistake, compromise, or lenity," [180] held that re-prosecution on the counts on which a conviction was initially obtained could occur. According to the Court, because of the "irrationality" of the earlier inconsistent verdicts,[181] the criminal defendants failed to demonstrate that the first jury had "actually decided" that they did not commit the crime underlying the second trial.[182] As a result, while the government was prohibited from re-prosecuting the defendants in *Bravo-Fernandez* on the charges that had earlier resulted in an acquittal,[183] issue preclusion could not be used to prevent a second trial on the charges that had previously resulted in guilty verdicts.

SELF-INCRIMINATION

Development and Scope

The source of the Self-Incrimination Clause was the maxim "*nemo tenetur seipsum accusare*," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath *ex officio*. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters

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a court's evaluation of the evidence as insufficient to convict is the equivalent to an acquittal and, accordingly, bars reprosecution for that same offense. *See* Burks v. United States, 437 U.S. 1, 10–11 (1978).

[180] *See Bravo-Fernandez*, slip op. at 17.

[181] *Id*. at 18.

[182] *Id*. at 16. *The Bravo-Fernandez Court* distinguished the case from *Yeager v. United States*, 557 U.S. 110 (2009), where the Court held that *Powell* did not extend to the situation where a jury returned a verdict of acquittal on one count and hung on another count and prosecutors attempted to retry on the hung count. *Id*. at 124. Because the jury "speaks only though its verdict," a hung count did not reveal anything about the jury's reasoning and only the acquittal could factor into the issue preclusion analysis. *Id*. at 122. Unlike in *Yeager*, the acquittals in *Bravo-Fernandez* were accompanied with inconsistent guilty verdicts, leading the Court to conclude that the criminal defendants could not demonstrate that the jury had actually decided the underlying issue at the second trial. *See Bravo-Fernandez*, slip op. at 16–18.

[183] *See Bravo-Fernandez*, slip op. at 19 (noting that the earlier acquittals "remain inviolate").

about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.[184]

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath *ex officio*, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.[185] The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,[186] and the privilege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights.[187] Madison's version of the clause read "nor shall be compelled to be a witness against himself," but a House amendment inserted "in any criminal case" into the provision.[188]

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing. Of course, constitutional guarantees often expand, or contract, over time as judges adapt underlying rules to new factual patterns and practices. The difficulty is that the Court has generally not articulated the objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served.[189] Commonly mentioned in numerous cases was the as-

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[184] Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in Essays in History and Political Theory in Honor of Charles Howard McIlwain 199 (C. Wittke ed., 1936).

[185] The traditional historical account is 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 2250 (J. McNaughton rev. 1961), but more recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. Leonard Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

[186] 3 F. Thorpe, *The Federal and State Constitutions*, reprinted in H. Doc. No. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 id. at 2455 (New Hampshire); 5 id. at 2787 (North Carolina), 3038 (Pennsylvania); 6 id. at 3741 (Vermont); 7 id. at 3813 (Virginia).

[187] Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 Bernard Schwartz, The Bill of Rights: A Documentary History 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

[188] Id. at 753 (August 17, 1789).

[189] Discussing the privilege in one case, the Court stated:

sertion that the privilege was designed to protect the innocent and further the search for truth.[190]

It appears now, however, that the Court has rejected both of these as inapplicable and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[191] To protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." [192] Furthermore, "[t]he privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise em-

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It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (internal citations omitted).

[190] *E.g.*, Ullmann v. United States, 350 U.S. 422, 426 (1956); Quinn v. United States, 349 U.S. 155, 162–63 (1955); Twining v. New Jersey, 211 U.S. 78, 91 (1908).

[191] In *Tehan v. United States ex rel. Shott*, the Court noted:

[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder[s] the entire load."

. . .

The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415, 416 (1966); *see also* California v. Byers, 402 U.S. 424, 448–58 (1971) (Harlan, J., concurring); Schmerber v. California, 384 U.S. 757, 760–65 (1966); Miranda v. Arizona, 384 U.S. 436, 460 (1966). For a critical view of the privilege, see Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

[192] *Ullmann*, 350 U.S. at 438–39.

braces those which would furnish a link in the chain of evidence needed to prosecute . . . ” [193]

The privilege against self-incrimination parries the general obligation to provide testimony under oath when called upon, but it also applies in police interrogations. In all cases, the privilege must be supported by a reasonable fear that a response will be incriminatory. The issue is a matter of law for a court to determine,[194] and therefore, with limited exceptions, one must claim the privilege to benefit from it.[195] Otherwise, silence in the face of questioning may be insufficient to invoke the privilege because it may not afford an adequate opportunity either to test whether information withheld falls within the privilege or to cure a violation through a grant of immunity.[196] A witness who fails to claim the privilege explicitly when an affirmative claim is required is deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[197] However, an assertion of innocence in conjunction with a claim of the privilege does not obviate the right of witnesses to invoke it, as their

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[193] Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Emspak v. United States, 349 U.S. 190 (1955); Blau v. United States, 340 U.S. 332 (1951); Blau v. United States, 340 U.S. 159 (1950).

[194] *E.g.*, Mason v. United States, 244 U.S. 362 (1917).

[195] The primary exceptions are for a criminal defendant not taking the stand and a suspect being subject to inherently coercive circumstances (*e.g.*, custodial interrogation). *See* Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. at 4–6 (2013) (plurality opinion).

[196] In *Salinas v. Texas*, 570 U.S. ___, No. 12–246, slip op. (2013), the defendant—Salinas—answered all questions during noncustodial questioning about a double murder, other than one about whether his shotgun would match shells recovered at the murder scene. He fell silent on this inquiry, but did not assert the privilege against self-incrimination. At closing argument at Salinas's murder trial, the prosecutor argued that this silence indicated guilt, and a majority of the Court found the comments constitutionally permissible. The Court affirmed the Texas Supreme Court's ruling that Salinas had failed to invoke his Fifth Amendment rights because he did not do so explicitly. Although no opinion drew a majority of Justices, in an opinion joined by Chief Justice Roberts and Justice Kennedy, Justice Alito observed that a defendant could choose to remain silent for numerous reasons other than avoiding self-incrimination. *Id.* at 9 (plurality opinion).

[197] Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The “waiver” concept here has been pronounced “analytically [un-]sound,” with the Court preferring to reserve the term “waiver” “for the process by which one affirmatively renounces the protection of the privilege.” Garner v. United States, 424 U.S. 648, 654 n.9 (1976). Thus, the Court has settled upon the concept of “compulsion” as applied to “cases where disclosures are required in the face of claim of privilege.” *Id.* “[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Id.* at 654. Similarly, the Court has enunciated the concept of “voluntariness” to be applied in situations where it is claimed that a particular factor denied the individual a “free choice to admit, to deny, or to refuse to answer.” *Id.* at 654 n.9, 656–65.

responses still may provide the government with evidence it may later seek to use against them.[198]

Although individuals must have reasonable cause to apprehend danger and cannot be the judge of the validity of their claims, a court that would deny a claim of the privilege must be "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the individual is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate."[199] To reach a determination, furthermore, a trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory. As the Court observed:

> [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[200]

The privilege against self-incrimination is a personal one and cannot be used by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution.[201] Nor may a corporate official with custody of corporate documents that incriminate him personally resist their compelled production on the assertion of his personal privilege.[202]

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or

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[198] Ohio v. Reiner, 532 U.S. 17 (2001).

[199] Hoffman v. United States, 341 U.S. 479, 488 (1951) (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)). For an application of these principles, see *Malloy v. Hogan*, 378 U.S. 1, 11–14 (1964), and *id.* at 33 (White, Stewart JJ., dissenting). Where the government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* California v. Byers, 402 U.S. 424 (1971) (plurality opinion).

[200] *Hoffman*, 341 U.S. at 486–87.

[201] United States v. White, 322 U.S. 694, 701 (1944); Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906).

[202] United States v. White, 322 U.S. 694, 699–700 (1944); Wilson v. United States, 221 U.S. 361, 384–385 (1911). But the government may make no evidentiary use of the act of production in proceeding individually against the corporate custodian. Braswell v. United States, 487 U.S. 99 (1988). *Cf.* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); United States v. Rylander, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

in a future criminal proceeding or when it might be exploited to uncover other evidence against him.[203] Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.[204] Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature,[205] and there can be no valid claim if there is no criminal prosecution.[206] The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.[207]

What the privilege protects against is compulsion of "testimonial" disclosures. Thus, the clause is not offended by such nontestimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.[208] A person may be compelled to produce specific documents

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[203] Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, *In re* Gault, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, McCarthy v. Arndstein, 266 U.S. 34 (1924), a potential defendant or any other witness before a grand jury, Reina v. United States, 364 U.S. 507 (1960); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, Watkins v. United States, 354 U.S. 178, 195–96 (1957); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955), or before an administrative body. *In re* Groban, 352 U.S. 330, 333, 336–37, 345–46 (1957); ICC v. Brimson, 154 U.S. 447, 478–80 (1894).

[204] Estelle v. Smith, 451 U.S. 454, 462–63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"); Mitchell v. United States, 526 U.S. 314 (1999) (non-capital sentencing).

[205] Allen v. Illinois, 478 U.S. 364 (1986) (declaration that person is "sexually dangerous" under Illinois law is not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings"). In *Murphy*, the Court went on to explain that "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,' and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . ." Id. (citations omitted).

[206] Chavez v. Martinez, 538 U.S. 760 (2003) (rejecting damages claim brought by suspect interrogated in hospital but not prosecuted).

[207] Miranda v. Arizona, 384 U.S. 436 (1966).

[208] Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 221–23 (1967); Holt v. United States, 218 U.S. 245, 252 (1910). In California v. Byers, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, id. at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, id. at 434 (concurring), and Justices Black, Douglas, Brennan, and Marshall, id. at 459, 464 (dissenting), disagreed. In South Dakota v. Neville, 459 U.S.

even though they contain incriminating information.[209] If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.[210] Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.[211]

The protection is against "compulsory" incrimination, and traditionally the Court has treated within the clause only those compulsions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.[212]

553 (1983), the Court indicated as well that a state may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on the absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In another case, involving roadside videotaping of a drunk driving suspect, the Court found that the slurred nature of the suspect's speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature. Pennsylvania v. Muniz, 496 U.S. 582 (1990). On the other hand, the suspect's answer to a request to identify the date of his sixth birthday was considered testimonial. Id. Two Justices challenged the interpretation limiting application to "testimonial" disclosures, claiming that the original understanding of the word "witness" was not limited to someone who gives testimony, but included someone who gives any kind of evidence. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

[209] Fisher v. United States, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." Id. at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. Andresen v. Maryland, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. Doe v. United States, 487 U.S. 201 (1988).

[210] In United States v. Doe, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic. Similarly, a juvenile court's order to produce a child implicates the privilege, because the act of compliance "would amount to testimony regarding [the subject's] control over and possession of [the child]." Baltimore Dep't of Social Services v. Bouknight, 493 U.S. 549, 555 (1990).

[211] United States v. Hubbell, 530 U.S. 27 (2000).

[212] *E.g.*, Marchetti v. United States, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); Malloy v. Hogan,

The compulsion need not be imprisonment, but can also be termination of public employment [213] or disbarment of a lawyer [214] as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions.[215] However, although it appears that prisoners [216] and probationers [217] have less protection than others do, the Court has not developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion.[218]

It has long been the rule that a defendant who takes the stand on his own behalf does so voluntarily, and cannot then claim the privilege to defeat cross-examination on matters reasonably related to the subject matter of his direct examination,[219] and that such a

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378 U.S. 1 (1964) (contempt citation on refusal to testify). *See also* South Dakota v. Neville, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); Selective Service System v. Minnesota PIRG, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

[213] Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the state if at any time they refused to waive immunity and answer questions respecting their transactions with the state. The state may require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. *See also* Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[214] Spevack v. Klein, 385 U.S. 511 (1967).

[215] McKune v. Lile, 536 U.S. 24 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." 536 U.S. at 38 (opinion of Justice Kennedy). Concurring Justice O'Connor stated her belief that the "minor" change in living conditions seemed "very unlikely to actually compel [the prisoner] to [participate]." Id. at 51.

[216] *See*, in addition to McKune v. Lile, Baxter v. Palmigiano, 425 U.S. 308 (1976) (adverse inference from inmate's silence at prison disciplinary hearing); and Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (adverse inference from inmate's silence at clemency hearing).

[217] Minnesota v. Murphy, 465 U.S. 420 (1984) (the possibility of revocation of probation was not so coercive as to compel a probationer to provide incriminating answers to probation officer's questions).

[218] The Court in McKune v. Lile split 5-to-4, with no opinion of the Court.

[219] Brown v. Walker, 161 U.S. 591, 597–98 (1896); Fitzpatrick v. United States, 178 U.S. 304, 314–16 (1900); Brown v. United States, 356 U.S. 148 (1958). See also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (testimony at a clemency interview is voluntary, and cannot be compelled).

defendant may be impeached by proof of prior convictions.[220] But, in *Griffin v. California*,[221] the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand on his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."[222] Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[223] Nor may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[224] But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in

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[220] Spencer v. Texas, 385 U.S. 554, 561 (1967); *cf.* Michelson v. United States, 335 U.S. 469 (1948).

[221] 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. *See* Wilson v. United States, 149 U.S. 60 (1893). In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that the Self-Incrimination Clause required a state, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. Bruno v. United States, 308 U.S. 287 (1939). In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection. Carter v. Kentucky was applied in James v. Kentucky, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

[222] Although the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. United States v. Robinson, 485 U.S. 25, 32 (1988).

[223] Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1983).

[224] Doyle v. Ohio, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the *Miranda* warning told the defendant he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in United States v. Hale, 422 U.S. 171 (1975). The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal *habeas corpus* relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993). *See also* Fry v. Pliler, 551 U.S. 112, 114 (2007) (the "substantial and injurious effect" standard is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman v. California").

no way been officially encouraged, through a *Miranda* warning or otherwise.[225]

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, because use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.[226] The Court also proscribed the introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree," and had been "coerced" from the defendant through use of the confession.[227] Potentially most far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.[228]

Although this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon developed another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.[229] The Court in an opinion by Justice Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the Self-Incrimination Clause,

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[225] Jenkins v. Anderson, 447 U.S. 231 (1980). *Cf.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

[226] Simmons v. United States, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in McGautha v. California, 402 U.S. 183, 210–13 (1971).

[227] Harrison v. United States, 392 U.S. 219 (1968).

[228] Jackson v. United States, 390 U.S. 570, 583 (1968).

[229] Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). Parker and Brady entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; Richardson pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably "hard" choice.[230] Similarly, the Court held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the clause.[231] Nor does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts from which the jury may infer the defendant's guilt unless he rebuts the presumption.[232]

The obligation to testify is not relieved by this clause, if, regardless of whether incriminating answers are given, a prosecution is precluded,[233] or if the result of the answers is not incrimination, but rather harm to reputation or exposure to infamy or disgrace.[234] The clause does not prevent a public employer from discharging an

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[230] McGautha v. California, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here. *Cf.* Corbitt v. New Jersey, 439 U.S. 212 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[231] Williams v. Florida, 399 U.S. 78, 80–86 (1970). The compulsion of choice, Justice White argued for the Court, proceeded from the strength of the state's case and not from the disclosure requirement. That is, the rule did not affect whether or not the defendant chose to make an alibi defense and to call witnesses, but merely required him to accelerate the timing. It appears, however, that in Brooks v. Tennessee, 406 U.S. 605 (1972), the Court used the "needless encouragement" test in striking down a state rule requiring the defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court's view, this impermissibly burdened the defendant's choice whether to testify or not. Another prosecution discovery effort was approved in United States v. Nobles, 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

[232] "The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." Yee Hem v. United States, 268 U.S. 178, 185 (1925), quoted with approval in Turner v. United States, 396 U.S. 398, 418 n.35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. Id. at 425. *See also* United States v. Gainey, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, *see* discussion under the Fourteenth Amendment, "Proof, Burden of Proof, and Presumptions," *infra*.

[233] Prosecution may be precluded by tender of immunity (see next topic for discussion of immunity), or by pardon, Brown v. Walker, 161 U.S. 591, 598–99 (1896). The effect of a mere tender of pardon by the President remains uncertain. *Cf.* Burdick v. United States, 236 U.S. 79 (1915) (acceptance necessary, and self-incrimination is possible in absence of acceptance); Biddle v. Perovich, 274 U.S. 480 (1927) (acceptance not necessary to validate commutation of death sentence to life imprisonment).

[234] Brown v. Walker, 161 U.S. 591, 605–06 (1896); Ullmann v. United States, 350 U.S. 422, 430–31 (1956). Minorities in both cases had contended for a broader

employee who, in an investigation specifically and narrowly directed at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.[235] But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.[236]

Finally, the rules established by the clause and the judicial interpretations apply against the states to the same degree that they apply against the Federal Government,[237] and neither sovereign can compel discriminatory admissions that would incriminate the person in the other jurisdiction.[238] There is no "cooperative internationalism" that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and

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rule. *Walker*, 161 U.S. at 631 (Justice Field dissenting); *Ullmann*, 350 U.S. at 454 (Justice Douglas dissenting).

[235] Gardner v. Broderick, 392 U.S. 273, 278 (1968). Testimony compelled under such circumstances is, even in the absence of statutory immunity, barred from use in a subsequent criminal trial by force of the Fifth Amendment itself. Garrity v. New Jersey, 385 U.S. 493 (1967). However, unlike public employees, persons subject to professional licensing by government appear to be able to assert their privilege and retain their licenses. *Cf.* Spevack v. Klein, 385 U.S. 511 (1967) (lawyer may not be disbarred solely because he refused on self-incrimination grounds to testify at a disciplinary proceeding), *approved in* Gardner v. Broderick, 392 U.S. at 277–78. Justices Harlan, Clark, Stewart, and White dissented generally. 385 U.S. 500, 520, 530.

[236] *See* Slochower v. Board of Higher Education, 350 U.S. 551 (1956), *limited by* Lerner v. Casey, 357 U.S. 468 (1958), and Nelson v. County of Los Angeles, 362 U.S. 1 (1960), which were in turn apparently limited by *Garrity* and *Gardner*.

[237] Malloy v. Hogan, 378 U.S. 1 (1964) (overruling Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947)).

[238] Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), (overruling United States v. Murdock, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony that might incriminate him under state law), Knapp v. Schweitzer, 357 U.S. 371 (1958) (state may compel a witness to give testimony that might incriminate him under federal law), and Feldman v. United States, 322 U.S. 487 (1944) (testimony compelled by a state may be introduced into evidence in the federal courts)). *Murphy* held that a state could compel testimony under a grant of immunity but that, because the state could not extend the immunity to federal courts, the Supreme Court would not permit the introduction of evidence into federal courts that had been compelled by a state or that had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S. at 75–80, rather than one taken pursuant to the Court's supervisory power as Justice Harlan would have preferred. Id. at 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, Adams v. Maryland, 347 U.S. 179 (1954), but whether Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony *Murphy* did not say.

Whether testimony could be compelled by either the Federal Government or a state that could incriminate a witness in a foreign jurisdiction is unsettled. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. *Cf. Murphy*, 378 U.S. at 58–63, 77.

consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.[239]

The Power To Compel Testimony and Disclosure

Immunity.—"Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible [with the values of the Self-Incrimination Clause]. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[240] Apparently the first immunity statute was enacted by Parliament in 1710[241] and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857, and immunized any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified.[242]

Revised in 1862 so as merely to prevent the use of the congressional testimony at a subsequent prosecution of any congressional witness,[243] the statute was soon rendered unenforceable by the ruling in *Counselman v. Hitchcock*[244] that an analogous limited immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. *Counselman* was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence[245] and it prohibited only future use of the compelled testimony.[246] The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the present.[247] In any event, following *Counselman*, Congress enacted a statute that conferred transactional immunity as the price for be-

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[239] United States v. Balsys, 524 U.S. 666 (1998).

[240] Kastigar v. United States, 406 U.S. 441, 445–46 (1972). It has been held that the Fifth Amendment itself precludes the use as criminal evidence of compelled admissions, Garrity v. New Jersey, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. Rogers v. United States, 340 U.S. 367 (1951).

[241] 9 Anne, c. 14, 3–4 (1710). *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

[242] Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

[243] Ch. 11, 12 Stat. 333 (1862).

[244] 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

[245] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). *See also* id. at 586.

[246] 142 U.S. at 585–86.

[247] "Transactional" immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; "use" immunity means that no tes-

ing able to compel testimony,[248] and the Court sustained this law in a five-to-four decision.[249]

"The 1893 statute has become part of our constitutional fabric and has been included 'in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.'" [250] So spoke Justice Frankfurter in 1956, broadly reaffirming *Brown v. Walker* and upholding the constitutionality of a federal immunity statute.[251] Because all but one of the immunity acts passed after *Brown v. Walker* were transactional immunity statutes,[252] the question of the constitutional sufficiency of use immunity did not arise, although dicta in cases dealing with immunity continued to assert the necessity of the former type of grant.[253] But, beginning in 1964, when it applied the Self-Incrimination Clause to the states, the Court was faced with the problem that arose because a state could grant immunity only in its own courts and not in the courts

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timony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.

[248] Ch. 83, 27 Stat. 443 (1893).

[249] Brown v. Walker, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, because the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, id. at 610, and that a witness was protected against infamy and disparagement as much as prosecution. Id. at 628.

[250] Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting Shapiro v. United States, 335 U.S. 1, 6 (1948)).

[251] "[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." 350 U.S. at 438–39. The internal quotation is from Boyd v. United States, 116 U.S. 616, 634 (1886).

[252] Kastigar v. United States, 406 U.S. 441, 457–58 (1972); Piccirillo v. New York, 400 U.S. 548, 571 (1971) (Justice Brennan dissenting). The exception was an immunity provision of the bankruptcy laws, 30 Stat. 548 (1898), 11 U.S.C. § 25(a)(10), repealed by 84 Stat. 931 (1970). The right of a bankrupt to insist on his privilege against self-incrimination as against this statute was recognized in McCarthy v. Arndstein, 266 U.S. 34, 42 (1924), "because the present statute fails to afford complete immunity from a prosecution." The statute also failed to prohibit the use of derivative evidence. Arndstein v. McCarthy, 254 U.S. 71 (1920).

[253] *E.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906); United States v. Monia, 317 U.S. 424, 425, 428 (1943); Smith v. United States, 337 U.S. 137, 141, 146 (1949); United States v. Murdock, 284 U.S. 141, 149 (1931); Adams v. Maryland, 347 U.S. 179, 182 (1954). In Ullmann v. United States, 350 U.S. 422, 436–37 (1956), Justice Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

of another state or of the United States.[254] On the other hand, to foreclose the states from compelling testimony because they could not immunize a witness in a subsequent "foreign" prosecution would severely limit state law enforcement efforts. Therefore, the Court emphasized the "use" restriction rationale of *Counselman* and announced that as a "constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it," and thus formulated a use restriction to that effect.[255] Then, while refusing to adopt the course because of statutory interpretation reasons, the Court indicated that use restriction in a federal regulatory scheme requiring the reporting of incriminating information was "in principle an attractive and apparently practical resolution of the difficult problem before us," citing *Murphy* with apparent approval.[256]

Congress thereupon enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.[257] Soon tested, this statute was sustained in *Kastigar v. United States*.[258] "[P]rotection coextensive with the privilege is the degree of protection which the Constitution requires," wrote Justice Powell for the Court, "and is all that the Constitution requires. . . ."[259] "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole con-

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[254] Malloy v. Hogan, 378 U.S. 1 (1964), extended the clause to the states. That Congress could immunize a federal witness from state prosecution and, of course, extend use immunity to state courts, was held in Adams v. Maryland, 347 U.S. 179 (1954), and had been recognized in Brown v. Walker, 161 U.S. 591 (1896).

[255] Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. Id. at 92. *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

[256] Marchetti v. United States, 390 U.S. 39, 58 (1968).

[257] Organized Crime Control Act of 1970, Pub. L. 91–452, § 201(a), 84 Stat. 922, 18 U.S.C. §§ 6002–6003. Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. United States v. Doe, 465 U.S. 605 (1984).

[258] 406 U.S. 441 (1972). A similar state statute was sustained in Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

[259] Kastigar v. United States, 406 U.S. 441, 459 (1972). *See also* United States v. Hubbell, 530 U.S. 27 (2000) (because the statute protects against derivative use of compelled testimony, a prosecution cannot be based on incriminating evidence revealed only as the result of compliance with an extremely broad subpoena).

cern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." [260]

Required Records Doctrine.—Although the privilege is applicable to an individual's papers and effects,[261] it does not extend to corporate persons; hence corporate records, as has been noted, are subject to compelled production.[262] In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" [263] This exception developed out of, as Justice Frankfurter showed in dissent, the rule that documents which are part of the official records of government

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[260] 406 U.S. at 453. Joining Justice Powell in the opinion were Justices Stewart, White, and Blackmun, and Chief Justice Burger. Justices Douglas and Marshall dissented, contending that a ban on use could not be enforced even if a use ban was constitutionally adequate. Id. at 462, 467. Justices Brennan and Rehnquist did not participate but Justice Brennan's views that transactional immunity was required had been previously stated. Piccirillo v. New York, 400 U.S. 548, 552 (1971) (dissenting). *See also* New Jersey v. Portash, 440 U.S. 451 (1979) (prosecution use of defendant's immunized testimony to impeach him at trial violates Self-Incrimination Clause). Neither the clause nor the statute prevents the perjury prosecution of an immunized witness or the use of all his testimony to prove the commission of perjury. United States v. Apfelbaum, 445 U.S. 115 (1980). *See also* United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976). Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had "so testified" previously, the deposition testimony not being covered by the earlier immunity. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

[261] Boyd v. United States, 116 U.S. 616 (1886). *But see* Fisher v. United States, 425 U.S. 391 (1976).

[262] *See* discussion, *supra*, under "Development and Scope."

[263] Shapiro v. United States, 335 U.S. 1, 33 (1948) (quoting Davis v. United States, 328 U.S. 582, 589–90 (1946), which quoted Wilson v. United States, 221 U.S. 361, 380 (1911)). Dicta in *Wilson* is the source of the required-records doctrine, the holding of the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. *Cf.* Heike v. United States, 227 U.S. 131 (1913). *Davis* was a search and seizure case and dealt with gasoline ration coupons which were government property even though in private possession. *See Shapiro*, 335 U.S. at 36, 56–70 (Justice Frankfurter dissenting).

are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume." [264]

"It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." [265] But the only limit that the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." [266] That there are limits established by the Self-Incrimination Clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

Reporting and Disclosure.—The line of cases begins with *United States v. Sullivan*,[267] in which a unanimous Court held that the Fifth Amendment did not privilege a bootlegger in not filing an income

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[264] 335 U.S. at 51.

[265] 335 U.S. at 32.

[266] 335 U.S. at 32.

[267] 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in Garner v. United States, 424 U.S. 648 (1976), holding that a taxpayer's privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one's privilege to alert the government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the government could seek an indictment for failure to file, since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, regardless of whether a good-faith er-

tax return because the filing would have disclosed the illegality in which he was engaged. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime," Justice Holmes stated for the Court.[268] However, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . ." [269] Using its taxing power to reach gambling activities over which it might otherwise not have had jurisdiction,[270] Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the IRS a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a complete failure to file, (2) because the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) because registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.[271]

Constitutional limitations appeared, however, in *Albertson v. SACB*,[272] which struck down under the Self-Incrimination Clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." [273]

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roneous assertion of the privilege could subject him to prosecution, a question not resolved.

[268] 274 U.S. at 263–64.

[269] 274 U.S. at 263.

[270] The expansion of the commerce power would now obviate reliance on the taxing power.

[271] United States v. Kahriger, 345 U.S. 22 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[272] 382 U.S. 70 (1965).

[273] 382 U.S. at 79. The decision was unanimous, with Justice White not participating. The same issue had been held not ripe for adjudication in Communist Party v. SACB, 367 U.S. 1, 105–10 (1961).

The gambling tax reporting scheme was next struck down by the Court.[274] Because of the pervasiveness of state laws prohibiting gambling, said Justice Harlan for the Court, "the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination."[275] Overruling *Kahriger* and *Lewis*, the Court rejected its earlier rationales. Registering *per se* would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.[276] Any contention that the voluntary engagement in gambling "waived" the self-incrimination claim, because there is "no constitutional right to gamble," would nullify the privilege.[277] And the privilege was not governed by a "rigid chronological distinction" so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial.[278] Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the "required records" doctrine of *Shapiro*. "First, petitioner . . . was not . . . obliged

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[274] Marchetti v. United States, 390 U.S. 39 (1968) (occupational tax); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax). In Haynes v. United States, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a prescribed form, since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. Minor v. United States, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements, coupled with use immunity. United States v. Freed, 401 U.S. 601 (1971).

[275] Marchetti v. United States, 390 U.S. 39, 48 (1968).

[276] "Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'" 390 U.S. at 50.

[277] "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51. *But cf.* California v. Byers, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because there is no "right" to leave the scene of an accident a requirement that a person involved in an accident stop and identify himself does not violate the Self-Incrimination Clause.

[278] Marchetti v. United States, 390 U.S. 39, 52–54 (1968). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination . . . . This principle does not permit the rigid chronological distinctions adopted in *Kahriger* and *Lewis*. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence." Id. at 53–54. *Cf.* United States v. Freed, 401 U.S. 601, 605–07 (1971).

to keep and preserve records 'of the same kind as he has customarily kept'; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever 'public aspects' there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in 'an essentially noncriminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.' . . . The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*." [279]

Most recent in this line of cases is *California v. Byers*,[280] which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson-Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either "highly selective" or "inherently suspect of criminal activities." The combination of a noncriminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination.[281] Justice Harlan concurred to make up the major-

[279] Marchetti v. United States, 390 U.S. 39, 57 (1968).
[280] 402 U.S. 424 (1971).
[281] 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

ity on the disposition of the case, disagreeing with the plurality's conclusion that the stop and identification requirement did not compel incrimination.[282] However, the Justice thought that, where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government's interest and the individual's interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan voted to sustain the statute.[283] *Byers* was applied in *Baltimore Dep't of Social Services v. Bouknight* [284] to uphold a juvenile court's order that the mother of a child under the court's supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified out of concern for the child's safety—a "compelling reason[ ] unrelated to criminal law enforcement." [285] Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court's order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child's "custodian."

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[282] "The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imaginary' risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have called the 'real danger v. imaginary possibility standard' . . . . A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the 'inherently-suspect-class' factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view." 402 U.S. at 437–38.

[283] 402 U.S. at 448–58. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. Id. at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

[284] 493 U.S. 549 (1990).

[285] 493 U.S. at 561. By the same token, the Court concluded that the targeted group—persons who care for children pursuant to a juvenile court's custody order—is not a group "inherently suspect of criminal activities" in the *Albertson-Marchetti* sense.

Confessions: Police Interrogation, Due Process, and Self-Incrimination

The Common Law Rule.—By the latter part of the eighteenth century English and early American courts had developed a rule that coerced confessions were potentially excludable from admission at trial because they were testimonially untrustworthy.[286] The Supreme Court at times continued to ground exclusion of involuntary confessions on this common law foundation of unreliability without any mention of the constitutional bar against self-incrimination. Consider this dictum from an 1884 opinion: "[V]oluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."[287] Subsequent cases followed essentially the same line of thought.[288]

Then, language in the 1897 case of *Bram v. United States* opened the door to eventually extending the doctrinal basis for analyzing the admissibility of a confession beyond the common-law test that focused on voluntariness as an indicator of the confession's trustworthiness as evidence. "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[289] However, though this approach[290] and the case itself were subsequently approved in sev-

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[286] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954–59 (1966).

[287] Hopt v. Utah, 110 U.S. 574, 584–85 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

[288] Pierce v. United States, 160 U.S. 335 (1896); Sparf and Hansen v. United States, 156 U.S. 51 (1895). In Wilson v. United States, 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing its credibility.

[289] Bram v. United States, 168 U.S. 532, 542 (1897).

[290] Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogation were relevant and perhaps controlling on the question of admissibility of a confession.

eral cases,[291] the Court would still hold in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent,[292] and more than once later opinions could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ."[293] One reason for this was that the Self-Incrimination Clause had not yet been made applicable to the states, thereby requiring that the admissibility of confessions in state courts be determined under due process standards developed from common-law principles. It was only after the Court extended the Self-Incrimination Clause to the states that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[294]

McNabb-Mallory Doctrine.—Perhaps one reason the Court did not squarely confront the application of the Self-Incrimination Clause to police interrogation and the admissibility of confessions in federal courts was that, in *McNabb v. United States*,[295] it promulgated a rule excluding confessions obtained after an "unnecessary delay" in presenting a suspect for arraignment after arrest.[296] This rule, developed pursuant to the Court's supervisory power over the

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[291] Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Powers v. United States, 223 U.S. 303, 313 (1912); Shotwell Mfg. Co. v. United States, 371 U.S. 342, 347 (1963).

[292] Powers v. United States, 223 U.S. 303 (1912).

[293] United States v. Carignan, 342 U.S. 36, 41 (1951). *See also* McNabb v. United States, 318 U.S. 332, 346 (1943); Brown v. Mississippi, 297 U.S. 278, 285 (1936); Stein v. New York, 346 U.S. 156, 191 n.35 (1953).

[294] Miranda v. Arizona, 384 U.S. 436 (1966). According to Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823, at 250 n.5 (3d ed. 1940); *see also* vol. 8 id. at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately—the bar against self-incrimination deriving primarily from notions of liberty and fairness, proscriptions against involuntary confessions deriving primarily from notions of reliability—they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 495 n.43 (1968). *See also* Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).

[295] 318 U.S. 332 (1943). *See also* Anderson v. United States, 318 U.S. 350 (1943).

[296] In Upshaw v. United States, 335 U.S. 410 (1948), the Court rejected lower court interpretations that delay in arraignment was but one factor in determining the voluntariness of a confession, and held that a confession obtained after a thirty-hour delay was inadmissible *per se*. Mallory v. United States, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. United States v. Mitchell, 322 U.S. 65 (1944).

lower federal courts[297] and hence not applicable to the states,[298] was designed to implement the guarantees assured to a defendant by the Federal Rules of Criminal Procedure,[299] and was clearly informed with concern over incommunicado interrogation and coerced confessions.[300] Although the Court never attempted to specify a minimum time after which delay in presenting a suspect for arraignment could invalidate confessions, Congress in 1968 legislated to set a six-hour period for interrogation following arrest before the suspect must be presented.[301] In *Corley v. United States*,[302] the Court held that this legislation merely limited, and did not eliminate, *McNabb-Mallory's* exclusionary rule. Thus, confessions within six hours of arrest were admissible to the extent permitted by the statute and Rules of Evidence, whereas, "[i]f the confession occurred before presentment and beyond six hours . . . , the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed."[303]

State Confession Cases Before Miranda.—In its first encounter with a confession case arising from a state court, the Supreme Court set aside a conviction based solely on confessions extorted through repeated whippings with ropes and studded belts.[304] For

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[297] McNabb v. United States, 318 U.S. 332, 340 (1943); Upshaw v. United States, 335 U.S. 410, 414 n.2 (1948). Burns v. Wilson, 346 U.S. 137, 145 n.12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.

[298] Gallegos v. Nebraska, 342 U.S. 55, 60, 63–64, 71–73 (1951); Stein v. New York, 346 U.S. 156, 187–88 (1953); Culombe v. Connecticut, 367 U.S. 568, 599–602 (1961) (Justice Frankfurter announcing judgment of the Court).

[299] Rule 5(a) requiring prompt arraignment was promulgated in 1946, but the Court in *McNabb* relied on predecessor statutes, some of which required prompt arraignment. *Cf.* Mallory v. United States, 354 U.S. 449, 451–54 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him, must warn him that what he says may be used against him, must tell him of his right to counsel and his right to remain silent, and must also provide for the terms of bail.

[300] McNabb v. United States, 318 U.S. 332, 343 (1943); Mallory v. United States, 354 U.S. 449, 452–53 (1957).

[301] The provision was part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. § 3501(c).

[302] 556 U.S. ___, No. 07–10441 (2009).

[303] 556 U.S. ___, No. 07–10441, slip op. at 18.

[304] Brown v. Mississippi, 297 U.S. 278 (1936). "[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id. at 285, 286.

some 30 years thereafter the Court attempted through a consideration of the "totality of the circumstances" surrounding interrogation to determine whether a confession was "voluntary" and admissible or "coerced" and inadmissible. During this time, the Court was balancing, in Justice Frankfurter's explication, a view that police questioning of suspects was indispensable in solving many crimes, on the one hand, with the conviction that the interrogation process is not to be used to overreach persons who stand helpless before it.[305] "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[306] Obviously, a court seeking to determine whether a confession was voluntary operated under a severe handicap, as the interrogation process was in secret with only police and the suspect witness to it, and as the concept of voluntariness referred to the defendant's mental condition.[307] Despite, then, a bountiful number of cases, binding precedents were few.

On the one hand, many of the early cases disclosed clear instances of coercion of a nature that the Court could little doubt produced involuntary confessions. Not only physical torture,[308] but other overtly coercive tactics as well were condemned. *Chambers v. Florida*[309] held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary. *Ashcraft v. Tennessee*[310] held inadmissible

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[305] Culombe v. Connecticut, 367 U.S. 568, 570–602 (1961) (announcing judgment of the Court).

[306] 367 U.S. at 602.

[307] "The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances." 367 U.S. at 603. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 973–82 (1966).

[308] Brown v. Mississippi, 297 U.S. 278 (1936).

[309] 309 U.S. 227 (1940).

[310] 322 U.S. 143 (1944). Dissenting, Justices Jackson, Frankfurter, and Roberts protested that "interrogation *per se* is not, while violence *per se* is, an outlaw." A confession made after interrogation was not truly "voluntary" because all questioning is "inherently coercive," because it puts pressure upon a suspect to talk. Thus, in evaluating a confession made after interrogation, the Court must, they insisted,

a confession obtained near the end of a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers. Similarly, *Ward v. Texas*,[311] voided a conviction based on a confession obtained from a suspect who had been questioned continuously over the course of three days while being driven from county to county and told falsely of a danger of lynching. "Since *Chambers v. State of Florida*, . . . this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.' A prolonged interrogation of the accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." [312]

Although the Court would not hold that prolonged questioning by itself made a resultant confession involuntary,[313] it did increasingly find coercion present even in intermittent questioning over a period of days of incommunicado detention.[314] In *Stein v. New York*,[315] however, the Court affirmed convictions of experienced criminals who

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determine whether the suspect was in possession of his own will and self-control and not look alone to the length or intensity of the interrogation. They accused the majority of "read[ing] an indiscriminating hostility to mere interrogation into the Constitution" and preparing to bar all confessions made after questioning. Id. at 156. A possible result of the dissent was the decision in Lyons v. Oklahoma, 322 U.S. 596 (1944), which stressed deference to state-court factfinding in assessing the voluntariness of confessions.

[311] 316 U.S. 547 (1942). *See also* Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 540 (1941).

[312] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

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

[314] Watts v. Indiana, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers for periods briefer than in *Watts* during both days and nights); Harris v. South Carolina, 338 U.S. 68 (1949) (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft). Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. 338 U.S. at 57.

[315] 346 U.S. 156 (1953).

had confessed after twelve hours of intermittent questioning over a period of thirty-two hours of incommunicado detention. Although the questioning was less intensive than in the prior cases, Justice Jackson for the majority stressed that the correct approach was to balance "the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[316] By the time of the decision in *Haynes v. Washington*,[317] however, which held inadmissible a confession made by an experienced criminal because of the "unfair and inherently coercive context" in which the confession was made, it was clear that the Court often focused more on the nature of the coercion without regard to the individual characteristics of the suspect.[318] Nevertheless, the Court did continue to cite at times age and intelligence as demonstrating the susceptibility of the particular suspects to even mild coercion.[319]

The "totality of the circumstances" was looked to in determining admissibility. In some of the cases a single factor could be thought to stand out as indicating the involuntariness of the confession,[320]

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[316] 346 U.S. at 185.

[317] 373 U.S. 503 (1963) (confession obtained some 16 hours after arrest but interrogation over this period consumed little more than two hours; he was refused in his requests to call his wife and told that his cooperation was necessary before he could communicate with his family).

[318] 373 U.S. at 514. *See also* Spano v. New York, 360 U.S. 315 (1959). (After eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on suspect's sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); Rogers v. Richmond, 365 U.S. 534 (1961) (suspect resisted questioning for six hours but yielded when officers threatened to bring his invalid wife to headquarters). More recent cases include Davis v. North Carolina, 384 U.S. 737 (1966) (escaped convict held incommunicado 16 days but periods of interrogation each day were about an hour each); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Darwin v. Connecticut, 391 U.S. 346 (1968).

[319] Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961). The suspect in Spano v. New York, 360 U.S. 315 (1959), was a 25-year-old foreigner with a history of emotional instability. The fact that the suspect was a woman was apparently significant in Lynumn v. Illinois, 372 U.S. 528 (1963), in which officers threatened to have her children taken from her and to have her taken off the welfare relief rolls.

But a suspect's mental state alone—even insanity—is insufficient to establish involuntariness absent some coercive police activity. Colorado v. Connelly, 479 U.S. 157 (1986).

[320] *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect who had already been subjected to three days of interrogation); Townsend v. Sain, 372 U.S. 293 (1963) (suspect was administered drug with properties of "truth serum" to relieve withdrawal pains of narcotics addiction, although police probably were not aware of drug's side effects).

but in other cases the Court recited a number of contributing factors, including age, intelligence, incommunicado detention, denial of requested counsel, denial of access to friends, trickery, and other things, without seeming to rank any factor above the others.[321] Confessions induced through the exploitation of some illegal action, such as an illegal arrest[322] or an unlawful search and seizure,[323] were found inadmissible. Where police obtain a subsequent confession after obtaining one that is inadmissible as involuntary, the Court did not assume that the subsequent confession was similarly involuntary, but independently evaluated whether the coercive actions which produced the first continued to produce the later confession.[324]

From the Voluntariness Standard to Miranda.—Invocation by the Court of a self-incrimination standard for judging the fruits of police interrogation was no unheralded novelty in *Miranda v. Arizona*.[325] Though the historical basis of the rule excluding coerced and involuntary confessions, in both early state confession cases[326] and earlier cases from the lower federal courts,[327] was their untrustworthiness,[328] in *Lisenba v. California*,[329] Justice Roberts drew a distinction between the common law confession rule and the standard of due process. "[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at dif-

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[321] *E.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737 (1966); Ashdown v. Utah, 357 U.S. 426 (1958); Thomas v. Arizona, 356 U.S. 390 (1958).

[322] Wong Sun v. United States, 371 U.S. 471 (1963).

[323] Fahy v. Connecticut, 375 U.S. 85 (1963).

[324] United States v. Bayer, 331 U.S. 532 (1947); Lyons v. Oklahoma, 322 U.S. 596 (1944); Leyra v. Denno, 347 U.S. 556 (1954); Darwin v. Connecticut, 391 U.S. 346 (1968).

[325] 384 U.S. 436 (1966).

[326] Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940).

[327] Hopt v. Utah, 110 U.S. 574 (1884); Wilson v. United States, 162 U.S. 613 (1896).

[328] 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 882, at 246 (3d ed. 1940).

[329] 314 U.S. 219, 236 (1941).

ferent times the different rationales of trustworthiness and constitutional fairness.[330]

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that, in *Rogers v. Richmond*,[331] Justice Frankfurter spoke for six other Justices in writing: "Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Nevertheless, Justice Frankfurter said in another case, "[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved."[332] Three years later, in *Malloy v. Hogan*,[333] in the process of applying the Self-Incrimination Clause to the states, Justice Brennan for the Court reinterpreted the line of cases since *Brown v. Mississippi*[334] to conclude that the Court had initially based its rulings on the common-law confession rationale, but that, beginning with *Lisenba v. California*,[335] a "federal standard" had been developed. The Court had engaged in a "shift [that] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Today, continued Justice

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[330] *Compare* Ashcraft v. Tennessee, 322 U.S. 143 (1944), *with* Lyons v. Oklahoma, 322 U.S. 596 (1944), *and* Malinski v. New York, 324 U.S. 401 (1945). In Watts v. Indiana, 338 U.S. 49 (1949), Harris v. South Carolina, 338 U.S. 68 (1949), and Turner v. Pennsylvania, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. *See* 338 U.S. at 57 (Justice Jackson concurring and dissenting). In Stein v. New York, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.

[331] 365 U.S. 534, 540–41 (1961). Similar expressions may be found in Spano v. New York, 360 U.S. 315 (1959), and Blackburn v. Alabama, 361 U.S. 199 (1960). *See also* Culombe v. Connecticut, 367 U.S. 568, 583 n.25 (1961), in which Justice Frankfurter, announcing the judgment of the Court, observed that "the conceptions underlying the rule excluding coerced confessions and the privilege again self-incrimination have become, to some extent, assimilated."

[332] Culombe v. Connecticut, 367 U.S. 568, 601 (1961). The same thought informs the options of the Court in Haynes v. Washington, 373 U.S. 503 (1963).

[333] 378 U.S. 1 (1964).

[334] 297 U.S. 278 (1936).

[335] 314 U.S. 219 (1941).

Brennan, "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897," when *Bram v. United States* had announced that the Self-Incrimination Clause furnished the basis for admitting or excluding evidence in federal courts.[336]

One week after the decision in *Malloy v. Hogan*, the Court defined the rules of admissibility of confessions in different terms: although it continued to emphasize voluntariness, it did so in self-incrimination terms rather than in due process terms. In *Escobedo v. Illinois*,[337] it held inadmissible a confession obtained from a suspect in custody who repeatedly had requested and been refused an opportunity to consult with his retained counsel, who was at the police station seeking to gain access to his client.[338] Although *Escobedo* appeared in the main to be a Sixth Amendment right-to-counsel case, the Court at several points emphasized, in terms that clearly implicated self-incrimination considerations, that the suspect had not been warned of his constitutional rights.[339]

Miranda v. Arizona.—In *Miranda v. Arizona*, a custodial confession case decided two years after *Escobedo*, the Court deemphasized the Sixth Amendment holding of *Escobedo* and made the Fifth Amendment self-incrimination rule preeminent.[340] The core of the Court's prescriptive holding in *Miranda* is as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demon-

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[336] Malloy v. Hogan, 378 U.S. 1, 6–7 (1964). Protesting that this was "*post facto* reasoning at best," Justice Harlan contended that the "majority is simply wrong" in asserting that any of the state confession cases represented anything like a self-incrimination basis for the conclusions advanced. Id. at 17–19. Bram v. United States, 168 U.S. 532 (1897), is discussed under "Confessions: Police Interrogation, Due Process, and Self-Incrimination," *supra*.

[337] 378 U.S. 478 (1964). Joining Justice Goldberg in the majority were Chief Justice Warren and Justices Black, Douglas, and Brennan. Justices Clark, Harlan, Stewart, and White dissented. Id. at 492, 493, 495.

[338] Previously, it had been held that a denial of a request to consult counsel was but one of the factors to be considered in assessing voluntariness. Crooker v. California, 357 U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958). Chief Justice Warren and Justices Black, Douglas, and Brennan were prepared in these cases to impose a requirement of right to counsel *per se*. Post-indictment interrogation without the presence of counsel seemed doomed after Spano v. New York, 360 U.S. 315 (1959), and this was confirmed in Massiah v. United States, 377 U.S. 201 (1964). *See* discussion of "Custodial Interrogation" under Sixth Amendment, *infra*.

[339] Escobedo v. Illinois, 378 U.S. 478, 485, 491 (1964) (both pages containing assertions of the suspect's "absolute right to remain silent" in the context of police warnings prior to interrogation).

[340] 384 U.S. 436, 444–45 (1966). In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that neither *Escobedo* nor *Miranda* was to be applied retroactively. In cases where trials commenced after the decisions were announced, the due process "totality of circumstances" test was to be the key. *Cf.* Davis v. North Carolina, 384 U.S. 737 (1966).

strates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."[341]

In the opinion of the *Miranda* Court, police interrogation as conceived and practiced was inherently coercive and the resulting intimidation, though informal and legally sanctionless, was contrary to the protection to be afforded in a system that convicted on the basis of evidence independently secured. In the Court's view, this premise underlaid the law in the federal courts since 1897, and the application of the Self-Incrimination Clause to the states in 1964 necessitated the application of the principle in state courts as well. Thereafter, state and local police interrogation practices need be structured to ensure that suspects not be stripped of the ability to make a free and rational choice between speaking and not speaking. The warnings and the provision of counsel were essential, the Court said, in custodial interrogations.[342] "In these cases [presently before the

[341] 384 U.S. at 444–445.

[342] Justices Clark, Harlan, Stewart, and White dissented, finding no historical support for the application of the clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. Miranda v. Arizona, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court's decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience, but he contended that the change made in *Miranda* was ill-conceived because it arose from a

Court],” said Chief Justice Warren, “we might not find the defendants’ statements to have been involuntary in traditional terms[, but o]ur concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.” [343] It was thus not the application of the Self-Incrimination Clause to police interrogation in *Miranda* that constituted the major change from precedent but rather the prescriptive series of warnings and guarantees which the Court imposed as security for the observance of the privilege.

Although the Court’s decision rapidly became highly controversial and the source of much political agitation, including playing a prominent role in the 1968 presidential election, the Court has continued to adhere to it,[344] albeit not without considerable qualification. Nevertheless, the constitutional status of the *Miranda* warnings has remained clouded in uncertainty. Had the Court announced a constitutionally compelled rule, or merely a supervisory rule that could be superseded by statute? In 1968, Congress enacted a statute, codified at 18 U.S.C. § 3501, designed to set aside *Miranda* in the federal courts and to reinstate the traditional voluntariness test.[345] The statute lay unimplemented, for the most part, due to constitutional doubts about it. Meanwhile, the Court created exceptions to the *Miranda* warnings over the years, and referred to the warnings as “prophylactic” [346] and “not themselves rights protected by the Constitution.” [347] There were even hints that some Justices might be willing to overrule the decision.

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view of interrogation as inherently coercive and because the decision did not adequately protect society’s interest in detecting and punishing criminal behavior. Id. at 531–45.

[343] 384 U.S. at 457. For the continuing recognition of the difference between the traditional involuntariness test and the *Miranda* test, *see* Michigan v. Tucker, 417 U.S. 433, 443–46 (1974); Mincey v. Arizona, 437 U.S. 385, 396–402 (1978). The acknowledgment that the decision considerably expanded upon previous doctrine, even if the assimilation of self-incrimination values by the confession-exclusion rule be considered complete, was more clearly made a week after *Miranda* when, in denying retroactivity to that case and to *Escobedo*, the Court asserted that law enforcement officers had relied justifiably upon prior cases, “now no longer binding,” which treated the failure to warn a suspect of his rights or the failure to grant access to counsel as one of the factors to be considered. Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

[344] *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Chief Justice Burger concurring) (“The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.”)

[345] Pub. L. 90–351, § 701(a), 82 Stat. 210, 18 U.S.C. § 3501. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37–53 (1968). An effort to enact a companion measure applicable to the state courts was defeated.

[346] New York v. Quarles, 467 U.S. 549, 653 (1984).

[347] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

In *Dickerson v. United States*,[348] the Court addressed the foundational issue, finding that *Miranda* was a "constitutional decision" that could not be overturned by statute, and consequently that 18 U.S.C. § 3501, which provided for a less strict "voluntariness" standard for the admissibility of confessions, could not be sustained. Consistent application of *Miranda* warnings to state proceedings necessarily implied a constitutional base, the Court explained, since federal courts "hold no supervisory authority over state judicial proceedings."[349] Moreover, *Miranda* itself had purported to "give concrete constitutional guidance to law enforcement agencies and courts to follow."[350] The two dissenting Justices in *Dickerson* maintained that the majority's characterization of *Miranda* as providing concrete constitutional guidance fell short of holding that custodial interrogation not preceded by *Miranda* warnings was unconstitutional, a position with which the dissenters pointedly disagreed.[351] Eleven years after Dickerson, in the 2011 case *J.D.B. v. North Carolina*, the number of Justices asserting that *Miranda* was not a constitutional rule grew to four.[352] Also, that *Miranda* may be rooted in the Constitution does not, according to the Court, mean that the precise articulation of the warnings in it is "immutable."[353]

Beyond finding that *Miranda* has, at the least, "constitutional underpinnings," the *Dickerson* Court also rejected a request to overrule *Miranda*. "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance," Chief Justice Rehnquist wrote for the seven-Justice majority, "the principles of *stare decisis* weigh heavily against overruling it now." There was no special justification for overruling the decision; subsequent cases had not undermined the decision's doctrinal underpinnings, but rather had "reaffirm[ed]" its "core ruling." Moreover, *Miranda* warnings had "become so embedded in routine police practice [that they] have become part of our national culture."[354]

As to the viability of *Miranda* claims in federal *habeas corpus* cases, the Court had suggested in 1974 that most claims could be

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[348] 530 U.S. 428 (2000).
[349] 530 U.S. at 438.
[350] 530 U.S. at 439 (quoting from *Miranda*, 384 U.S. at 441–42).
[351] 530 U.S. at 444 (Justices Scalia and Thomas dissenting).
[352] 564 U.S. ___, No. 09–11121, slip op. (2011) (Jusitces Alito, Scalia, Thomas and Chief Justice Roberts, dissenting).
[353] *See, e.g.*, Florida v. Powell, 559 U.S. ___, No. 08–1175, slip op. at 8, 12–13 (2010).
[354] 530 U.S. at 443.

disallowed,[355] but such a course was squarely rejected in 1993. The Court ruled in *Withrow v. Williams* that *Miranda* protects a fundamental trial right of the defendant, unlike the Fourth Amendment exclusionary rule addressed in *Stone v. Powell*,[356] and claimed violations of *Miranda* merited federal *habeas corpus* review because they relate to the correct ascertainment of guilt.[357] The purposes of the *Miranda* rule differed from the *Mapp v. Ohio*[358] exclusionary rule denied enforcement in *habeas* proceedings in *Stone*, the Court explained, because the primary purpose of *Mapp* was to deter future Fourth Amendment violations, a purpose that the Court claimed would only be marginally advanced by allowing collateral review.[359] A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal *habeas* review of state convictions, because most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.[360]

In any event, the Court has established several lines of decisions interpreting key aspects of *Miranda*.

First, *Miranda* warnings must be given prior to "questioning initiated by law enforcement officers after a person has been taken *into custody* or otherwise deprived of his freedom of action in any significant way."[361] The cases have distilled "custody or other significant deprivation of action" into a two-part assessment under which restricting a person's movement is a necessary but not sufficient el-

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[355] In Michigan v. Tucker, 417 U.S. 433, 439 (1974), the Court had suggested a distinction between a constitutional violation and a violation of "the prophylactic rules developed to protect that right." The actual holding in *Tucker*, however, had turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

[356] 428 U.S. 465 (1976).

[357] 507 U.S. 680 (1993). Even though a state prisoner's *Miranda* claim may be considered in federal *habeas* review, the scope of federal *habeas* review is narrow. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state court judgment may be set aside on *habeas* review only if the judgment is found to be contrary to, or an unreasonable application of, clearly established Supreme Court precedent. By contrast, a federal court reviewing a state court judgment on direct review considers federal legal questions *de novo* and can overturn a state court holding based on its own independent assessment of federal legal issues. This difference in scope of review can be critical. *Compare* Yarborough v. Alvarado, 541 U.S. 652 (2004) (*habeas* petition denied because state court's refusal to take a juvenile's age into account in applying *Miranda* was not an unreasonable application of clearly established Supreme Court precedent), *with* J.D.B. v. North Carolina, 564 U.S. ___, No. 09–11121, slip op. (2011) (on the Court's *de novo* review of the age issue, state court's refusal to take a juvenile's age into account in applying *Miranda* held to be in error, and case remanded).

[358] 367 U.S. 643 (1961).

[359] 507 U.S. at 686–93.

[360] 507 U.S. at 693.

[361] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

ement. Not all inhibitions of "free movement" trigger *Miranda*. Whether a person is "in custody" during questioning depends on the coercive pressure posed. The Court applies an objective, context-specific test of how intimidated a reasonable person in the suspect's shoes would feel to freely exercise his right against self-incrimination. A police officer's subjective and undisclosed view that a person being interrogated is a criminal suspect is not relevant for *Miranda* purposes, nor is the subjective view of the person being questioned.[362] The only refinement to this one-size-fits-all reasonable person test is consideration of age if the detainee is a juvenile.[363]

An ordinary traffic stop does not to amount to *Miranda* "custody."[364] Nor do all interrogations of prison inmates about previous outside conduct, even if the inmate is isolated from the general prison population for questioning.[365] This view on prison interrogations evidences the Court's continuing movement toward individualized analyses of *Miranda* issues based on particular circumstances and away from the more categorical decisions announced soon after *Miranda*. Still, some of the early decisions may retain vitality. One example is the 1969 decision in *Orozco v. Texas*, which held that question-

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[362] Stansbury v. California, 511 U.S. 318 (1994).

[363] J.D.B. v. North Carolina, 564 U.S. ___, No. 09–11121, slip op. (2011) (case remanded to evaluate whether a 13-year-old student questioned by a uniformed police officer and school administrators on school grounds was in custody).

[364] Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation not custodial interrogation until "freedom of action is curtailed to a 'degree associated with formal arrest'"). Thus, "custody" for self-incrimination purposes under the Fifth Amendment does not necessarily cover all detentions that are "seizures" under the Fourth Amendment. Id.

[365] Howes v. Fields, 565 U.S. ___, No. 10–680, slip op. (2012) (taking a prisoner incarcerated for disorderly conduct aside for questioning about an unrelated child molestation incident held, 6–3, not to constitute custodial interrogation under the totality of the circumstances in the case), distinguishing Mathis v. United States, 391 U.S. 1 (1968) (questioning state prisoner about unrelated federal tax violation held to be custodial interrogation). While the *Howes* Court split 6–3 on whether a custodial interrogation had taken place for Fifth Amendment purposes, the case was before it on *habeas* review, which requires that a clearly established Supreme Court precedent mandates a contrary result. All the *Howes* Justices agreed that *Mathis* had not, for purposes of *habeas* review of a state case, "clearly established" that all private questioning of an inmate about previous, outside conduct was "custodial" *per se*. Rather, *Howes* explained that a broader assessment of all relevant factors in each case was necessary to establish coercive pressure amounting to "custody." *Cf.* Maryland v. Shatzer, 559 U.S. ___, No. 08–680, slip op. (2010) (extended release of interrogated inmate back into the general prison population broke "custody" for purposes of later questioning); *see also* Illinois v. Perkins, 496 U.S. 292 (1990) (inmate's conversation with an undercover agent does not create a coercive, police-dominated environment and does not implicate *Miranda* if the suspect does not know that he is conversing with a government agent).

ing a person upon his arrest in his home is custodial.[366] On the other hand, the fact that a suspect may be present in a police station does not necessarily mean, in the absence of further restrictions, that questioning is custodial,[367] and the fact that he is in his home or other familiar surroundings will ordinarily lead to a conclusion that the inquiry was noncustodial.[368] Also, if a person has been subjected to *Miranda* custody, that custody ends when he is free to resume his normal life activities after questioning.[369] Nevertheless, a break in custody may not end all *Miranda* implications for subsequent custodial interrogations.[370]

Second, *Miranda* warnings must precede custodial *interrogation*. It is not necessary under *Miranda* that the police squarely ask a question. The breadth of the interrogation concept is demonstrated in *Rhode Island v. Innis*.[371] There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the defendant, who had been given the *Miranda* warnings and had asserted he wished to consult a lawyer before submitting to questioning, was not asked questions by the officers. However, the officers engaged in conversation among themselves, in which they indicated that a school for handicapped children was near the

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[366] 394 U.S. 324 (1969) (police entered suspect's bedroom at 4 a.m., told him he was under arrest, and questioned him; four of the eight Justices who took part in the case, including three dissenters, voiced concern about this "broadening" of *Miranda* beyond the police station).

[367] Oregon v. Mathiason, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit, questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime); Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. (2013) (plurality opinion) (voluntarily accompanying police to station for questioning). *Cf.* Stansbury v. California, 511 U.S. 318 (1994). *See also* Minnesota v. Murphy, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation); Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal *habeas* review under the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

[368] Beckwith v. United States, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence was not a custodial interrogation, although inquiry had "focused" on him).

[369] This holds even in the case of convict who is released after interrogation back into the general population. Maryland v. Shatzer, 559 U.S. ___, No. 08–680, slip op. (2010).

[370] Edwards v. Arizona, 451 U.S. 477 (1981).

[371] 446 U.S. 291 (1980). A remarkably similar factual situation was presented in Brewer v. Williams, 430 U.S. 387 (1977), which was decided under the Sixth Amendment. In *Brewer*, and also in Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Court has had difficulty in expounding on what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.

crime scene and that they hoped the weapon was found before a child discovered it and was injured. The defendant then took them to the weapon's hiding place.

Unanimously rejecting a contention that *Miranda* would have been violated only by express questioning, the Court said: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." [372] A divided Court then concluded that the officers' conversation did not amount to a functional equivalent of questioning and that the evidence was admissible.[373]

A later divided Court applied *Innis* in *Arizona v. Mauro* [374] to hold that a suspect who had requested an attorney was not "interrogated" by bringing instead the suspect's wife, who also was a suspect, to speak with him in police presence. The majority emphasized that the suspect's wife had asked to speak with her husband, the meeting was therefore not a police-initiated ruse designed to elicit a response from the suspect, and in any event the meeting could not be characterized as an attempt by the police to use the coercive nature of confinement to extract a confession that would not be given in an unrestricted environment. The dissent argued that the police had exploited the wife's request to talk with her husband in a custodial setting to create a situation the police knew, or should reasonably have known, was reasonable likely to result in an incriminatory statement.

In *Estelle v. Smith*,[375] the Court held that a court-ordered jailhouse interview by a psychiatrist seeking to determine the defendant's competency to stand trial constituted "interrogation" with re-

[372] Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

[373] 446 U.S. at 302–04. Justices Marshall, Brennan, and Stevens dissented, id. at 305, 307. *See also* Illinois v. Perkins, 496 U.S. 292 (1990) (absence of coercive environment makes *Miranda* inapplicable to jail cell conversation between suspect and police undercover agent).

[374] 481 U.S. 520 (1987).

[375] 451 U.S. 454 (1981).

spect to testimony on issues guilt and punishment; the psychiatrist's conclusions about the defendant's dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not been given his *Miranda* warnings prior to the interview. That the defendant had been questioned by a psychiatrist designated to conduct a neutral competency examination, rather than by a police officer, was "immaterial," the Court concluded, since the psychiatrist's testimony at the penalty phase changed his role from one of neutrality to that of an agent of the prosecution.[376] Other instances of questioning in less formal contexts in which the issues of custody and interrogation intertwine, *e.g.*, in on-the-street encounters, await explication by the Court.

Third, before a suspect in custody is interrogated, he must be given *full* warnings, or the *equivalent*, of his *rights. Miranda*, of course, required express warnings to be given to an in-custody suspect of his right to remain silent, that anything he said may be used as evidence against him, that he has a right to counsel, and that if he cannot afford counsel he is entitled to an appointed attorney.[377] The Court recognized that "other fully effective means" could be devised to convey the right to remain silent,[378] but it was firm that the prosecution was not permitted to show that an unwarned suspect knew of his rights in some manner.[379] Nevertheless, it is not necessary that the police give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used "fully conveyed" to a defendant his rights.[380]

Fourth, once a warned suspect asserts his *right* to *silence* and requests *counsel*, the police must scrupulously respect his assertion of right. The *Miranda* Court strongly stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must

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[376] 451 U.S. at 467.

[377] Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* id. at 469–73.

[378] 384 U.S. at 444.

[379] 384 U.S. at 469.

[380] California v. Prysock, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings "*reasonably* conveyed" a suspect's rights, the Court adding that reviewing courts "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed "if and when you go to court"). Even where warnings were not the "*clearest possible* formulation of *Miranda's* right-to-counsel advisement," the Court found them acceptable as "sufficiently comprehensive and comprehensible when given a commonsense reading." Florida v. Powell, 559 U.S. ___, No. 08–1175, slip op. at 12 (2010) (emphasis in original) (upholding warning of a right to talk to a lawyer before answering any questions, coupled with advice that the right could be invoked at any time during police questioning, as adequate to inform a suspect of his right to have a lawyer present during questioning).

cease." Further, if the suspect indicates he wishes the assistance of counsel during interrogation, questioning must cease until he has counsel.[381]

That said, the Court has issued a distinct line of cases on the right to counsel that has created practically a *per se* rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings. In *Edwards v. Arizona*,[382] initial questioning had ceased as soon as the suspect had requested counsel, and the suspect had been returned to his cell. Questioning had resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of this rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[383] The *Edwards* rule bars police-initiated questioning stemming from a separate investiga-

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[381] Miranda v. Arizona, 384 U.S. 436, 472, 473–74 (1966). While a request for a lawyer is a *per se* invocation of Fifth Amendment rights, a request for another advisor, such as a probation officer or family member, may be taken into account in determining whether a suspect has evidenced an intent to claim his right to remain silent. Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who requested to see his probation officer, rather than counsel, found under the totality-of-the-circumstances to have not invoked a right to remain silent).

[382] 451 U.S. 477 (1981).

[383] 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. Id. at 487, 488 (Chief Justice Burger and Justices Powell and Rehnquist). In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. Connecticut v. Barrett, 479 U.S. 523 (1987).

In Minnick v. Mississippi, 498 U.S. 146 (1990), the Court interpreted *Edwards* to bar interrogation without counsel present of a suspect who had earlier consulted with an attorney on the accusation at issue. "[W]hen counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney." Id. at 153.

The Court has held that *Edwards* should not be applied retroactively to a conviction that had become final, Solem v. Stumes, 465 U.S. 638 (1984), but that *Ed-*

tion as well as questioning relating to the crime for which the suspect was arrested.[384] It also applies to interrogation by officers of a different law enforcement authority.[385]

On the other hand, the *Edwards* rule requiring that a lawyer be provided to a suspect who had requested one in an earlier interrogation does not apply once there has been a meaningful break in custody. The Court in *Maryland v. Shatzer*[386] characterized the *Edwards* rule as a judicially prescribed precaution against using the coercive pressure of prolonged custody to badger a suspect who has previously requested counsel into talking without one. However, after a suspect has been released to resume his normal routine for a sufficient period to dissipate the coercive effects of custody, a period set at 14 days by the *Shatzer* Court, the rationale for solicitous treatment ceases. If the suspect is thereafter put into custody again, the options for questioning no longer are limited to suspect-initiated talks or providing counsel, but rather the police may issue new *Miranda* warnings and proceed accordingly.[387] Moreover, the *Edwards* rule has not been explicitly extended to other aspects of the *Miranda* warnings.[388]

Fifth, a properly warned suspect may *waive* his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and respond to questioning, but the Court also cautioned that the prosecution bore a "heavy burden" to establish that a valid waiver had occurred.[389] The Court continued: "[a] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually ob-

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wards does apply to cases pending on appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51 (1985).

[384] Arizona v. Roberson, 486 U.S. 675 (1988). By contrast, the Sixth Amendment right to counsel is offense-specific, and does not bar questioning about a crime unrelated to the crime for which the suspect has been charged. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991).

[385] Minnick v. Mississippi, 498 U.S. 146 (1990).

[386] 559 U.S. ___, No. 08–680, slip op. (2010).

[387] Id.

[388] For a pre-*Edwards* case on the right to remain silent, see Michigan v. Mosley, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and suspect made incriminating admission; since police "scrupulously honored" suspect's request, admission valid).

[389] Miranda v. Arizona, 384 U.S. 436, 475 (1966). *See also* Tague v. Louisiana, 444 U.S. 469 (1980). A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning, hence an accused's signed waiver following arrest for one crime is not invalidated by police having failed to inform him of intent to question him about another crime. Colorado v. Spring, 479 U.S. 564 (1987).

tained."[390] Subsequent cases indicated that determining whether a suspect has waived his *Miranda* rights is a fact-specific inquiry not easily susceptible to *per se* rules. According to these cases, resolution of the issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[391] Under this line of cases, a waiver need not always be express, nor does *Miranda* impose a formalistic waiver procedure.[392]

In *Berghuis v. Thompkins*, citing the societal benefit of requiring an accused to invoke *Miranda* rights unambiguously, the Court refocused its *Miranda* waiver analysis to whether a suspect understood his rights.[393] There, a suspect refused to sign a waiver form, remained largely silent during the ensuing 2-hour and 45-minute interrogation, but then made an incriminating statement. The five-Justice majority found that the suspect had failed to invoke his right to remain silent and also implicitly had waived the right. According to the Court, though a statement following silence alone may not be adequate to show a waiver, the prosecution may show an implied waiver by demonstrating that a suspect understood the *Miranda* warnings given him and subsequently made an uncoerced statement.[394] Further, once a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly invokes them later.[395]

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[390] 384 U.S. at 475.

[391] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In Oregon v. Elstad, 470 U.S. 298 (1985), the Court held that a confession following a *Miranda* warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. *See* Bobby v. Dixon, 565 U.S. ___, No. 10–1540, slip op. (2012). *See also* Moran v. Burbine, 475 U.S. 412 (1986) (signed waivers following *Miranda* warnings not vitiated by police having kept from suspect information that attorney had been retained for him by a relative); Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who consented to interrogation after his request to consult with his probation officer was denied found to have waived rights; totality-of-the-circumstances analysis held to apply). *Elstad* was distinguished in Missouri v. Seibert, 542 U.S. 600 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[392] North Carolina v. Butler, 441 U.S. 369 (1979). In *Butler*, the defendant had refused to sign a waiver but agreed to talk with FBI agents nonetheless. On considering whether the defendant had thereby waived his right to counsel (his right to remain silent aside), the Court held that no express oral or written statement was required. Though the defendant was never directly responsive on his desire for counsel, the Court found that a waiver could be inferred from his actions and words.

[393] 560 U.S. ___, No. 08–1470, slip op. (2010).

[394] 560 U.S. ___, No. 08–1470, slip op. at 12–13 (2010).

[395] Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that "maybe I should talk to a lawyer," uttered after *Miranda* waiver and after an hour and a

Sixth, the admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of *Miranda* may not, of course, be introduced against him at trial for purposes of establishing guilt [396] or for determining the sentence, at least in bifurcated trials in capital cases.[397] On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[398]

The Court, in opinions that bespeak a sense of necessity to narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.[399] Thus, in *Harris v. New York*,[400] the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant's testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v. Hass*,[401] the Court permitted impeachment use of a statement made by the defendant after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with

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half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said "no, I don't want a lawyer").

[396] Miranda v. Arizona, 384 U.S. 436, 479 (1966). *See also* Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of *McNabb-Mallory*).

[397] Estelle v. Smith, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

[398] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial fruit" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning). Note too that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

[399] Under Walter v. United States, 347 U.S. 62 (1954), the defendant not only denied the offense of which he was accused (sale of drugs), but also asserted he had never dealt in drugs. The prosecution was permitted to impeach him concerning heroin seized illegally from his home two years before. The Court observed that the defendant could have denied the offense without making the "sweeping" assertions, as to which the government could impeach him.

[400] 401 U.S. 222 (1971). The defendant had denied only the commission of the offense. The Court observed that it was only "speculative" to think that impermissible police conduct would be encouraged by permitting such impeachment, a resort to deterrence analysis being contemporaneously used to ground the Fourth Amendment exclusionary rule, whereas the defendant's right to testify was the obligation to testify truthfully and the prosecution could impeach him for committing perjury. *See also* United States v. Havens, 446 U.S. 620 (1980) (Fourth Amendment).

[401] 420 U.S. 714 (1975). By contrast, a defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976).

the pre-*Miranda* tests for the admission of confessions and statements.[402]

The Court has created a "public safety" exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York v. Quarles*,[403] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,[404] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself will "lessen the desirable clarity of the rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." [405] No such compelling justification was offered for a *Miranda* exception for lesser offenses, however, and protecting the rule's "simplicity and clarity" counseled against creating one.[406] "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." [407]

The Operation of the Exclusionary Rule

Supreme Court Review.—The Court's review of the question of admissibility of confessions or other incriminating statements is designed to prevent the foreclosure of the very question to be decided by it, the issue of voluntariness under the due process standard, the issue of the giving of the requisite warnings and the subsequent waiver, if there is one, under the *Miranda* rule. Recurring to Justice Frankfurter's description of the inquiry as a "three-

[402] *E.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979).

[403] 467 U.S. 649 (1984).

[404] The Court's opinion was joined by Chief Justice Burger and by Justices White, Blackmun, and Powell. Justice O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response, and Justices Marshall, Brennan, and Stevens dissented.

[405] 467 U.S. at 658–59.

[406] Berkemer v. McCarty, 468 U.S. 420, 432 (1984).

[407] 468 U.S. at 434.

phased process" in due process cases at least,[408] it can be seen that the Court's self-imposed rules of restraint on review of lower-court factfinding greatly influenced the process. The finding of facts surrounding the issue of coercion—the length of detention, circumstances of interrogation, use of violence or of tricks and ruses, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. "This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat*, necessarily, that we are not to be bound by findings wholly lacking support in evidence."[409]

However, the conclusions of the lower courts as to how the accused reacted to the circumstances of his interrogation, and as to the legal significance of how he reacted, are subject to open review. "No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply be declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State judgment that the confession was voluntary cannot stand."[410] *Miranda*, of course, does away with the judgments about the effect of lack of warnings, and the third phase, the legal determination of the interaction of the first two phases, is determined solely by two factual determinations: whether the warnings were given and if so whether there was a valid waiver. Presumably, supported determinations of these two

[408] Culombe v. Connecticut, 367 U.S. 568, 603–06 (1961).

[409] 367 U.S. at 603. *See* Ashcraft v. Tennessee, 322 U.S. 143, 152–53 (1944); Lyons v. Oklahoma, 322 U.S. 596, 602–03 (1944); Watts v. Indiana, 338 U.S. 49, 50–52 (1949); Gallegos v. Nebraska, 342 U.S. 55, 60–62 (1951); Stein v. New York, 346 U.S. 156, 180–82 (1953); Payne v. Arkansas, 356 U.S. 560, 561–62 (1958).

[410] Culombe v. Connecticut, 367 U.S. 568, 605 (1961). *See* Watts v. Indiana, 338 U.S. 49, 51 (1949); Malinski v. New York, 324 U.S. 401, 404, 417 (1945).

facts by trial courts would preclude independent review by the Supreme Court. Yet, the Court has been clear that it may and will independently review the facts when the factfinding has such a substantial effect on constitutional rights.[411]

In *Withrow v. Williams*,[412] the Court held that the rule of *Stone v. Powell*,[413] precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*.

Procedure in the Trial Courts.—The Court has placed constitutional limitations upon the procedures followed by trial courts for determining the admissibility of confessions and other incriminating admissions. Three procedures were developed over time to deal with the question of admissibility when involuntariness was claimed. By the orthodox method, the trial judge heard all the evidence on voluntariness in a separate and preliminary hearing, and if he found the confession involuntary the jury never received it, while if he found it voluntary the jury received it with the right to consider its weight and credibility, which consideration included the circumstances of its making. By the New York method, the judge first reviewed the confession under a standard leading to its exclusion only if he found it not possible that "reasonable men could differ over the [factual] inferences to be drawn" from it; otherwise, the jury would receive the confession with instructions to first determine its voluntariness and to consider it if it were voluntary and to disregard it if it were not. By the Massachusetts method, the trial judge himself determined the voluntariness question and if he found the confession involuntary the jury never received it; if he found it to have been voluntarily made he permitted the jury to receive it with instructions that the jurors should make their own independent determination of voluntariness.[414]

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[411] "In cases in which there is a claim of denial of rights under the Federal Constitution this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and cases cited therein.

[412] 507 U.S. 680 (1993).

[413] 428 U.S. 465 (1976). *See* discussion of Stone v. Powell under the Fourth Amendment, *infra*.

[414] Jackson v. Denno, 378 U.S. 368, 410–23 (1964) (appendix to opinion of Justice Black concurring in part and dissenting in part).

The New York method was upheld against constitutional attack in *Stein v. New York*,[415] but eleven years later a five-to-four decision in *Jackson v. Denno*,[416] found it inadequate to protect the due process rights of defendants. The procedure did not, the Court held, ensure a "reliable determination on the issue of voluntariness" and did not sufficiently guarantee that convictions would not be grounded on involuntary confessions. Because there was only a general jury verdict of guilty, it was impossible to determine whether the jury had first focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a conclusion of guilt on wholly independent evidence. It was doubtful that a jury could appreciate the values served by the exclusion of involuntary confessions and put out of mind the content of the confession no matter what was determined with regard to its voluntariness. The rule was reiterated in *Sims v. Georgia*,[417] in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness, upon an initial determination merely that the prosecution had made out a prima facie case that the confession was voluntary. The Court has interposed no constitutional objection to use of either the orthodox or the Massachusetts method for determining admissibility.[418] It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt,[419] or by clear and convincing evidence.[420]

DUE PROCESS

History and Scope

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as

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[415] 346 U.S. 156, 170–79 (1953). Significant to the Court's conclusion on this matter was the further conclusion of the majority that coerced confessions were inadmissible solely because of their unreliability; if their trustworthiness could be established the utilization of an involuntary confession violated no constitutional prohibition. This conception was contrary to earlier cases and was subsequently repudiated. *See* Jackson v. Denno, 378 U.S. 368, 383–87 (1964).

[416] 378 U.S. 368 (1964). On the sufficiency of state court determinations, *see* Swenson v. Stidham, 409 U.S. 224 (1972); La Vallee v. Della Rose, 410 U.S. 690 (1973).

[417] 385 U.S. 538 (1967).

[418] Jackson v. Denno, 378 U.S. 368 and n.8 (1964); Lego v. Twomey, 404 U.S. 477, 489–90 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge's determination).

[419] Lego v. Twomey, 404 U.S. 477 (1972).

[420] Colorado v. Connelly, 479 U.S. 157 (1986).

to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just."[421] The content of due process is "a historical product"[422] that traces all the way back to chapter 39 of Magna Carta, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[423] The phrase "due process of law" first appeared in a statutory rendition of this chapter in 1354. "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[424] Though Magna Carta was in essence the result of a struggle over interest between the King and his barons,[425] this particular clause over time transcended any such limitation of scope, and throughout the fourteenth century parliamentary interpretation expanded far beyond the intention of any of its drafters.[426] The understanding which the founders of the American constitutional system, and those who wrote the Due Process Clauses, brought to the subject they derived from Coke, who in his *Second Institutes* expounded the proposition that the term "by law of the land" was equivalent to "due process of law," which he in turn defined as "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by

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[421] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[422] Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[423] Text and commentary on this chapter may be found in W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. Id. at 504, and see 139–59. As expanded, it read: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." *See also* J. Holt, Magna Carta 226–29 (1965). The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text: "To no one will we sell, to no one will we deny or delay right or justice." This 1225 reissue became the standard text thereafter.

[424] 28 Edw. III, c. 3. *See* F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629, 86–97 (1948), recounting several statutory reconfirmations. Note that the limitation of "free man" had given way to the all-inclusive delineation.

[425] W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John (Glasgow, 2d rev. ed. 1914); J. Holt, Magna Carta (1965).

[426] F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629 (1948).

writ original of the Common Law."[427] The significance of both terms was procedural, but there was in Coke's writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term "law of the land" was early the preferred expression in colonial charters and declarations of rights, which gave way to the term "due process of law," although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also suggests some limitations on substance because of its association with the guarantee of just compensation upon the taking of private property for public use.[428]

Scope of the Guaranty.—Standing by itself, the phrase "due process" would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that "due process of law" would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."[429] All persons within the territory of the United States are entitled to its protection, including corporations,[430] aliens,[431] and presumptively citizens seeking readmission to the United States,[432] but States as such

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[427] Sir Edward Coke, Institutes of the Laws of England, Part II, 50–51 (1641). For a review of the influence of Magna Carta and Coke on the colonies and the new nation, *see*, *e.g.*, A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

[428] The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the "law of the land" phrase in a separate article, 3 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th Congress, 2d Sess. 1688 (1909), whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases. 7 id. at 3813. New York in its constitution of 1821 was the first state to pick up "due process of law" from the United States Constitution. 5 id. at 2648.

[429] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). Webster had made the argument as counsel in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). *See also* Chief Justice Shaw's opinion in Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).

[430] *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).

[431] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[432] United States v. Ju Toy, 198 U.S. 253, 263 (1905); *cf.* Quon Quon Poy v. Johnson, 273 U.S. 352 (1927).

are not so entitled.[433] It is effective in the District of Columbia[434] and in territories which are part of the United States,[435] but it does not apply of its own force to unincorporated territories.[436] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[437]

Early in our judicial history, a number of jurists attempted to formulate a theory of natural rights—natural justice, which would limit the power of government, especially with regard to the property rights of persons.[438] State courts were the arenas in which this struggle was carried out prior to the Civil War. Opposing the "vested rights" theory of protection of property were jurists who argued first, that the written constitution was the supreme law of the State and that judicial review could look only to that document in scrutinizing legislation and not to the "unwritten law" of "natural rights," and second, that the "police power" of government enabled legislatures to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the written constitution. The "vested rights" jurists thus found in the "law of the land" and the "due process" clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.[439] Thus, Chief Justice Taney was not innovating when, in the *Dred Scott* case, he pronounced, without elaboration, that one of the reasons that the Missouri Compromise was unconstitutional was that an act of Congress that deprived "a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[440] Following the war, with the ratification of the Fourteenth Amendment's Due Process Clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation. First resisted, the arguments came in time to

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[433] South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

[434] Wight v. Davidson, 181 U.S. 371, 384 (1901).

[435] Lovato v. New Mexico, 242 U.S. 199, 201 (1916).

[436] Public Utility Comm'rs v. Ynchausti & Co., 251 U.S. 401, 406 (1920).

[437] Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the Due Process Clause applies to every human being, including enemy belligerents.

[438] *Compare* the remarks of Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388–89, 398–99 (1798).

[439] The full account is related in E. Corwin, Liberty Against Government ch. 3 (1948). The pathbreaking decision of the era was Wynhamer v. The People, 13 N.Y. 378 (1856).

[440] Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

be accepted, and they imposed upon both federal and state legislation a firm judicial hand that was not to be removed until the crisis of the 1930s, and that today in non-economic legislation continues to be reasserted.

"It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. Although the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."[441] The most obvious difference between the two Due Process Clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with other express provisions in the Bill of Rights guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the states has been held to contain implicitly not only the standards of fairness and justness found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In that sense, the two clauses are not the same thing, but, insofar as they impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed by, express constitutional guarantees, the interpretation of the two clauses is substantially, if not wholly, the same. Save for areas in which the particularly national character of the Federal Government requires separate treatment, this book's discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment's Due Process Clause, such as, for example, the development of equal protection standards as an aspect of Fifth Amendment due process.

Procedural Due Process

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process "due process." "To what principles, then, are we to resort to ascertain whether this process, en-

[441] French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

acted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." A survey of history disclosed that the law in England seemed always to have contained a summary method, not unlike the law in question, for recovering debts owed the Crown. Therefore, "[t]ested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . ." [442]

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the development of procedures unknown to English law. But when California's abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding was the English practice and that Coke had indicated that it was a proceeding required as "the law of the land." The Court in *Murray's Lessee* meant "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law." To hold that only historical, traditional procedures can constitute due process, the Court said, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." [443] Therefore, the Court concluded, due process "must be held to guarantee not particular forms of procedures, but the very substance of individual rights to life, liberty, and property." The Due Process Clause prescribed "the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves

[442] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276–77, 280 (1856). The Court took a similar approach in Fourteenth Amendment due process interpretation in Davidson v. City of New Orleans, 96 U.S. 97 (1878), and Munn v. Illinois, 94 U.S. 113 (1877).

[443] Hurtado v. California, 110 U.S. 516, 528–29 (1884).

these principles of liberty and justice, must be held to be due process of law." [444]

Generally.—The phrase "due process of law" does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved.[445] "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." [446] What is unfair in one situation may be fair in another.[447] "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." [448]

Administrative Proceedings: A Fair Hearing.—With respect to action taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the final order becomes effective.[449] In *Bowles v. Willingham*,[450] the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings.[451] Although a taxpayer must be afforded a fair oppor-

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[444] 110 U.S. at 532, 535, 537. This flexible approach has been followed by the Court. *E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[445] Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904).

[446] *Ex parte* Wall, 107 U.S. 265, 289 (1883).

[447] *Compare* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), *with* Ng Fung Ho v. White, 259 U.S. 276 (1922).

[448] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Justice Frankfurter concurring).

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

[450] 321 U.S. 503, 521 (1944).

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

tunity for a hearing in connection with the collection of taxes,[452] collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.[453]

When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality.[454] A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon the proposal before the final command is issued.[455] But a variance between the charges and findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint.[456] The mere admission of evidence that would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[457] A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having ra-

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

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

[454] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). *But see* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (Justice Powell), 196–99 (Justice White) (1974) (hearing before probably partial officer at pretermination stage).

[455] Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has experienced some difficulty with application of this principle to administrative hearings and subsequent review in selective service cases. *Compare* Gonzales v. United States, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* United States v. Nugent, 346 U.S. 1 (1953) (in auxiliary hearing that culminated in a Justice Department report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption"), *and* Gonzales v. United States, 364 U.S. 59 (1960) (five-to-four decision finding no due process violation when petitioner (1) at departmental proceedings was not permitted to rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board, nor (2) at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

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

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

tional probative force. Hearsay may be received in an administrative hearing and may constitute by itself substantial evidence in support of an agency determination, provided that there are present factors which assure the underlying reliability and probative value of the evidence and, at least in the case at hand, where the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them with regard to the evidence.[458] Although the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[459] it has refused to lay down a general rule that would cover all cases.[460]

In the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, and applicable Navy regulations that confirm this authority, together with a stipulation in the contract between a restaurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements, due process was not denied by the summary exclusion on security grounds of the concessionaire's cook, without hearing or advice as to the basis for the exclusion. The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest.[461] Because the Civil Rights Commission acts solely as an investigative and fact-finding agency and makes

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

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

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

[461] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). Four dissenters, Justices Brennan, Black, Douglas, and Chief Justice Warren, emphasized the inconsistency between the Court's acknowledgment that the cook had a right not to have her entry badge taken away for arbitrary reasons, and its rejection of her right to be told in detail the reasons for such action. The case has subsequently been cited as involving an "extraordinary situation." Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 n.10 (1970).

Manifesting a disposition to adjudicate on non-constitutional grounds dismissals of employees under the Federal Loyalty Program, the Court, in Peters v. Hobby, 349 U.S. 331 (1955), invalidated, as in excess of its delegated authority, a finding of reasonable doubt as to the loyalty of the petitioner by a Loyalty Review Board which, on its own initiative, reopened his case after he had twice been cleared by his Agency Loyalty Board, and arrived at its conclusion on the basis of adverse information not offered under oath and supplied by informants, not all of whom were known to the Review Board and none of whom was disclosed to petitioner for cross-examination by him. The Board was found not to possess any power to review on its own initiative. Concurring, Justices Douglas and Black condemned as irreconcilable with due process and fair play the use of faceless informers whom the petitioner is unable to confront and cross-examine.

no adjudications, the Court, in *Hannah v. Larche*,[462] upheld supplementary rules of procedure adopted by the Commission, independently of statutory authorization, under which state electoral officials and others accused of discrimination and summoned to appear at its hearings, are not apprised of the identity of their accusers, and witnesses, including the former, are not accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings. Such procedural rights, the Court maintained, have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations in no way determining private rights.

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

Again avoiding constitutional issues, the Court, in Greene v. McElroy, 360 U.S. 474 (1959), invalidated the security clearance procedure required of defense contractors by the Defense Department as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order which sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Frankfurter, Harlan, and Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Clark dissented. *See also* the dissenting opinions of Justices Douglas and Black in Beard v. Stahr, 370 U.S. 41, 43 (1962), and in Williams v. Zuckert, 371 U.S. 531, 533 (1963).

[462] 363 U.S. 420, 493, 499 (1960). Justices Douglas and Black dissented on the ground that when the Commission summons a person accused of violating a federal election law with a view to ascertaining whether the accusation may be sustained, it acts in lieu of a grand jury or a committing magistrate, and therefore should be obligated to afford witnesses the procedural protection herein denied. Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. 91–521, § 4, 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

Aliens: Entry and Deportation.—The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[463] To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, with regard to whether or not they shall be permitted to enter the country, is due process of law.[464] Because the status of a resident alien returning from abroad is equivalent to that of an entering alien, his exclusion by the Attorney General without a hearing, on the basis of secret, undisclosed information, also is deemed consistent with due process.[465] The complete authority of Congress in the matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country a money penalty, collectible before and as a condition of the grant of clearance.[466] If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing.[467] Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such

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[463] *See* discussion under Art. I, § 8, cl. 4, The Power of Congress to Exclude Aliens.

[464] United States v. Ju Toy, 198 U.S. 253, 263 (1905). *See also* The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903). *Cf.* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[465] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). The long continued detention on Ellis Island of a non-deportable alien does not change his status or give rise to any right of judicial review. In dissent, Justices Black and Douglas maintained that the protracted confinement on Ellis Island without a hearing could not be reconciled with due process. Also dissenting, Justices Frankfurter and Jackson contended that when indefinite commitment on Ellis Island becomes the means of enforcing exclusion, due process requires that a hearing precede such deprivation of liberty.

Cf. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953), in which the Court, after acknowledging that resident aliens held for deportation are entitled to procedural due process, ruled that as a matter of law the Attorney General must accord notice of the charges and a hearing to a resident alien seaman who is sought to be "expelled" upon his return from a voyage overseas. *Knauff* was distinguished on the ground that the seaman's status was not that of an entrant, but rather that of a resident alien. *See also* Leng May Ma v. Barber, 357 U.S. 185 (1958).

[466] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909).

[467] Kwock Jan Fat v. White, 253 U.S. 454, 457 (1920). *See also* Chin Yow v. United States, 208 U.S. 8 (1908).

an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on *habeas corpus*.[468]

In certain cases, the exclusion of an alien has been seen to implicate the rights of U.S. citizens.[469] These cases have often been decided by the lower courts and involve U.S. citizens' First Amendment rights, which the Supreme Court appeared to recognize in its 1972 decision in *Kleindienst v. Mandel*.[470] However, U.S. citizens have also asserted that the exclusion of an alien has impinged upon the citizen's due process rights.[471] In *Kerry v. Din*, five Justices agreed that denying an immigrant visa to the husband of a U.S. citizen on the grounds that he was inadmissible under a provision of federal immigration law (which pertains to "terrorist activities"), without further explanation, did not violate the due process rights of the U.S. citizen spouse.[472] These Justices differed in their reasoning, though. A three-Justice plurality found that none of the various "interests" asserted by the U.S. citizen wife constituted a protected liberty interest for purposes of the Due Process Clause.[473] For this reason, the plurality rejected the wife's argument that, insofar as

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[468] United States v. Sing Tuck, 194 U.S. 161 (1904). *See also* Quon Quon Poy v. Johnson, 273 U.S. 352, 358 (1927).

[469] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (apparently recognizing that citizens' First Amendment rights were affected by the denial of a nonimmigrant visa to a Marxist journalist who had been invited to speak in the United States); *See also* Kerry v. Din, 576 U.S. ___, No. 13–1402, slip op. (2015) (plurality and concurring opinions, taken together, suggesting that at least a majority of the Court accepts that *Kleindienst* allows U.S. citizens to challenge visa denials that affect other rights beyond their First Amendment rights); *cf.* Trump v. Int'l Refugee Assistance Project, 582 U.S. ___, No. 16–1436, slip op. at 11 (noting that "foreign nationals abroad who have no connection to the United States at all" can be denied entry as such a denial does not "impose any legally relevant hardship" on the foreign nationals themselves).

[470] *See, e.g.,* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 117 (2d Cir. 2009) ("The Supreme Court has recognized a First Amendment right to 'hear, speak, and debate with' a visa applicant."); Adams v. Baker, 909 F.2d 643, 647 n.3 (1st Cir. 1990) ("[I]t is important to recognize that the only issue which may be addressed by this court is the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien."); Abourezk v. Reagan, 785 F.2d 1043, 1063 n.1 (D.C. Cir. 1986) (noting that the government defendants had "concede[d] that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional (first amendment) claim") (Bork, J., dissenting).

[471] *See, e.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).

[472] 576 U.S. ___, No. 13–1402, slip op. (2015).

[473] *Id.* at 5–6 (Scalia, J., joined by Roberts, C.J. & Thomas, J.) (plurality opinion). According to the plurality, the U.S. citizen spouse's alleged interests had been variously formulated as a "liberty interest in her marriage"; a "right of association with one's spouse"; a "liberty interest in being reunited with certain blood relatives"; and the "liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse." *Id.* at 7. The plurality also expressly noted that no fundamental right to marriage, as such, had been infringed, because "the Federal Government has not attempted to forbid a marriage." *Id.* (contrasting the case at hand with Loving v. Virginia, 388 U.S. 1 (1967)).

enforcement of the law affected her enjoyment of an "implied fundamental liberty," the government must provide her "a full battery of procedural-due-process protections," including stating the specific grounds on which her husband's visa had been denied.[474] A two-Justice concurrence did not reach the question of whether the U.S. citizen wife had asserted a protected liberty interest, but instead concluded that the consular officials' citation of a particular statutory ground for inadmissibility as the basis for denying the visa application satisfied due process under *Kleindienst*, which requires only that the government state a "facially legitimate and *bona fide* reason" for the denial.[475]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country. Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights.[476] The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon their continued liberty to reside within the United States. Findings of fact reached by executive officers after a fair, though summary, deportation hearing may be made conclusive.[477] In *Wong Yang Sung v. McGrath*,[478] however, the Court intimated that a hearing before a tribunal that did

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[474] *Id.* at 6. The plurality took issue with the dissenting Justices' view that procedural due process rights attach to liberty interests that are not created by nonconstitutional law, such as a statute, but are "sufficiently important" so as to "flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Id.* at 11. According to the plurality, this view is a "novel" one that is inconsistent with the Court's established methodology for identifying fundamental rights that are subject to protection under the Due Process Clause. *Id*. at 12.

[475] *Id.* at 3 (Kennedy, J., concurring, joined by Alito, J.).

[476] Harisiades v. Shaughnessy, 342 U.S. 580 (1952). But this fact does not mean that a person may be deported on the basis of judgment reached on the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Court has held, a deportation order may only be entered if it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. INS, 385 U.S. 276 (1966). *Woodby*, and similar rulings, were the result of statutory interpretation and were not constitutionally compelled. Vance v. Terrazas, 444 U.S. 252, 266–67 (1980).

[477] Zakonaite v. Wolf, 226 U.S. 272 (1912). *See* Jay v. Boyd, 351 U.S. 345 (1956), in which the Court emphasized that suspension of deportation is not a matter of right, but of grace, like probation or parole, and, accordingly, an alien is not entitled to a hearing that contemplates full disclosure of the considerations (information of a confidential nature pertaining to national security) that induced administrative officers to deny suspension. In four dissenting opinions, Chief Justice Warren, together with Justices Black, Frankfurter, and Douglas, found irreconcilable with a fair hearing and due process the delegation by the Attorney General of his discretion to an inferior officer and the vesting of the latter with power to deny a suspension on the basis of undisclosed evidence that may constitute no more than uncorroborated hearsay.

[478] 339 U.S. 33 (1950). *See also* Kimm v. Rosenberg, 363 U.S. 405, 408, 410, 415 (1960), in which the Court ruled that when, at a hearing on his petition for suspension of a deportation order, an alien invoked the Fifth Amendment in response to

not meet the standards of impartiality embodied in the Administrative Procedure Act [479] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process that may be corrected on *habeas corpus*.[480] In contrast with the decision in *United States v. Ju Toy* [481] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to his day in court if he denies that he is an alien.[482] Because aliens within the United States are protected to some extent by due process, Congress must give "clear indication" of an intent to authorize *indefinite* detention of illegal aliens, and probably must also cite "special justification," as, for example, for "suspected terrorists." [483] In *Demore v. Kim*,[484] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress's broad powers over aliens. "[W]hen the government deals with deportable aliens, the Due Process Clause does not require it to employ the

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questions as to Communist Party membership and contended that the burden of proving such affiliation was on the government, it was incumbent on the alien to supply the information, as the government had no statutory discretion to suspend deportation of a Communist. Justices Douglas, Black, Brennan, and Chief Justice Warren dissented on the ground that exercise of the privilege is a neutral act, supporting neither innocence nor guilt and may not be used as evidence of dubious character. Justice Brennan also thought the government was requiring the alien to prove non-membership when no one had intimated that he was a Communist.

[479] 5 U.S.C. §§ 551 *et seq*.

[480] Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). *See also* Mahler v. Eby, 264 U.S. 32, 41 (1924). Although, in Heikkila v. Barber, 345 U.S. 229 (1953), the Court held that a deportation order under the Immigration Act of 1917 might be challenged only by habeas corpus, in Shaughnessy v. Pedreiro, 349 U.S. 48 (1955), it established that, under the Immigration Act of 1952, 8 U.S.C. § 1101, the validity of a deportation order also may be contested in an action for declaratory judgment and injunctive relief. Also, a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order has been denied. United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[481] 198 U.S. 253 (1905).

[482] Ng Fung Ho v. White, 259 U.S. 276, 281 (1922).

[483] Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (construing a statute so as to avoid a "serious constitutional problem," id. at 699, and recognizing a "presumptively reasonable" detention period of six months for removable aliens).

[484] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

least burdensome means to accomplish its goal."[485] A closely divided Court earlier ruled that, in time of war, the deportation of an enemy alien may be ordered summarily by executive action; due process of law does not require the courts to determine the sufficiency of any hearing that is gratuitously afforded to the alien.[486]

Judicial Review of Administrative or Military Proceedings.—To the extent that constitutional rights are involved, due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In *St. Joseph Stock Yards Co. v. United States*,[487] the Court held that, upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stockyard company, due process required that the court exercise its independent judgment upon the facts to determine whether the rates were confiscatory.[488] Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point.[489] The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[490]

There has been a division on the Court with regard to what extent, if at all, proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the Due Process Clause. In *In re Yamashita*,[491] the majority denied a petition for certiorari and petitions for writs of *habeas corpus* to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that, because the military commission, in admitting evidence to which objection had been made, had not violated any act of Congress, a treaty, or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the

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[485] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

[486] Ludecke v. Watkins, 335 U.S. 160 (1948). Three of the four dissenting Justices, Douglas, Murphy, and Rutledge, argued that even an enemy alien could not be deported without a fair hearing.

[487] 298 U.S. 38 (1936).

[488] 298 U.S. at 51–54. Justices Brandeis, Stone, and Cardozo, although concurring in the result, took exception to this proposition.

[489] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1941).

[490] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

[491] 327 U.S. 1 (1946).

courts. And, in *Johnson v. Eisentrager*,[492] the Court overruled a lower court decision that, in reliance upon the dissenting opinion in *Yamashita*, had held that the Due Process Clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of *habeas corpus*.

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.[493] During a military action in Afghanistan,[494] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to hold such an "enemy combatant" while providing him with limited recourse to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[495] However, the Court ruled that the government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision-maker, and must be allowed to consult an attorney.[496]

Without dissent, in *Hiatt v. Brown*,[497] the Court reversed the judgment of a lower court that had discharged a prisoner serving a sentence imposed by a court-martial because of errors that had deprived the prisoner of due process of law. The Court held that the

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[492] 339 U.S. 763 (1950). Justices Douglas, Black, and Burton dissented.

[493] 542 U.S. 507 (2004).

[494] In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," Pub. L. 107–40, which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[495] There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the "Authorization for Use of Military Force" passed by Congress to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[496] 542 U.S. at 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. Id. at 554 (dissenting).

[497] 339 U.S. 103 (1950).

court below had erred in extending its review, for the purpose of determining compliance with the Due Process Clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[498] Similarly, in *Burns v. Wilson*,[499] the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam in which the petitioners asserted that their imprisonment resulted from proceedings that violated their constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations, and does not embrace an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

Substantive Due Process

Justice Harlan, dissenting in *Poe v. Ullman*,[500] observed that one view of due process, "ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept . . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"

Discrimination.— Literally speaking, the Fifth Amendment, unlike the Fourteenth Amendment, "contains no equal protection

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[498] 339 U.S. at 111.

[499] 346 U.S. 137 (1953).

[500] 367 U.S. 497, 540, 541 (1961). The internal quotation is from Hurtado v. California, 110 U.S. 516, 532 (1884). Development of substantive due process is briefly noted above under "Scope of the Guaranty" and is treated more extensively under the Fourteenth Amendment.

clause and it provides no guaranty against discriminatory legislation by Congress."[501] Nevertheless, "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[502] Even before the Court reached this position, it had assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[503] The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the Due Process and Equal Protection Clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[504] Thus, in *Bolling v. Sharpe*,[505] a companion case to *Brown v. Board of Education*,[506] the Court held that segregation of pupils in the public schools of the District of Columbia violated the Due Process Clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct

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[501] Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941).

[502] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214–18 (1995).

[503] Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937). *See also* Currin v. Wallace, 306 U.S. 1, 13–14 (1939).

[504] Truax v. Corrigan, 257 U.S. 312, 331 (1921). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[505] 347 U.S. 497, 499–500 (1954).

[506] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the Equal Protection Clause if the cases had come from the states. *E.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

In subsequent cases, the Court has applied its Fourteenth Amendment jurisprudence to federal legislation that contained classifications based on sex[507] and illegitimacy,[508] and that set standards of eligibility for food stamps.[509] However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the Equal Protection Clause itself does not outlaw "reasonable" classifications, neither is the Due Process Clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.[510] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a private person.[511] A veterans law that extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, its being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively different from that caused

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[507] Frontiero v. Richardson, 411 U.S. 677 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977). *But see* Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Jobst, 434 U.S. 47 (1977).

[508] *Compare* Jiminez v. Weinberger, 417 U.S. 628 (1974), *with* Mathews v. Lucas, 427 U.S. 495 (1976).

[509] Department of Agriculture v. Murry, 413 U.S. 508 (1973). *See also* Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[510] Richardson v. Belcher, 404 U.S. 78, 81 (1971); FCC v. Beach Communications, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve only dwelling units under common ownership); Lyng v. Castillo, 477 U.S. 635 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together). With respect to courts and criminal legislation, *see* Hurtado v. United States, 410 U.S. 578 (1973); Marshall v. United States, 414 U.S. 417 (1974); United States v. MacCollom, 426 U.S. 317 (1976).

[511] Hill v. United States ex rel. Weiner, 300 U.S. 105, 109 (1937). *See also* District of Columbia v. Brooke, 214 U.S. 138 (1909); Panama R.R. v. Johnson, 264 U.S. 375 (1924); Detroit Bank v. United States, 317 U.S. 329 (1943).

by alternative service, and for Congress to have so provided to make military service more attractive.[512]

"The federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."[513] The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government's being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

Congressional Police Measures.—Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the Due Process Clause. Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the expense of hospitalizing such persons.[514] It may prohibit the transportation in interstate commerce of filled milk[515] or the importation of convict-made goods into any state where their receipt, possession, or sale is a violation of local law.[516] It may require employers to bargain collectively with

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[512] Johnson v. Robison, 415 U.S. 361 (1974). *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). Wayte v. United States, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).

[513] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). For example, the power to regulate immigration has permitted the federal government to discriminate on the basis of alienage, at least so long as the discrimination satisfies the rational basis standard of review. *See* Mathews v. Diaz, 426 U.S. 67, 79–80, 83 (1976) (holding that federal conditions upon alien eligibility for public assistance were not "wholly irrational," and observing that "[in] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"). Nonetheless, with regard to statutes that touch upon immigration-related matters but do not address the entry or exclusion of aliens, the Court has suggested that if such a law discriminates on the basis of suspect factors other than alienage or national origin a more "exacting standard of review" may be required. *See* Sessions v. Morales-Santana*, 582 U.S. ___, No. 15–1191, slip op. 14–17 (2017)* (distinguishing between immigration and citizenship contexts, and applying heightened scrutiny to hold that a derivative citizenship statute which discriminated by gender violated equal protection principles).

[514] United States v. New York S.S. Co., 269 U.S. 304 (1925).

[515] United States v. Carolene Products Co., 304 U.S. 144 (1938); Carolene Products Co. v. United States, 323 U.S. 18 (1944).

[516] Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937).

representatives of their employees chosen in a manner prescribed by law, to reinstate employees discharged in violation of law, and to permit use of a company-owned hall for union meetings.[517] Subject to First Amendment considerations, Congress may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.[518]

Congressional Regulation of Public Utilities.—Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of state action, the review of agency orders seldom has turned on constitutional issues. In two cases, however, maximum rates prescribed by the Secretary of Agriculture for stockyard companies were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[519] A few years later, in *FPC v. Hope Natural Gas Co.*,[520] the Court adopted an entirely different approach. It held that the validity of the Commission's order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates that enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts kept by public utility companies,[521] and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property,[522] have been sustained against the objection that they were arbitrary and invalid. An order of the Secre-

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[517] *E.g.*, Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956); NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[518] *Ex parte* Jackson, 96 U.S. 727 (1878); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[519] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Denver Union Stock Yards Co. v. United States, 304 U.S. 470 (1938).

[520] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to use any single formula or combination of formulas in determining rates.

[521] A. T. & T. Co. v. United States, 299 U.S. 232 (1936); United States v. Ne w York Tel. Co., 326 U.S. 638 (1946); Northwestern Co. v. FPC, 321 U.S. 119 (1944).

[522] Valvoline Oil Co. v. United States, 308 U.S. 141 (1939); Champlin Rfg. Co. v. United States, 329 U.S. 29 (1946).

tary of Commerce directed to a single common carrier by water requiring it to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment.[523]

Congressional Regulation of Railroads.—Legislation and administrative orders pertaining to railroads have been challenged repeatedly under the Due Process Clause, but seldom with success. Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained,[524] as has the Commission's division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation.[525] The recapture of one-half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee.[526] An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even through its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads.[527] Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property.[528] Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities that they manufactured, mined, or produced.[529] An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease,[530] is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement by which the carrier bound itself to issue such passes annually for life, in settlement of a claim for personal injuries.[531] A non-arbitrary Interstate Commerce Commission order establishing a non-compensatory rate for carriage of certain commodities does not violate the Due

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[523] Isbrandtsen-Moller Co. v. United States, 300 U.S. 146 (1937).
[524] St. Louis S.W. Ry. v. United States, 245 U.S. 136, 143 (1917).
[525] *New England Divisions Case*, 261 U.S. 184 (1923).
[526] Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 481, 483 (1924).
[527] Chicago, I. & L. Ry. v. United States, 270 U.S. 287 (1926). *Cf.* Seaboard Air Line Ry. v. United States, 254 U.S. 57 (1920).
[528] *Assigned Car Cases*, 274 U.S. 564, 575 (1927).
[529] United States v. Delaware & Hudson Co., 213 U.S. 366, 405, 411, 415 (1909).
[530] United States v. Lowden, 308 U.S. 225 (1939).
[531] Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911).

Process or Just Compensation Clauses as long as it serves the public interest and the rates as a whole yield just compensation.[532]

Occasionally, however, regulatory action has been held invalid under the Due Process Clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads for a space of two days was held to be arbitrary and invalid.[533] A retirement act that made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension even if the employee had contributed nothing to the pension fund, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional.[534]

Taxation.—In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the states by the Fourteenth. The Federal Government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[535] and it may tax the income of a citizen resident abroad, which is derived from property located at his residence.[536] The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the state's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment. . . ."[537] It has sustained, over charges of unfair differentiation between persons, a graduated income tax,[538] a higher tax on oleomargarine than on butter,[539] an excise tax on "puts" but not on "call,"[540] a tax on the income of business operated by corporations but not on similar enterprises carried on by individuals,[541] an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations were taxed on income from all

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[532] Baltimore & Ohio R.R. v. United States, 345 U.S. 146 (1953).

[533] Chicago, R.I. & P. Ry. v. United States, 284 U.S. 80 (1931).

[534] Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). *But cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[535] United States v. Bennett, 232 U.S. 299, 307 (1914).

[536] Cook v. Tait, 265 U.S. 47 (1924).

[537] Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941). *But see* discussion of "Discrimination" *supra*.

[538] Brushaber v. Union Pac. R.R, 240 U.S. 1, 24 (1916).

[539] McCray v. United States, 195 U.S. 27, 61 (1904).

[540] Treat v. White, 181 U.S. 264 (1901).

[541] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

sources,[542] a tax on foreign-built but not upon domestic yachts,[543] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service,[544] a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums,[545] an Alaska statute imposing license taxes only on nonresident fisherman,[546] an act that taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal,[547] an excess profits tax that defined "invested capital" with reference to the original cost of the property rather than to its present value,[548] an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers,[549] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety,[550] and a tax on nonprofit mutual insurers, even though such insurers organized before a certain date were exempt, as there was a rational basis for the discrimination.[551]

Retroactive Taxes.—It has been customary from the beginning for Congress to give some retroactive effect to its tax laws, usually making them effective from the beginning of the tax year or from the date of introduction of the bill that became the law.[552] Application of an income tax statute to the entire calendar year in which enactment took place has never, barring some peculiar circumstance, been deemed to deny due process.[553] "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to

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[542] National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[543] Billings v. United States, 232 U.S. 261, 282 (1914).

[544] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[545] Bromley v. McCaughn, 280 U.S. 124 (1929).

[546] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

[547] Alaska Fish Co. v. Smith, 255 U.S. 44 (1921).

[548] LaBelle Iron Works v. United States, 256 U.S. 377 (1921).

[549] Helvering v. Northwest Steel Mills, 311 U.S. 46 (1940).

[550] Fernandez v. Wiener, 326 U.S. 340 (1945); *cf.* Coolidge v. Long, 282 U.S. 582 (1931).

[551] United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) (per curiam).

[552] United States v. Darusmont, 449 U.S. 292, 296–97 (1981).

[553] Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323, 331, 332 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Cooper v. United States, 280 U.S. 409, 411 (1930); Milliken v. United States, 283 U.S. 15, 21 (1931); Reinecke v. Smith, 289 U.S. 172, 175 (1933); United States v. Hudson, 299 U.S. 498, 500–01 (1937); Welch v. Henry, 305 U.S. 134, 146, 148–50 (1938); Fernandez v. Wiener, 326 U.S. 340, 355 (1945); United States v. Darusmont, 449 U.S. 292, 297 (1981).

enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."[554] A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress, was held valid.[555] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[556] Retroactive assessment of penalties for fraud or negligence,[557] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,[558] does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the Due Process Clause.[559] Similarly upheld were a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse[560] and the inclusion in the gross income of the settlor of income accruing to a revocable trust during any period when the settlor had power to revoke or modify it.[561]

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[562] those decisions have recently been distinguished, and their precedential value limited.[563] In *United States v. Carlton*, the Court declared that "[t]he

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[554] Welch v. Henry, 305 U.S. 134, 146–47 (1938).

[555] United States v. Hudson, 299 U.S. 498 (1937). *See also* Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323, 331, 341 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Lynch v. Hornby, 247 U.S. 339, 343 (1918).

[556] Cooper v. United States, 280 U.S. 409 (1930); *see also* Reinecke v. Smith, 289 U.S. 172 (1933).

[557] Helvering v. Mitchell, 303 U.S. 391 (1938).

[558] Helvering v. National Grocery Co., 304 U.S. 282 (1938).

[559] Patton v. Brady, 184 U.S. 608 (1902).

[560] Tyler v. United States, 281 U.S. 497 (1930); United States v. Jacobs, 306 U.S. 363 (1939).

[561] Reinecke v. Smith, 289 U.S. 172 (1933).

[562] Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), modified, 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). *See also* Heiner v. Donnan, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

[563] *Untermyer* was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases

due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation"—retroactive application of legislation must be shown to be "'justified by a rational legislative purpose.'" [564] Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress's purpose was "neither illegitimate nor arbitrary," the Court noted, since Congress had acted "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Also, "Congress acted promptly and established only a modest period of retroactivity." The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." [565]

Deprivation of Property: Retroactive Legislation.—Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not ordinarily condemn it. The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating former employees, who had terminated work in the industry before passage of the law, for black lung disabilities contracted in the course of their work, was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor.[566] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, *i.e.*, that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blamewor-

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were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" The Court noted further that *Untermyer* and *Blodgett* had been limited to situations involving creation of a wholly new tax, and that *Nichols* had involved a retroactivity period of 12 years. Id.

[564] 512 U.S. 26, 30, 31 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

[565] 512 U.S. at 33.

[566] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring) (questioning application of retroactive cost-spreading).

thiness might not have passed muster. The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether "the retroactive application . . . is itself justified by a rational legislative purpose." [567]

Rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a state court before the enabling legislation was passed.[568] For the reason that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," no vested right to use housing, built with the aid of FHA mortgage insurance for transient purposes, was acquired by one obtaining insurance under an earlier section of the National Housing Act, which, though silent in this regard, was contemporaneously construed as barring rental to transients, and was later modified by an amendment that expressly excluded such use.[569] An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of retroactivity which is condemned by law.[570] The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due pro-

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[567] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). *Accord*, United States v. Sperry Corp., 493 U.S. 52, 65 (1989) (upholding imposition of user fee on claimants paid by Iran-United States Claims Tribunal prior to enactment of fee statute). Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636–41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5–4 that the scheme's severe retroactive effect offended the Constitution, though differing on the governing clause. Four of the majority justices based the judgment solely on takings law, while opining that "there is a question" whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.

[568] Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

[569] FHA v. The Darlington, Inc., 358 U.S. 84, 89–91, 92–93 (1958). Dissenting, Justices Harlan, Frankfurter, and Whittaker maintained that under the Due Process Clause the United States, in its contractual relations, is bound by the same rules as private individuals unless the action taken falls within the general federal regulatory power.

[570] Woods v. Stone, 333 U.S. 472 (1948).

cess of law, because it operated not upon production, but upon the marketing of the product after the act was passed.[571]

In the exercise of its comprehensive powers over revenue, finance, and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted[572] and may invalidate provisions in private contracts calling for payment in gold coin,[573] but rights against the United States arising out of contract are more strongly protected by the Due Process Clause. Hence, a law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid,[574] and a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.[575]

The Due Process Clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law.[576] The exception of the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.[577]

Bankruptcy Legislation.—In acting pursuant to its power to enact uniform bankruptcy legislation, Congress has regularly autho-

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[571] Mulford v. Smith, 307 U.S. 38 (1939). An increase in the penalty for production of wheat in excess of quota was valid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount of the loan that might be made to cooperating farmers upon stored "farm marketing excess wheat." Wickard v. Filburn, 317 U.S. 111, 133 (1942).

[572] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 551 (1871).

[573] Norman v. Baltimore & O R.R., 294 U.S. 240 (1935).

[574] Perry v. United States, 294 U.S. 330 (1935).

[575] Lynch v. United States, 292 U.S. 571 (1934). *See also* De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953). Notice that these kinds of cases are precisely the ones that would be condemned under the Contract Clause, even under the relaxed scrutiny now employed, if the action were taken by a state. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). "Less searching standards" are imposed by the Due Process Clauses than by the Contract Clause. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984). Also, statutory reservation of the right to amend an agreement can defuse most such constitutional issues. Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) (amendment of Social Security Act to prevent termination by state when termination notice already filed). The Court has addressed similar issues under breach of contract theory. United States v. Winstar Corp., 518 U.S. 839 (1996).

[576] Noble v. Union River Logging R.R., 147 U.S. 165 (1893).

[577] Danzer Co. v. Gulf R.R., 268 U.S. 633 (1925).

rized retrospective impairment of contractual obligations,[578] but the Due Process Clause (by itself or infused with takings principles) constitutes a limitation upon Congress's power to deprive persons of more secure forms of property, such as the rights secured creditors have to obtain repayment of a debt. The Court had long followed a rule of construction favoring prospective-only application of bankruptcy laws, absent a clear showing of congressional intent,[579] but it was not until 1935 that the Court actually held unconstitutional a retrospective law. Struck down by the Court was the Frazier-Lemke Act, which by its terms applied only retrospectively, and which authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised value at the end of the stay. The Act offended the Fifth Amendment, the Court held, because it deprived the creditor of substantial property rights acquired prior to the passage of the act.[580] However, a modified law, under which the stay was subject to termination by the court and which continued the right of the creditor to have the property sold to pay the debt, was sustained.[581]

The sale of collateral under the terms of a contract may be enjoined without violating the Due Process Clause, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than delay the enforcement of the contract.[582] A provision that claims resulting from rejection of an unexpired lease should be treated as on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.[583] A right of redemption allowed by state law upon

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[578] *E.g.*, Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 673–75 (1935).

[579] Holt v. Henley, 232 U.S. 637, 639–40 (1914). *See also* Auffm'ordt v. Rasin, 102 U.S. 620, 622 (1881).

[580] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[581] Wright v. Vinton Branch, 300 U.S. 440 (1937). The relatively small modifications that the Court accepted as making the difference in validity, and the fact that subsequently the Court interpreted the statute so as to make smaller the modifications, John Hancock Mut. Life Ins. Co. v. Bartels, 308 U.S. 180, 184 & n.3 (1939); Wright v. Union Central Ins. Co., 311 U.S. 273, 278–79 (1940), has created differences of opinion with respect to whether *Radford* remains sound law. *Cf.* Helvering v. Griffiths, 318 U.S. 371, 400–01 & n.52 (1943) (suggesting *Radford* might not have survived *Vinton Branch*).

[582] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648 (1935).

[583] Kuchner v. Irving Trust Co., 299 U.S. 445 (1937).

foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debtor corporation where the trial court found that the claims of junior lienholders had no value.[584]

Right to Sue the Government.—A right to sue the government on a contract is a privilege, not a property right protected by the Constitution.[585] The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.[586] There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting a tax.[587] The denial to taxpayers of the right to sue for refund of processing and floor stock taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.[588] Congress may cut off the right to recover taxes illegally collected by ratifying their imposition and collection, where it could lawfully have authorized such exactions prior to their collection.[589]

Congressional Power to Abolish Common Law Judicial Actions.—Similarly, it is clearly settled that "[a] person has no property, no vested interest, in any rule of the common law."[590] It follows, therefore, that Congress in its discretion may abolish common-law actions, replacing them with other judicial actions or with administrative remedies at its discretion. There is slight intimation in some of the cases that if Congress does abolish a common law action it *must* either duplicate the recovery or provide a reasonable substitute remedy.[591] Such a holding seems only remotely likely,[592] but some difficulties may be experienced with respect to legislation that retrospectively affects rights to sue, such as shortening or length-

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[584] *In re* 620 Church Street Corp., 299 U.S. 24 (1936). In the context of Congress's plan to save major railroad systems, *see Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[585] Lynch v. United States, 292 U.S. 571, 581 (1934).

[586] Dodge v. Osborn, 240 U.S. 118 (1916).

[587] Graham & Foster v. Goodcell, 282 U.S. 409 (1931).

[588] Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).

[589] United States v. Heinszen & Co., 206 U.S. 370, 386 (1907).

[590] *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912). *See also* Silver v. Silver, 280 U.S. 117, 122 (1929) (a state case).

[591] The intimation stems from New York Cent. R.R. v. White, 243 U.S. 188 (1917) (a state case, involving the constitutionality of a workmen's compensation law). While denying any person's vested interest in the continuation of any particular right to sue, id. at 198, the Court did seem twice to suggest that abolition without a reasonable substitute would raise due process problems. Id. at 201. In Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 87–92 (1978), it noticed the contention but passed it by because the law at issue was a reasonable substitute.

ening statutes of limitation, and the like, although these have typically arisen in state contexts. In one decision, the Court sustained an award of additional compensation under the Longshoremen's and Harbor Workers' Compensation Act, made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, the challenge being made by the employer and insurer.[593]

Deprivation of Liberty: Economic Legislation.—The proscription of deprivation of liberty without due process, insofar as substantive due process was involved, was long restricted to invocation against legislation deemed to abridge liberty of contract.[594] The two leading cases invalidating federal legislation, however, have both been overruled, as the Court adopted a very restrained standard of review of economic legislation.[595] The Court's hands-off policy with regard to reviewing economic legislation is quite pronounced.[596]

NATIONAL EMINENT DOMAIN POWER

Overview

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power." [597] Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." [598] In the early years of the nation the federal power of eminent domain lay dormant as to property outside the District of Columbia,[599] and it was not until 1876 that its existence was recognized

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[592] It is more likely with respect to congressional provision of a statutory substitute for a cause of action arising directly out of a constitutional guarantee. *E.g.*, Carlson v. Green, 446 U.S. 14, 18–23 (1980).

[593] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[594] *See* "Liberty of Contract" heading under Fourteenth Amendment, *infra*.

[595] Adair v. United States, 208 U.S. 161 (1908), overruled in substance by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[596] *E.g.*, United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[597] United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of "just compensation" clauses in state constitutions. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879). For in-depth analysis of the eminent domain power, *see* 1 NICHOLS ON EMINENT DOMAIN (Julius L. Sackman, 2006).

[598] *Boom Co.*, 98 U.S. at 406.

[599] Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Jones, 109 U.S. 513 (1883). The general statutory authority for federal condemnation proceedings in federal courts was not en-

by the Supreme Court. In *Kohl v. United States* [600] any doubts were laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the existence of any state. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power,[601] but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects may be effected.[602] This prerogative of the National Government can neither be enlarged nor diminished by a state.[603] Whenever lands in a state are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the state, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state.[604]

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority." [605] The Just Compensation Clause of the Fifth Amendment did not apply to the states,[606] and at first the contention that the Due Process Clause of the Fourteenth Amendment afforded property owners the same measure of protection against the states as the Fifth Amendment did against the Federal Government was rejected.[607] However, within a decade the Court rejected the opposing argument that the amount of compensation to be awarded

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acted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. *See* 1 NICHOLS ON EMINENT DOMAIN § 1.24[5] (Julius L. Sackman, 2006).

[600] 91 U.S. 367 (1876).

[601] United States v. Gettysburg Electric Ry., 160 U.S. 668, 679 (1896).

[602] *E.g.*, California v. Central Pacific Railroad, 127 U.S. 1, 39 (1888) (highways); Luxton v. North River Bridge Co., 153 U.S. 525 (1894) (interstate bridges); Cherokee Nation v. Southern Kansas Ry, 135 U.S. 641 (1890) (railroads); Albert Hanson Lumber Co. v. United States, 261 U.S. 581 (1923) (canal); Ashwander v. TVA, 297 U.S. 288 (1936) (hydroelectric power). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." Berman v. Parker, 348 U.S. 26, 33 (1954).

[603] Kohl v. United States, 91 U.S. 367 374 (1876).

[604] Chappell v. United States, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a state, or that its taking may impair the state's tax revenue, or that the reservoir will obliterate part of the state's boundary and interfere with the state's own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941). So too, land held in trust and used by a city for public purposes may be condemned. United States v. Carmack, 329 U.S. 230 (1946).

[605] Green v. Frazier, 253 U.S. 233, 238 (1920).

[606] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[607] Davidson v. City of New Orleans, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.

in a state eminent domain case is solely a matter of local law. On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." [608] Although the guarantees of just compensation flow from two different sources, the standards used by the Court in dealing with the issues appear to be identical, and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

The power of eminent domain is inherent in government and may be exercised only through legislation or legislative delegation. Although such delegation is usually to another governmental body, it may also be to private corporations, such as public utilities, railroad companies, or bridge companies, when they are promoting a valid public purpose.[609]

Public Use

Explicit in the Just Compensation Clause is the requirement that the taking of private property be for a public use; one cannot be deprived of his property for any reason other than a public use, even with compensation.[610] The question whether a particular intended use is a public use is clearly a judicial one,[611] but the Court has always insisted on a high degree of judicial deference to the legislative determination.[612] "The role of the judiciary in determining whether that power is being exercised for a public use is an extremely narrow one." [613] When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court's willingness to defer to the highest court of the state in

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[608] Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 233, 236–37 (1897). *See also* Sweet v. Rechel, 159 U.S. 380, 398 (1895).

[609] Noble v. Oklahoma City, 297 U.S. 481 (1936); Luxton v. North River Bridge Co., 153 U.S. 525 (1895). One of the earliest examples of such delegation is Curtiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cr.) 233 (1810).

[610] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–59 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885).

[611] "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930).

[612] Kelo v. City of New London, 545 U.S. 469, 482 (2005). The taking need only be "rationally related to a conceivable public purpose." Id. at 490 (Justice Kennedy concurring).

[613] Berman v. Parker, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

resolving such an issue.[614] As early as 1908, the Court was obligated to admit that, notwithstanding its retention of the power of judicial review, "[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses . . . ."[615] However, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[616] There is some suggestion that "the scope of the judicial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[617] but it may well be that the case simply stands for the necessity for great judicial restraint.[618] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.[619]

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago.[620] The modern conception of public use equates it with the police power

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[614] Green v. Frazier, 253 U.S. 283, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930). *See also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[615] Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

[616] United States ex rel. TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id. at 555, 557 (concurring).

[617] 327 U.S. at 552.

[618] So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).

[619] Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 348 U.S. 26, 33 (1954). "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

[620] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power . . . ." Effectuation of these matters being within the authority of the legislature, the power to achieve them through the exercise of eminent domain is established. "For the power of eminent domain is merely the means to the end."[621] Subsequently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[622] Traditionally, eminent domain has been used to facilitate transportation, the supplying of water, and the like,[623] but the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[624]

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[621] Berman v. Parker, 348 U.S. 26, 32, 33 (1954).

[622] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 242 n.2 (Justice Scalia dissenting).

[623] *E.g.*, Kohl v. United States, 91 U.S. 367 (1876) (public buildings); Chicago M. & S.P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Dohany v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); Clark v. Nash, 198 U.S. 361 (1905) (right-of-way across neighbor's land to enlarge irrigation ditch for water without which land would remain valueless); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a State attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

[624] *E.g.*, Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923) (scenic highway); Brown v. United States, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new townsite, even though there might be some surplus lots to be sold); United States v. Gettysburg Electric Ry., 160 U.S. 668 (1896), and Roe v. Kansas ex rel. Smith, 278 U.S. 191 (1929) (historic sites). When time is deemed to be of the essence, Congress takes land directly by statute, authorizing procedures by which owners of appropriated land may obtain just compensation. *See*, *e.g.*, Pub. L. 90–545, § 3, 82 Stat. 931 (1968), 16 U.S.C. § 79(c) (taking land for creation of Redwood National Park); Pub. L. 93–444, 88 Stat. 1304 (1974) (taking lands for addition to Piscataway Park, Mary-

The Supreme Court has also approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,[625] a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase.[626] *Berman* was applied in *Hawaii Housing Auth. v. Midkiff*,[627] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking."[628] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[629]

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[630] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to invigorate a depressed

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land); Pub. L. 100–647, § 10002 (1988) (taking lands for addition to Manassas National Battlefield Park).

[625] 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id. at 33–34 (citations omitted).

[626] Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[627] 467 U.S. 229, 243 (1984).

[628] 467 U.S. at 243.

[629] 467 U.S. at 240. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

[630] 545 U.S. 469 (2005).

economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[631] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[632] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the "errant language" of these decisions, which was "unnecessary" to their holdings.[633]

Just Compensation

"When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[634] The Fifth Amendment's guarantee "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[635]

The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken."[636]

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631 545 U.S. at 487.

632 Written by Justice O'Connor, and joined by Justices Scalia and Thomas, and Chief Justice Rehnquist.

633 545 U.S. at 501.

634 Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

635 Armstrong v. United States, 364 U.S. 40, 49 (1960). "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." United States v. Cors, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscation of enemy property, but aliens not so denominated are entitled to the protection of this clause. *Compare* United States v. Chemical Foundation, 272 U.S. 1, 11 (1926) *and* Stoehr v. Wallace, 255 U.S. 239 (1921), *with* Silesian-American Corp. v. Clark, 332 U.S. 469 (1947), Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), *and* Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952). Takings Clause protections for such aliens may be invoked, however, only "when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

636 Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003); United States ex rel. TVA v. Powelson, 319 U.S. 266, 281 (1943); United States v. Miller, 317 U.S. 369, 375 (1943). The value of the property to the government for its particular use is not a criterion.

Originally the Court required that the equivalent be in money, not in kind,[637] but more recently has cast some doubt on this assertion.[638] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, . . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"[639] The general standard thus is the market value of the property, *i.e.*, what a willing buyer would pay a willing seller.[640] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[641] However, the Court is resistant to alternative standards, having repudiated reliance on the cost of substitute facilities.[642] Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value"

United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. Dohany v. Rogers, 281 U.S. 362 (1930).

Applying the owner's-loss standard, the Court addressed a state program requiring lawyers to deposit client funds that cannot earn net interest in a pooled account generating interest for indigent legal aid. *Brown*, 538 U.S. at 237. Assuming a taking of the client's interest, his pecuniary loss is nonetheless zero; hence, the just compensation required is likewise. *Brown* is in tension with the Court's earlier treatment of a similar state program, where it recognized value in the possession, control, and disposition of the interest. Phillips v. Washington Legal Found., 524 U.S. 156, 170 (1998).

[637] Van Horne's Lessee v. Dorrance, *2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795)*; United States v. Miller, 317 U.S. 369, 373 (1943).

[638] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150–51 (1974).

[639] Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 250 (1897); McGovern v. City of New York, 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936).

[640] United States v. Miller, 317 U.S. 369, 374 (1943); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). *See also* United States v. New River Collieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

[641] United States v. Miller, 317 U.S. 369, 374 (1943).

[642] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

in excess of that price.[643] By a five-to-four decision, the Court ruled that the government was not obliged to pay the present market value of a tug when the value had been greatly enhanced as a consequence of the government's wartime needs.[644]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases decided by five-to-four votes, one in which compensation was awarded and one in which it was denied. Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[645] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[646]

Interest.—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner, and no interest accrues.[647] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contem-

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[643] United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Commodities Trading Corp., 339 U.S. 121 (1950). *See also* Vogelstein & Co. v. United States, 262 U.S. 337 (1923).

[644] United States v. Cors, 337 U.S. 325 (1949). *See also* United States v. Toronto Navigation Co., 338 U.S. 396 (1949).

[645] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id. at 480.

[646] United States v. Fuller, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally created value should apply only when the government was in fact acting in the use of its own property; here the government was acting only as a condemnor. Id. at 494.

[647] Danforth v. United States, 308 U.S. 271, 284 (1939); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

poraneously with the taking."[648] If the owner and the government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[649] Where property of a citizen has been mistakenly seized by the government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property.[650]

Rights for Which Compensation Must Be Made.—If real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable "property,"[651] but also such lesser interests as easements[652] and leaseholds. If only a portion of a tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[653] On the other hand, if the taking has in fact benefitted the owner, the benefit may be set off against the value of the land condemned,[654] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[655] When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.[656]

The Court has also held that the government has a "categorical duty to pay just compensation" when it physically takes personal property, just as when it takes real property.[657] In *Horne v. Depart-*

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[648] United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs v. United States, 290 U.S. 13, 17 (1933); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

[649] Albrecht v. United States, 329 U.S. 599 (1947).

[650] Henkels v. Sutherland, 271 U.S. 298 (1926); *see also* Phelps v. United States, 274 U.S. 341 (1927).

[651] United States v. General Motors Corp., 323 U.S. 373 (1945).

[652] United States v. Welch, 217 U.S. 333 (1910).

[653] Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. United States v. Welch, 217 U.S. 333 (1910).

[654] Bauman v. Ross, 167 U.S. 548 (1897).

[655] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[656] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[657] *See* Horne v. Dep't of Agric., 576 U.S. ___, No. 14–275, slip op. at 5 (2015). In deciding this case, the Court presumably intended to leave intact established ex-

ment of Agriculture, the Court held that a raisin marketing order issued under a Depression-era statute requiring raisin growers to reserve a percentage of their total crop for the federal government to dispose of in its discretion constituted "a clear physical taking" because, even though the scheme was intended to benefit the growers by maintaining stable markets for raisins, the "[a]ctual raisins are transferred from the growers to the Government." [658] The Court further held the government could not avoid paying just compensation for this physical taking by providing for the return to the raisin growers of any net proceeds from the government's sale of the reserve raisins.[659] The majority also rejected the government's argument that the reserve requirement was not a physical taking because raisin growers voluntarily participated in the raisin market.[660] In so doing, the Court noted that selling produce in interstate commerce is not a "special government benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." [661] In addition, the Court determined that the value

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ceptions when the government seizes personal property (e.g., confiscation of adulterated drugs). *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.").

[658] *Horne*, slip op. at 8.

[659] *Id.* at 9–12.

[660] The government's argument might have carried more weight had the marketing order been viewed as a regulatory taking. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."); Bowles v. Willingham, 321 U.S. 503, 519 (1944) (rent control cannot be a taking of premises if "[t]here is no requirement that the apartments be used for purposes which bring them under the [rent control] Act").

[661] *Horne*, slip op. at 13. Here, the Court expressly rejected the argument that the raisin growers could avoid the physical taking of their property by growing different crops, or making different uses of their grapes, by quoting its earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."). The Court also distinguished the raisin reserve provisions from the requirement that companies manufacturing pesticides, fungicides, and rodenticides disclose trade secrets in order to sell those products at issue in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). It did so because the manufacturers in *Ruckelshaus* were seen to have taken part in a "voluntary exchange" of information that included their trade secrets, recognized as prop-

of the raisins for takings purposes was their fair market value, with no deduction for the offsetting benefits of the overall statutory scheme, which is intended to maintain stable markets for raisins.[662]

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,[663] patent rights,[664] and trade secrets.[665] So too, the franchise of a private corporation is property that cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the government was required to pay for the franchise to take tolls as well as for the tangible property.[666] The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required,[667] but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.[668] When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to uncompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the government "took" or destroyed them in perfecting its title.[669] As a general matter, there is no property interest in the continuation of a rule of law.[670] And, even though state participation in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agree-

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erty under the Takings Clause, in exchange for a "valuable Government benefit" in the form of a license to sell dangerous chemicals. No such government benefit was seen to be involved with the raisin growers because they were making "basic and familiar uses" of their property.

[662] *Horne*, slip op. at 14–16.

[663] Lynch v. United States, 292 U.S. 571, 579 (1934); Omnia Commercial Corp. v. United States, 261 U.S. 502, 508 (1923).

[664] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885).

[665] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[666] Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1983).

[667] Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[668] International Paper Co. v. United States, 282 U.S. 399 (1931).

[669] Armstrong v. United States, 364 U.S. 40, 50 (1960).

[670] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978).

ment with the state.[671] Similarly, there is no right to the continuation of governmental welfare benefits.[672]

Consequential Damages.—The Fifth Amendment requires compensation for the taking of "property," hence does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.[673] "Whatever of property the citizen has the government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." [674] An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises.[675] Another exception to the general rule occurs with a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining

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[671] Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

[672] "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).

[673] Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, *see New Haven Inclusion Cases*, 399 U.S. 392, 489–95 (1970).

[674] United States v. General Motors Corp., 323 U.S. 373, 382 (1945).

[675] United States v. General Motors Corp., 323 U.S. 373 (1945). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government seized the tenant's plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. *See also* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

portion ("severance damages") as well as the value of the taken portion.[676]

Enforcement of Right to Compensation.—The nature and character of the tribunal to determine compensation is in the discretion of the legislature, and may be a regular court, a special legislative court, a commission, or an administrative body.[677] Proceedings to condemn land for the benefit of the United States are brought in the federal district court for the district in which the land is located.[678] The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body.[679] Federal courts may appoint a commission in condemnation actions to resolve the compensation issue.[680] If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,[681] although the scope of review may be limited by the legislature.[682] When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[683] "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State

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[676] United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." Id.

[677] United States v. Jones, 109 U.S. 513 (1883); Bragg v. Weaver, 251 U.S. 57 (1919).

[678] 28 U.S.C. § 1403. On the other hand, inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 520 (1998). Inverse condemnation claims against the United States not in excess of $10,000 may also be heard in federal district court under the "Little Tucker Act." 28 U.S.C. § 1346(a)(2).

[679] Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of "all issues" other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation. United States v. Reynolds, 397 U.S. 14 (1970).

[680] Rule 71A(h), Fed. R. Civ. P. These commissions have the same powers as a court-appointed master.

[681] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[682] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897). In federal courts, reports of Rule 71A commissions are to be accepted by the court unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).

[683] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898).

has deprived him of his property unconstitutionally."[684] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he was entitled to.[685]

When Property Is Taken

The issue whether one's property has been "taken" with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, physical damage results to property because of government action, or where regulatory action limits activity on the property or otherwise deprives it of value,[686] whether there has been a taking in the Fifth Amendment sense becomes critical.

Government Activity Not Directed at the Property.—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[687] Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[688] similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street.[689] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the

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[684] McGovern v. City of New York, 229 U.S. 363, 370–71 (1913).

[685] 229 U.S. at 371. *See also* Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).

[686] The Court has not yet determined whether the actions of a court may give rise to a taking. In Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, Justice Scalia, joined by three other Justices, recognized that a court could effect a taking through a decision that contravened established property law. 560 U.S. ___, No. 08–1151, slip op. (2010). Justice Kennedy and Justice Breyer, each joined by one other Justice, wrote concurring opinions finding that the case at hand did not require the Court to determine whether, or when, a judicial decision on the rights of a property owner can violate the Takings Clause. Though all eight participating Justices agreed on the result in *Stop the Beach Renourishment, Inc*, the viability and dimensions of a judicial takings doctrine thus remains unresolved.

[687] *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[688] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[689] Sauer v. City of New York, 206 U.S. 536 (1907). *But see* the litigation in the state courts cited by Justice Cardozo in Roberts v. City of New York, 295 U.S. 264, 278–82 (1935).

governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[690] or by a landowner in raising the height of the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.temple v. c[691]

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when the government floods land permanently or recurrently.[692] A later formulation was that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."[693] It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there.[694] In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.[695] Eventually, the term "inverse condemnation" came to be used to refer to such cases where the government has not instituted formal condemnation proceedings, but instead the property owner has sued for just compensation, claiming that governmental action or regulation has "taken" his property.[696]

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

[691] Manigault v. Springs, 199 U.S. 473 (1905).

[692] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872). Recurrent, temporary floodings are not categorically exempt from Takings Clause liability. Ark. Game & Fishing Comm'n v. United States, 568 U.S. ___, No. 11–597, slip op. (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam).

[693] United States v. Dickinson, 331 U.S. 745, 748 (1947).

[694] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1 (1919); Peabody v. United States, 231 U.S. 530 (1913).

[695] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[696] "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting). *See also* United

Navigable Waters.—The repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce constitute an important reservation to the developing law of liability in the taking area. When damage results consequentially from an improvement to a river's navigable capacity, or from an improvement on a nonnavigable river designed to affect navigability elsewhere, it is generally not a taking of property but merely an exercise of a servitude to which the property is always subject.[697] This exception does not apply to lands above the ordinary high-water mark of a stream,[698] hence is inapplicable to the damage the government may do to such "fast lands" by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.[699] And, when previously nonnavigable waters are made navigable by private investment, government may not, without paying compensation, simply assert a navigation servitude and direct the property owners to afford public access.[700]

Regulatory Takings.—Although it is established that government may take private property, with compensation, to promote the public interest, that interest also may be served by regulation of property use pursuant to the police power, and for years there was broad dicta that no one may claim damages that result from a police regulation designed to secure the common welfare, especially in the area of health and safety.[701] "What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest." [702] But regulation may deprive an owner of most or all beneficial use of his prop-

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States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

[697] Gibson v. United States, 166 U.S. 269 (1897); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

[698] United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961).

[699] United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kansas City Ins. Co., 339 U.S. 799 (1950); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961).

[700] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).

[701] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). *See also The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 255 (1897); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).

[702] 1 Nichols on Eminent Domain § 1.42 (Julius L. Sackman, 2006).

erty and may destroy the values of the property for the purposes to which it is suited.[703] The older cases flatly denied the possibility of compensation for this diminution of property values,[704] but the Court in 1922 established as a general principle that "if regulation goes too far it will be recognized as a taking." [705]

In *Mahon*, Justice Holmes, for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased by deeds that reserved to the coal companies ownership of subsurface mining rights and that held the companies harmless for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and at the same time deprived the coal companies of the entire value of their subsurface estates. The Court observed that "[f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it." [706] The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far." [707] However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.[708]

The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public inter-

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[703] *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance upheld restricting owner of brick factory from continuing his use after residential growth surrounding factory made use noxious, even though value of property was reduced by more than 90%); Miller v. Schoene, 276 U.S. 272 (1928) (no compensation due owner's loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees was rational).

[704] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare).

[705] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of *all* beneficial use of his property requires compensation, unless the owner's proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

[706] 260 U.S. at 414–15.

[707] 260 U.S. at 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. Id. at 416.

[708] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

est.[709] But it was with respect to zoning, in the context of substantive due process, that the Court first experienced some difficulty in this regard. The Court's first zoning case involved a real estate company's challenge to a comprehensive municipal zoning ordinance, alleging that the ordinance prevented development of its land for industrial purposes and thereby reduced its value from $10,000 an acre to $2,500 an acre.[710] Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus valid on its face; whether its application to diminish property values in any particular case was also valid would depend, the Court said, upon a finding that it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [711] A few years later the Court, again relying on due process rather than taking law, did invalidate the application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that to exempt the tract would impair no substantial municipal interest.[712] But then the Court withdrew from the land-use scene until the 1970s, giving little attention to states and their municipalities as they developed more comprehensive zoning techniques.[713]

As governmental regulation of property has expanded over the years—in terms of zoning and other land use controls, environmental regulations, and the like—the Court never developed, as it admitted, a "set formula to determine where regulation ends and taking begins." [714]

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[709] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also* Panhandle Co. v. Highway Comm'n, 294 U.S. 613 (1935); Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953), *and compare* the Court's two decisions in Georgia Ry. & Electric Co. v. City of Decatur, 295 U.S. 165 (1935), *and* 297 U.S. 620 (1936).

[710] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[711] 272 U.S. at 395. *See also* Zahn v. Board of Pub. Works, 274 U.S. 325 (1927).

[712] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[713] Initially, the Court's return to the land-use area involved substantive due process, not takings. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). *See also* City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).

[714] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The phrase appeared first in Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

More recently the Court has observed that, "[i]n the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules." [715] Indeed, "[t]his area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" [716] Nonetheless, the Court has now formulated general principles that guide many of its decisions in the area. [717]

In *Penn Central Transportation Co. v. City of New York*,[718] the Court, while cautioning that regulatory takings cases require "essentially ad hoc, factual inquiries," nonetheless laid out general guidance for determining whether a regulatory taking has occurred. "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." [719]

At issue in *Penn Central* was the City's landmarks preservation law, as applied to deny approval to construct a 53-story office building atop Grand Central Terminal. The Court upheld the landmarks law against Penn Central's takings claim through application of the principles set forth above. The economic impact on Penn Central was considered: the Company could still make a "reasonable return" on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City spe-

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[715] Murr v. Wisconsin 582 U.S. __, __, No. 15–214, slip op. at 7 (2017) (rejecting the argument of the owners of two adjoining undeveloped lots that a regulatory taking occurred through the enactment of regulations that forbade improvment or seperate sale of the lots).

[716] *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency 535 U.S. 302, 322 (2002)).

[717] While observing that the "central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility," the Court in *Murr v. Wisconsin* reiterated the "two guidelines . . . for determining when government regulation is so onerous that it constitutes a taking." *Id.* at ___, slip op. at 7. First, with some qualifications, "'a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause.'" *Id.* (quoting Palazzolo v. Rhode Island, 533 U. S. 606, 617 (2001)). Second, if "a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at ___, slip op. at 7–8 (quoting *Palazzolo*, 533 U.S. at 617).

[718] 438 U.S. 104 (1978). Justices Rehnquist and Stevens and Chief Justice Burger dissented. Id. at 138.

[719] 438 U.S. at 124 (citations omitted).

cifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.[720]

Justice Holmes began his analysis in *Mahon* with the observation that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law,"[721] and *Penn Central's* economic impact standard also leaves ample room for recognition of this principle. Thus, the Court can easily hold that a mere permit requirement does not amount to a taking,[722] nor does a simple recordation requirement.[723] The tests become more useful, however, when compliance with regulation becomes more onerous.

Several times the Court has relied on the concept of "distinct [or, in most later cases, 'reasonable'] investment-backed expectations" first introduced in *Penn Central*. In *Ruckelshaus v. Monsanto Co.*,[724] the Court used the concept to determine whether a taking had resulted from the government's disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a distinct investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[725] Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[726] Rely-

[720] 438 U.S. at 124–28, 135–38.

[721] 260 U.S. at 413.

[722] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (requirement that permit be obtained for filling privately-owned wetlands is not a taking, although permit denial resulting in prevention of economically viable use of land may be).

[723] Texaco v. Short, 454 U.S. 516 (1982) (state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps is not a taking); United States v. Locke, 471 U.S. 84 (1985) (reasonable regulation of recordation of mining claim is not a taking).

[724] 467 U.S. 986 (1984).

[725] 467 U.S. at 1011.

[726] 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. Id. at 1008–10.

ing less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly v. Pension Benefit Guaranty Corp.*[727] upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and "substantially disproportionate" retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*[728] struck down the Coal Miner Retiree Health Benefit Act's requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

On the other hand, a federal ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts, the Court not directly addressing the ban's obvious interference with investment-backed expectations.[729] The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.[730]

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[727] 475 U.S. 211 (1986). *Accord*, Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645–46 (1993). In addition, *see* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (involving frustration of "expectancies" developed through improvements to private land and governmental approval of permits), and PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with "reasonable investment backed expectations").

[728] 524 U.S. 498 (1998). The split doctrinal basis of *Eastern Enterprises* undercuts its precedent value, and that of *Connolly* and *Concrete Pipe*, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

[729] Andrus v. Allard, 444 U.S. 51 (1979).

[730] Similarly, the Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. at 594. *Contrast* Hodel v. Irving, 481 U.S. 704 (1987), where the Court found insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property. Note as well the differing views expressed in *Irving* as to whether that case limits Andrus v. Allard to its facts. Id. at 718 (Justice Brennan concurring, 719 (Justice Scalia concurring). *See also* the suggestion in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027–28 (1992), that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other.

The Court has made plain that, in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts are to compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff's property—the "parcel as a whole"—that sets the scope of analysis.[731] In *Murr v. Wisconsin*, the Court stated that, "[l]ike the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. Courts must instead define the parcel in a manner that reflects *reasonable expectations* about the property." [732] In *Murr*, the owners of two small adjoining lots, previously owned separately, wished to sell one of the lots and build on the other. The landowners were prevented from doing so by state and local regulations, enacted to implement a federal act, which effectively merged the lots when they came under common ownership, thereby barring the separate sale or improvement of the lots. The landowners therefore sought just compensation, alleging a regulatory taking of their property.[733]

In ruling against the landowners, the Supreme Court set forth a flexible multi-factor test for defining "the proper unit of property" to analyze whether a regulatory taking has occurred.[734] The Court continued the approach of prior cases whereby the boundaries of

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[731] The "parcel as a whole" analysis refers to the precept that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130; *see also* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602, 644 (1993); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court affirmed the established spatial dimension of the doctrine, under which the court must consider the entire relevant tract, as well as the functional dimension, under which the court must consider plaintiff's full bundle of rights. *See* 535 U.S. 302, 327 (2002). The spatial dimension is perhaps best illustrated by the analysis in *Penn Central*, wherein the Court declined to segment Grand Central Terminal from the air rights above it. 438 U.S. at 130. And the functional dimension of the parcel as a whole is demonstrated by the Court's refusal in *Andrus v. Allard* to segment one "stick" in the plaintiff's "bundle" of property rights in holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained. 444 U.S. 51, 65–66 (1979). In *Tahoe-Sierra*, the Court also added a temporal dimension to the "parcel as a whole" analysis, under which a court considers the entire time span of plaintiff's property interest. Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use because use and value return in the period following the moratorium's expiration. *Tahoe-Sierra*, 535 U.S. at 327. Thus, such moratoria are to be analyzed under the ad hoc, multifactor *Penn Central* test, rather than a per se "total takings" approach.

[732] *Id*. at 20 (internal citation omitted) (emphasis added).

[733] *Id*.

[734] *Id*. at 11. In doing so, the Court rejected arguments for the adoption of "a formalistic rule to guide the parcel inquiry," one that would "tie the definition of the parcel to state law." *See id*. at 14.

the parcel determine the "denominator of the fraction" of value taken from a property by a governmental regulation, which in turn can determine whether the government has "taken" private property.[735] Under this formula, regulators have an interest in a larger denominator—in the *Murr* case, combining the two adjoining lots—to reduce the likelihood of having to provide compensation, while property owners seeking to show that their property has been taken have an interest in the denominator being as small as possible. The *Murr* Court instructed that, in determining the parcel at issue in a regulatory takings case, "no single consideration can supply the exclusive test for determining the denominator.[736] Instead, courts must consider a number of factors," including (1) "the treatment of the land under state and local law" [737]; (2) "the physical characteristics of the land" [738]; and (3) "the prospective value of the regulated land." [739]

In the course of its opinion in *Penn Central* the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use.[740] The principle, it had been contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*.[741] In that case, after the town had expanded around an excavation used by a company for mining sand and gravel, the town enacted an ordinance that in effect terminated further mining at the site. Declaring that no compensation was owed, the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb

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[735] *Id.* at 9 ("[B]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' As commentators have noted, the answer to this question may be outcome determinative." (quoting *Keystone*, 480 U.S. at 497)).

[736] *Id.*

[737] *Id.* at 11–12 ("[C]ourts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.").

[738] *Id.* ("[C]ourts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.").

[739] *Id.* at 11, 13 ("[C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.").

[740] The dissent was based upon this test. *Penn Central*, 438 U.S. at 144–46.

[741] 369 U.S. 590 (1962). Hadacheck v. Sebastian, 239 U.S. 394 (1915), and, perhaps, Miller v. Schoene, 276 U.S. 272 (1928), also fall under this heading, although *Schoene* may also be assigned to the public peril line of cases.

the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." [742] In *Penn Central*, however, the Court denied that there was any such test and that prior cases had turned on the concept. "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." [743] More recently, in *Lucas v. South Carolina Coastal Council*,[744] the Court explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." [745]

Penn Central is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a *per se* takings rule for certain physical invasions: when government permanently [746] occupies property (or authorizes someone else to do so), the action constitutes a taking regardless of the public interests served or the extent of damage to the parcel as a whole.[747] The modern case dealt with a law that required landlords to permit a cable tele-

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[742] 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. 369 U.S. at 595. The test was derived from Lawton v. Steele, 152 U.S. 133, 137 (1894) (holding that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction).

[743] *Penn Central*, 438 U.S. at 133–34 n.30.

[744] 505 U.S. 1003 (1992).

[745] 505 U.S. at 1026. The *Penn Central* majority also rejected the dissent's contention, 438 U.S. at 147–50, that regulation of property use constitutes a taking unless it spreads its distribution of benefits and burdens broadly so that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. The Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others: "Legislation designed to promote the general welfare commonly burdens some more than others." Id. at 133–34.

[746] By contrast, the *per se* rule is inapplicable to *temporary* physical occupations of land. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428, 434 (1982); PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

[747] The rule emerged from cases involving flooding of lands and erection of poles for telegraph lines, *e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904).

vision company to install its cable facilities upon their buildings; although the equipment occupied only about 1½ cubic feet of space on the exterior of each building and had only a *de minimis* economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.[748] Recently, the Court sharpened further the distinction between regulatory takings and permanent physical occupations by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.[749] Physical invasions falling short of permanent physical occupations remain subject to *Penn Central*.

A second *per se* taking rule is of more recent vintage. Land use controls constitute takings, the Court stated in *Agins v. City of Tiburon*, if they do not "substantially advance legitimate governmental interests," or if they deny a property owner "economically viable use of his land."[750] This second *Agins* criterion creates a categorical rule: when, with respect to the parcel as a whole, the landowner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[751] The only exceptions, the Court explained in *Lucas*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations. Regulations "so severe" as to prohibit all economically beneficial use of land "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nui-

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[748] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *Loretto* was distinguished in FCC v. Florida Power Corp., 480 U.S. 245 (1987); regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking in the absence of any requirement that utilities allow attachment and acquiesce in physical occupation of their property. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992) (no physical occupation was occasioned by regulations in effect preventing mobile home park owners from setting rents or determining who their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land).

[749] *Tahoe-Sierra*, 535 U.S. at 323. *Tahoe-Sierra's* sharp physical-regulatory dichotomy is hard to reconcile with dicta in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[750] 447 U.S. 255, 260 (1980).

[751] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). The *Agins/Lucas* total deprivation rule does not create an all-or-nothing situation, since "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. Id. at 1019 n.8 (1992). *See also Palazzolo*, 533 U.S. at 632.

sance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . , or otherwise." [752] Thus, while there is no broad "noxious use" exception separating police power regulations from takings, there is a narrower "background principles" exception based on the law of nuisance and unspecified "property law" principles.

Together with the investment-backed expectations factor of *Penn Central*, background principles were viewed by many lower courts as supporting a "notice rule" under which a taking claim was absolutely barred if based on a restriction imposed under a regulatory regime predating plaintiff's acquisition of the property. In *Palazzolo v. Rhode Island*,[753] the Court forcefully rejected the absolute version of the notice rule, regardless of rationale. Under such a rule, it said, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause." [754] Whether any role is left for preacquisition regulation in the takings analysis, however, the Court's majority opinion did not say, leaving the issue to dueling concurrences from Justice O'Connor (prior regulation remains a factor) and Justice Scalia (prior regulation is irrelevant). Less than a year later, Justice O'Connor's concurrence carried the day in extended dicta in *Tahoe-Sierra*,[755] though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

The "or otherwise" reference, the Court explained in *Lucas*,[756] was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in *United States v. Caltex, Inc.*,[757] the owners of property destroyed by retreating United States armies in Manila during World War II were held not entitled to compensation, and in *United States v. Central Eureka Mining Co.*,[758] the Court held that a federal or-

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[752] 505 U.S. at 1029.

[753] 533 U.S. 606 (2001).

[754] 533 U.S. at 627.

[755] 535 U.S. at 335.

[756] 505 U.S. at 1029 n.16.

[757] 344 U.S. 149 (1952). In dissent, Justices Black and Douglas advocated the applicability of a test formulated by Justice Brandeis in Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935), a regulation case, to the effect that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

[758] 357 U.S. 155 (1958).

der suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensation for loss of profits. Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of the damage inflicted on the buildings subsequent to the occupation.[759]

The first prong of the *Agins* test,[760] asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings law, said *Lingle v. Chevron U.S.A. Inc.*,[761] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[762] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[763] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads)[764] must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of

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[759] National Bd. of YMCA v. United States, 395 U.S. 85 (1969). "An undertaking by the government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

[760] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[761] 544 U.S. 528 (2005).

[762] 544 U.S. at 542.

[763] 483 U.S. 825 (1987).

[764] A third type of inverse condemnation, in addition to regulatory and *Nollan*, also applies to exactions imposed as conditions precedent to permit approval. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. ___, No. 11–1447 (2013). To the argument that nothing is "taken" when a permit is denied for failure to agree to a condition precedent, the Court stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly. *Id.* at 10. The Court in *Koontz* did not discuss what remedies might be available to a plaintiff who refuses to accept certain demanding conditions precedent and thereby is refused a permit.

extortion." [765] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard* [766] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community—at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[767] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[768] The Court clarified this uncertainty in *Koontz v. St. Johns River Water Management District* by holding that monetary exactions imposed under land use permitting were subject to essential nexus/rough proportionality analysis.[769]

The announcement following *Penn Central* of the above *per se* rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan/Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analy-

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[765] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[766] 512 U.S. 374 (1994).

[767] 526 U.S. 687 (1999).

[768] A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been *per se physical* takings if condemned directly.

[769] 570 U.S. ___, No. 11–1447 (2013).

sis. These decisions endorse *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's *per se* rules to the "relatively narrow" physical occupation and total wipeout circumstances, and the "special context" of exactions.[770]

Following the *Penn Central* decision, the Court grappled with the issue of the appropriate remedy property owners should pursue in objecting to land use regulations.[771] The remedy question arises because there are two possible constitutional objections to be made to regulations that go "too far" in reducing the value of property or which do not substantially advance a legitimate governmental interest. The regulation may be invalidated as a denial of due process, or may be deemed a taking requiring compensation, at least for the period in which the regulation was in effect. The Court finally resolved the issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that when land use regulation is held to be a taking, compensation is due for the period of implementation prior to the holding.[772] The Court recognized that, even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[773] Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy.[774]

The process of describing general criteria to guide resolution of regulatory taking claims, begun in *Penn Central*, has reduced to some

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[770] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). The other two decisions are Palazzolo v. Rhode Island, 533 U.S. 606 (2001), and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[771] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (issue not reached because property owners challenging development density restrictions had not submitted a development plan); Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 293–97 (1981), and Hodel v. Indiana, 452 U.S. 314, 333–36 (1981) (rejecting facial taking challenges to federal strip mining law).

[772] 482 U.S. 304 (1987). The decision was 6–3, Chief Justice Rehnquist's opinion of the Court being joined by Justices Brennan, White, Marshall, Powell, and Scalia, and Justice Stevens' dissent being joined in part by Justices Blackmun and O'Connor. The position the Court adopted had been advocated by Justice Brennan in a dissenting opinion in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (dissenting from Court's holding that state court decision was not "final judgment" under 28 U.S.C. § 1257).

[773] 482 U.S. at 321.

[774] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

extent the ad hoc character of takings law. It is nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorized are explained in different terms by the Court. The overriding objective, the Court frequently reminds us, is to vitalize the Takings Clause's protection against government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [775] Thus a taking may be found if the effect of regulation is enrichment of the government itself rather than adjustment of the benefits and burdens of economic life in promotion of the public good.[776] Similarly, the Court looks askance at governmental efforts to secure public benefits at a landowner's expense—"government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions." [777]

On the other side of the coin, the nature as well as the extent of property interests affected by governmental regulation sometimes takes on importance. Some strands are more important than others. The right to exclude others from one's land is so basic to ownership that extinguishment of this right ordinarily constitutes a taking.[778] Similarly valued is the right to pass on property to one's heirs.[779]

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[775] Armstrong v. United States, 364 U.S. 40, 49 (1960). For other incantations of this fairness principle, *see Penn Central*, 438 U.S. at 123–24; and Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 333–42–89 (2002).

[776] Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) (government retained the interest derived from funds it required to be deposited with the clerk of the county court as a precondition to certain suits; the interest earned was not reasonably related to the costs of using the courts, since a separate statute required payment for the clerk's services). By contrast, a charge for governmental services "not so clearly excessive as to belie [its] purported character as [a] user fee" does not qualify as a taking. United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

[777] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978). In addition to the cases cited there, *see also* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (viewed as governmental effort to turn private pond into "public aquatic park"); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ("extortion" of beachfront easement for public as permit condition unrelated to purpose of permit).

[778] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (physical occupation occurs with public easement that eliminates right to exclude others); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigation servitude requiring public access to a privately-owned pond was a taking under the circumstances; owner's commercially valuable right to exclude others was taken, and requirement amounted to "an actual physical invasion"). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (requiring shopping center to permit individuals to exercise free expression rights on property onto which public had been invited was not destructive of right to exclude others or "so essential to the use or economic value of [the] property" as to constitute a taking).

[779] Hodel v. Irving, 481 U.S. 704 (1987) (complete abrogation of the right to pass on to heirs fractionated interests in lands constitutes a taking), Babbitt v. Youpee, 519 U.S. 234 (1997) (same result based on "severe" restriction of the right).

Failure to incur administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doctrine, an area of takings law that the Court has developed extensively since *Penn Central*. In the leading decision of *Williamson County Regional Planning Commission v. Hamilton Bank*,[780] the Court announced the canonical two-part ripeness test for takings actions brought in federal court. First, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land. Second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal court. Thus, the claim in *Williamson County* was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,[781] a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved. In a somewhat different context, a taking challenge to a municipal rent control ordinance was considered "premature" in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be considered a reasonable rent increase.[782] Beginning with *Lucas* in 1992, however, the Court's ripeness determinations have displayed an impatience with formalistic reliance on the "final decision" rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*,[783] for example, the Court saw no point in requiring the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue made plain that no development at all would be permitted there. "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[784]

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[780] 473 U.S. 172 (1985).
[781] 477 U.S. 340 (1986).
[782] Pennell v. City of San Jose, 485 U.S. 1 (1988).
[783] 533 U.S. 606 (2001).
[784] 533 U.S. at 620. *See also* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff's not having applied for sale of her transferrable development rights, because no discretion remains to agency and value of such rights is a simple issue of fact).

Facial challenges dispense with the *Williamson County* final decision prerequisite, though at great risk to the plaintiff in that, without pursuing administrative remedies, a claimant often lacks evidence that a statute has the requisite economic impact on his or her property.[785]

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely—a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[786] the Court unanimously declined to create an exception to the federal full faith and credit statute[787] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[788] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[789]

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[785] *See*, *e.g.*, Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

[786] 545 U.S. 323 (2005).

[787] 28 U.S.C. § 1738. The statute commands that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." The statute has been held to encompass the doctrines of claim and issue preclusion.

[788] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

[789] *San Remo Hotel*, 545 U.S. at 348 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).