Government Powers and Limitations

GOVERNMENT POWERS AND LIMITATIONS

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Introduction

There are several good constitutional law and civil rights and liberties textbooks on the market, so why create another? There was a confluence of factors that led to the creation of this volume. First, and most importantly, after many years of teaching a constitutional law series at a large public institution, it became apparent that the costs of the texts were a barrier to many students. Second, as texts were updated, the authors had to make choices about inclusion or exclusion of cases due to printing and publishing constraints. As such, some material that was pedagogically useful had to be jettisoned to include recent cases as the Court has changed doctrines in multiple areas recently. These two factors were the main motivations. Trailing behind them is the wonderful support and staff at Oregon State University's Open Educational Resources unit. With their help, I knew that the volumes would be useful and accessible to students.

To complete this volume, I worked with several excellent students that had completed the constitutional law series. We examined several other textbooks, and discussed which cases were critical and which were most helpful to them as they tried to understand the substantive material from the course. Together we built a plan for each chapter to include cases that are landmarks, and other cases that help build the profile of the doctrine so that there are guideposts as the doctrine shifts or changes. We read the full case and then selected the key components that related to the constitutional issue, focusing on the key facts, the constitutional questions, and the resolution of the case. We included dissents and concurring opinions where we agreed they were historically important, useful or provided a significantly different approach to the question. We have also included appendices that may help students place the cases in historical context. First, each case is hyperlinked by year to a table that indicates who was on the Court at the time of the decision, their appointing president, and that president's political affiliation. When available, the table also includes the justices' Martin Quinn scores for that year so that the ideological balance of the Court can be easily assessed. For these years, there is also a figure that provides these data in a visual format. Finally, there is a table and graph of the scores of the median justice for the years available, again using the Martin Quinn scores as our source.

To use this volume, I would approach it as any other constitutional law textbook; however, there is a significant difference. This volume, again, only contains excerpts. Unless the justices provide an introduction or make a strong connection to previous doctrine in the excerpt, these handholds between major cases are left to the instructor to elucidate. I have used this type of text before in a "rights of the criminally accused course" and it has been highly successful and pushes the students to make the connections as they read through the cases and discuss them in class

We hope to update this text every other year. I plan to assign my students a group project to excerpt a recent important case that warrants inclusion in the volume. The best versions of these excerpts, with additional editing by me, will then be included in a new version

A huge thank you to Alex Metzdorf, Stella Kemp, Ethan Derstine, and Walter DePuy for their hard work and dedication to this project. Alex was my righthand throughout this volume, working with me to create the table of contents, creating many excerpts, and helping revise others. Stella, Ethan, and Walter contributed many excerpts and ensured we finished by deadline.

Rorie Solberg, Editor
Oregon State University

Case List

A copy of the following case list, with embedded links for each chapter and case, is available to download as a document (https://beav.es/qDh) for editing and distribution. The list is also available to download as a sheet (https://beav.es/qD7) for easier reorganization and filtering.

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The Judiciary

Case List

Judiciary Review

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Martin v. Hunter's Lessee (1825)

Jurisdiction

Ex. parte McCardle (1869)
Patchak v. Zinke (2018)

Judiciary Review

Marbury v. Madison

5 U.S. 137 (1803)

> Vote: 4-0
> Decision: Dismissed
> Majority: Marshall, joined by Paterson, Chase, Washington
> Not participating: Cushing, Moore

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

...

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is:

1. Has the applicant a right to the commission he demands?

...

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States after which the seal of the United States was fixed to it, but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property ...

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shown that he has done everything to be performed by him ...

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed ... His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act, and, being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction ...

The signature is a warrant for affixing the great seal to the commission, and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made ...

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment, which must precede it and which is the mere act of the President ...

It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State ...

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? ...

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection ...

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right ...

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress ... Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned. but that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted ...

If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction.

In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political ... The acts of such an officer, as an officer, can never be examinable by the Courts.

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others ...

... where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy ...

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority ...

That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete and evidenced was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is then the opinion of the Court:

1. That, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace ... and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.
2. That, having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies ...

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone,

“to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice.”

Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired ... [w]hether it can [be] issue[d] from the Court ...

It has been insisted ... that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the Legislature, to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage — is entirely without meaning — if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it ...

When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction ...

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Excerpted by Kimberly Clairmont

Eakin v. Raub

12 Sergeant & Rawle 330 (Pa. 1825)

J. Gibson Dissenting

...

But it is said, that without it, the latter act would be unconstitutional; and, instead of controverting this, I will avail myself of it, to express an opinion which I have deliberately formed, on the abstract right of the judiciary to declare an unconstitutional act of the legislature void. It seems to me there is a plain difference, hitherto unnoticed, between acts that are repugnant to the constitution of the particular state, and acts that are repugnant to the constitution of the *United States;* my opinion being, that the judiciary is bound to execute the former, but not the latter. I shall hereafter attempt to explain this difference, by pointing out the particular provisions in the constitution of the *United States* on which it depends. I am aware, that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma; but I apprehend rather as a matter of faith than of reason ... But I may premise, that it is not a little remarkable, that although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall, (in *Marbury* v. *Madison*) and if the argument of a jurist so distinguished for the strength of his ratiocinative powers to be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend ... The constitution is a collection of fundamental laws, not to be departed from in practice nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error* [common error makes law], which offers a ready justification for every usurpation that has not been resisted ... Instead, therefore, of resting on the fact, that the right in question has universally been assumed by the *American* courts, the judge who asserts it ought to be prepared to maintain it on the principles of the constitution ...

I begin, then, by observing that in this country, the powers of the judiciary are divisible into those that are POLITICAL and those that are purely CIVIL. Every power by which one organ of the government is enabled to control another, or to exert an influence over its acts, is a political power. The political powers of the judiciary are *extraordinary* and *adventitious;* such, for instance, as are derived from certain peculiar provisions in the constitution of the *United States,* of which hereafter: and they are derived, by direct grant, from the common fountain of all political power. On the other hand, its civil, are its *ordinary* and *appropriate* powers; being part of its essence, and existing independently of any supposed grant in the constitution. But where the government exists by virtue of a *written* constitution, the judiciary does not necessarily derive from that circumstance, any other than its ordinary and appropriate powers. Our judiciary is constructed on the principles of the common law, which enters so essentially into the composition of our social institutions as to be inseparable from them, and to be in fact, the basis of the whole scheme of our civil and political liberty. In adopting any organ or instrument of the common law, we take it with just such powers and capacities as were incident to it at the com-

mon law, except where these are expressly, or by necessary implication, abridged or enlarged in the act of adoption; and, that such act is a written instrument, cannot vary its consequences or construction. In the absence of special provision to the contrary, sheriffs, justices of the peace, and other officers whose offices are established in the constitution, exercise no other powers here, than what similar officers do in *England;* and trial by jury would have been according to the course of the common law, without any declaration to that effect in the constitution. Now, what are the powers of the judiciary at the common law? They are those that necessarily arise out of its immediate business; and they are therefore commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever ... With us, although the legislature be the depository of only so much of the sovereignty as the people have thought fit to impart, it is nevertheless sovereign within the limit of its powers, and may relatively claim the same pre-eminence here that it may claim elsewhere. It will be conceded, then that the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature ...

The constitution of *Pennsylvania* contains no express grant of political powers to the judiciary. But, to establish a grant by implication, the constitution is said to be a law of superior obligation; and, consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way. This is conceded. But it is a fallacy, to suppose that they can come into collision *before the judiciary*. What is a constitution? It is an act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts. What is a statute? It is an act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. The constitution, then, contains no practical rules for the administration of *distributive justice,* with which alone the judiciary has to do; these being furnished in acts of ordinary legislation, by that organ of the government, which, in this respect, is exclusively the representative of the people; and it is generally true, that the provisions of a constitution are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary ... In all other cases, if the act of assembly supposed to be unconstitutional, were laid out of the question, there would remain no rule to determine the point in controversy in the cause, but the statute or common law, as it existed before the act of assembly was passed; and the constitution and act of assembly therefore do not furnish conflicting rules *applicable to the point before the court;* nor is it at all necessary, that the one or the other of them should give way ...

By the third article and second section, appellate jurisdiction of all cases arising under the constitution and laws of the *United States,* is reserved to the federal judiciary, under such regulations as congress may prescribe; and, in execution of this provision, congress has prescribed regulations for removing into the Supreme Court of the *United States,* all causes decided by the highest court of judicature of any state, which involve the construction of the constitution, or of any law or treaty of the *United States*. This is another guard against infraction of the limitations imposed on state sovereignty, and one which is extremely efficient in practice; for reversals of decisions in favour of the constitutionality of acts of assembly, have been frequent on writs of error to the Supreme Court of the *United States*.

Now, a reversal implies that it was not only the right, but the duty of the inferior court to decide otherwise; for where there is but one way of deciding, there can be no error. But what beneficial result would there be produced by the decision of a state court in favor of a state law palpably unconstitutional? The injured party would have the judgment reversed by the court in the last resort, and the cause would come back with a mandate to decide differently, which the state court dare not disobey; so that nothing would eventually be gained by the party claiming under the law of the state, but on the contrary, he would be burdened with additional costs. I grant, however, that the state judiciary ought not to exercise the

power, except in cases free from all doubt, because, as a writ of error to the supreme court of the United States lies to correct an error only in favor of the constitutionality of the state law, an error in deciding against it would be irremediable. Anticipating those who think they perceive in this, exactly what I have censured in those who assume the existence of the same power in respect to laws that are repugnant to the constitution of the state, but restrict the exercise of it to clear cases, I briefly remark, that the instances are not parallel; an error in deciding against the validity of the law, being irreparable in the one, and not so in the other. Unless, then, the respective states are not bound by the engagement, which they have contracted by becoming parties to the constitution of the United States, they are precluded from denying either the right or the duty of their judges, to declare their laws void when they are repugnant to that constitution ...

Excerpted by Kimberly Clairmont

Martin v. Hunter's Lessee

14 U.S. 304 (1816)

> Vote: 6-0
> Decision: Affirmed
> Majority: Story, joined by Washington, Johnson, Livingston, Todd, and Duvall
> Concurrence: Johnson
> Not participating: Marshall

Story J. delivered the opinion of the Court ...

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this Court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate:

"The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States; that the writ of error, in this cause, was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were, *coram non judice* [law before a court lacking authority to hear and decide the case in question], in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the Court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that Court, add much to the difficulty of the task which has so unwelcomely fallen upon us ...

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority ... The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own Constitutions, and the people of every State had the right to modify and restrain them according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in [the Tenth A]mendment of the Constitution ...

The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument ... is to have a reasonable construction, according to the import of its terms, and where a power is expressly given in general terms, it is not to be restrained to particular cases unless that construction grow out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure ... It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mould and model the exercise of its powers ...

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The 1st. section declares, "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior Courts as the Congress may, from time to time, ordain and establish."

The 2d section declares, that "the judicial power shall extend to all cases in law or equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, 'under their authority; to all cases affecting ambassadors, other public ministers and consuls ... to controversies between two or more states; between a state and citizens of another state ... "

It then proceeds to declare, that

"in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations, as the Congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that Government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon States, and to deprive them altogether of the exercise of some powers of sovereignty and to restrain and regulate them in the exercise of others ...

The object of the Constitution was to establish three great departments of Government — the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution itself, a construction which would lead to such a result cannot be sound ...

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe ... But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may therefore be exercised by Congress under every variety of form of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this Court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular Courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the let-

ter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted ...

It must therefore be conceded that the Constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States which might yet depend before State tribunals. It was foreseen that, in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our Governments, and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives ...

It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is whether the case at bar be within the purview of the 25th section of the Judiciary Act, so that this Court may rightfully sustain the present writ of error ... But it is contended, that the former judgment of this Court was rendered upon a case not within the purview of this section of the Judicial Act, and that, as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain any subsequent proceedings. To this argument several answers may be given ... The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the

propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this Court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this Court can revise its own judgments ...

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence that it is consistent with the Constitution and laws of the land ...

It is the opinion of the whole Court that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby, affirmed.

Excerpted by Kimberly Clairmont

Jurisdiction

Ex. parte McCardle

74 U.S. 506 (1869)

> Vote: 8-0
> Decision: Dismissed for want of jurisdiction
> Majority: Chase, joined by Nelson, Grier, Clifford, Swayne, Miller, Davis, and Field

The CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make." ...

[A]cts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in this case however is not an interference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867 affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause ...

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

Excerpted by Kimberly Clairmont

Patchak v. Zinke

583 U.S. ___ (2018)

> Vote: 6-3
> Decision: Affirmed
> Plurality: Thomas, joined by Breyer, Alito, Kagan
> Concurrence: Breyer
> Concurrence: Ginsburg (in judgment), joined by Sotomayor
> Concurrence: Sotomayor (in judgment)
> Dissent: Roberts, joined by Kennedy Gorsuch

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which JUSTICE BREYER, JUSTICE ALITO, and JUSTICE KAGAN join.

Petitioner, David Patchak, sued the Secretary of the Interior for taking land into trust on behalf of an Indian Tribe. While his suit was pending in the District Court, Congress enacted the ... Gun Lake Act or Act ... which provides that suits relating to the land "shall not be filed or maintained in a Federal court and shall be promptly dismissed." Patchak contends that, in enacting this statute, Congress impermissibly infringed the judicial power that Article III of the Constitution vests exclusively in the Judicial Branch. Because we disagree, we affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit ...

The separation of powers, among other things, prevents Congress from exercising the judicial power ... One way that Congress can cross the line from legislative power to judicial power is by "usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it." ... The simplest example would be a statute that says, "In Smith v. Jones, Smith wins." ... At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins ...

To distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court's precedents establish the following rule: Congress violates Article III when it "compel[s] ... findings or results under old law" ... But Congress does not violate Article III when it "changes the law." ...

Statutes that strip jurisdiction "chang[e] the law" for the purpose of Article III ... just as much as other exercises of Congress' legislative authority. Article I permits Congress "[t]o constitute Tribunals inferior to the supreme Court," §8, and

Article III vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," §1. These provisions reflect the so-called Madisonian Compromise, which resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress ...

Indeed, this Court has held that Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases. Shortly after the Civil War, for example, Congress repealed this Court's appellate jurisdiction over certain habeas corpus cases ... William McCardle, a military prisoner whose appeal was pending at the time, argued that the repealing statute was "an exercise by the Congress of judicial power." This Court disagreed. Jurisdiction-stripping statutes, the Court explained, do not involve "the exercise of judicial power" or "legislative interference with courts in the exercising of continuing jurisdiction ... "

This Court has reaffirmed these principles on many occasions. Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power ...

We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court's doubts about Congress' unexpressed motives, the number of "cases [that] were pending when the provision was enacted," or the time left on the statute of limitations ... But even if it did, we disagree with the dissent's characterization of §2(b). Nothing on the face of §2(b) is limited to Patchak's case, or even to his challenge under the Indian Reorganization Act. Instead, the text extends to all suits "relating to" the Bradley Property. Thus, §2(b) survives even under the dissent's theory: It "prospectively govern[s] an open-ended class of disputes" ...

We conclude that §2(b) of the Gun Lake Act does not violate Article III of the Constitution. The judgment of the Court of Appeals is, therefore, affirmed.

It is so ordered.

Excerpted by Kimberly Clairmont

Justiciability

Case List

Political Question Doctrine

Baker v. Carr (1962)
Nixon v. United States (1993)

Mootness

De Funis v. Odegaard (1974)

Exceptions to Mootness

Sibron v. New York (1968)
Richardson v. Wright (1972)
Roe v. Wade (1973)
West VA v. EPA (2022)

Ripeness

Trump v. New York (2020)

Standing

Flast v. Cohen (1968)
Lujan v. Defenders of Wildlife (1992)

Political Question Doctrine

Baker v. Carr

369 U.S. 186 (1962)

> Decision: Reversed and remanded
> Vote: 6-2
> Majority: Brennan, joined by Warren, Black, Douglas, Clark, Stewart
> Concurrence: Douglas
> Concurrence: Stewart
> Dissent: Frankfurter, joined by Harlan
> Dissent: Harlan, joined by Frankfurter
> Not participating: Whittaker

CHIEF JUSTICE BRENNAN delivered the opinion of the Court.

...

This civil action was brought under 42 U. S. C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, "these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court convened under 28 U. S. C. § 2281 in the Middle District of Tennessee. The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. We noted probable jurisdiction of the appeal. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion ...

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy ...

It is further alleged that, "because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901," the 1901 statute became "unconstitutional and obsolete." Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible ...

They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that, unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large ...

Because we deal with this case on appeal from an order of dismissal granted on 'appellees' motions, precise identification of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellees' grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted ... "

The court proceeded to explain its action as turning on the case's presenting a "question of the distribution of political strength for legislative purposes." For,

"From a review of [numerous Supreme Court] ... decisions, there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment." ...

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief, and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes ...

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration — what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction, the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2); or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion that this cause presents no nonjusticiable "political question" settles the only possible doubt that it is a case or controversy. Under the present heading of "Jurisdiction of the Subject Matter," we hold only that the matter set forth in the complaint does arise under the Constitution ...

Article III, § 2, of the Federal Constitution provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ... " It is clear that the cause of action is one which "arises under" the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit or "frivolous" ... That the claim is unsubstantial must be "very plain ... "

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts ...

We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion. ...

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally ... or by a refusal to count votes from arbitrarily selected precincts ... or by a stuffing of the ballot box ...

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green, (1946),* and subsequent per curiam cases ...

We understand the District Court to have read the cited cases as compelling the conclusion that, since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question," and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." The cited cases do not hold the contrary.

Of course, the mere fact that the suit seeks protection of a political right does not mean it presents a political question ... Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause, and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause ... To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

Our discussion ... requires review of a number of political question cases, in order to expose the attributes of the doctrine ... Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we, of course, do not explore their implications in other contexts. That review reveals that, in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question." We have said that,

"In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman v. Miller,* (1939). The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution ...

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and, for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization ...

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question, so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question ...

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: the question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which

judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts, they must, that a discrimination reflects no policy, but simply arbitrary and capricious action ...

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Excerpted by Kimberly Clairmont

Nixon v. United States

506 U.S. 224 (1993)

> Decision: Affirmed
> Vote: 9-0
> Majority: Rehnquist, joined by Stevens, O'Connor, Scalia, Kennedy, and Thomas
> Concurrence: Stevens
> Concurrence: White (in judgment), joined by Blackmun
> Concurrence: Souter (in judgement)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this Court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, §3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts.

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison ... The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. Because Nixon refused to resign from his office as a United States District Judge, he continued to collect his judicial salary while serving out his prison sentence ...

The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first two articles ... The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings ... Nixon sought a declaratory judgment that his impeachment conviction was void and that his judicial salary and privileges should be reinstated. The District Court held that his claim was nonjusticiable ... and the Court of Appeals for the District of Columbia Circuit agreed. We granted certiorari ...

A controversy is nonjusticiable–*i.e.,* involves a political question–where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. ... " *Baker* v. *Carr* (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed ... As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. It provides:

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation ... no Person shall be convicted without the Concurrence of two thirds of the Members present."

The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict ...

The conclusion that the use of the word "try" in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the ... very specific requirements that the Constitution does impose on the Senate when trying impeachments: The Members must be under oath, [and] a two-thirds vote is required to convict ... These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word "try" in the first sentence ...

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses-the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments ...

Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature ...

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. Nixon fears that if the Senate is given unreviewable authority to interpret the Impeachment Trial Clause, there is a grave risk that the Senate will usurp judicial power. The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge. This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. Hamilton explained that "[a]s the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire ... "

In the case before us, there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause. We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." ... But we conclude, after exercising that delicate responsibility, that the word "try" in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

Excerpted by Kimberly Clairmont

Mootness

De Funis v. Odegaard

416 U.S. 312, 319 (1974)

> Decision: Reversed
> Vote: Per Curiam
> Majority: Burger, joined by Stewart, Blackmun, Powell, Rehnquist
> Dissent: Douglas
> Dissent: Brennan, joined by Douglas, White, and Marshall

PER CURIAM.

In 1971 the petitioner Marco DeFunis, Jr., applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and granted the requested relief. DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and MR. JUSTICE DOUGLAS, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the "final disposition of the case by this Court." By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. Because of our concern that DeFunis' third-year standing in the Law School might have rendered this case moot, we requested the parties to brief the question of mootness before we acted on the petition.

In response, both sides contended that the case was not moot. The respondents indicated that, if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term ...

In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot, and to that question we now turn ...

The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." ... Although as a matter of Washington state law it appears that this case would be saved from mootness by "the great public interest in the continuing issues raised by this appeal," ... the fact remains that under Art. III "[e]ven in cases arising in the state-courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." ...

Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law. School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer touch[es] the legal relations of parties having adverse legal interests." ...

It might also be suggested that this case presents a question that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co v. ICC* (1911) ... and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gauntlet of the Law School's admission process, and so the question is certainly not "capable of repetition" so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from "[t]he usual rule in federal cases ... , that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." ...

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision *this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties. Accordingly, the judgment of the Supreme Court of Washington is vacated, and the case is remanded for such proceedings as by that court may be deemed appropriate.

It is so ordered.

Excerpted by Kimberly Clairmont

Exceptions to Mootness

Sibron v. New York

392 U.S. 40 (1968)

> Decision: Reversed
> Vote: 9-0
> Majority: Chief Justice Warren, joined by Black, White, Fortas, Douglas, Stewart, Marshall, and Brennan
> Concurrence: Douglas as to No. 63 and No. 74
> Concurrence: Black as to No. 74
> Concurrence: White
> Concurrence: Fortas
> Concurrence: Harlan
> Dissenting: Black as to No. 63

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These are companion cases to No. 67, *Terry v. Ohio, ante,* decided today ...

[T]he cases [here] arise in the context of New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180-a ...

The appellants, Sibron and Peters, were both convicted of crimes in New York state courts on the basis of evidence seized from their persons by police officers. The Court of Appeals of New York held that the evidence was properly admitted, on the ground that the searches which uncovered it were authorized by the statute. Sibron and Peters have appealed their convictions to this Court, claiming that § 180-a is unconstitutional on its face and as construed and applied, because the searches and seizures which it was held to have authorized violated their rights under the Fourth Amendment, made applicable to the States by the Fourteenth ... We noted probable jurisdiction ... and consolidated the two cases for argument with No. 67 ...

The facts in these cases may be stated briefly. Sibron, the appellant in No. 63, was convicted of the unlawful possession of heroin. He moved before trial to suppress ...

The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress ...

The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest. Section 180-a, the "stop-and-frisk" statute, was not mentioned at any point in

the trial court. The Appellate Term of the Supreme Court affirmed the conviction without opinion. In the Court of Appeals of New York [New York's highest court], Sibron's case was consolidated with the Peters case, No. 74. The Court of Appeals held that the search in Peters was justified under the statute, but it wrote no opinion in Sibron's case ...

At the outset we must deal with the question whether we have jurisdiction ... It is asserted that because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot under *St. Pierre v. United States,* (1943) ...

On numerous occasions in the past this Court has proceeded to adjudicate the merits of criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated ... Thus mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court ...

St. Pierre itself recognized two possible exceptions to its "doctrine" of mootness, and both of them appear to us to be applicable here. The Court stated that "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence" ... because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding. This was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right. There was no way for Sibron to bring his case here before his six-month-sentence expired. By statute he was precluded from obtaining bail pending appeal and by virtue of the inevitable delays of the New York court system, he was released less than a month after his newly appointed appellate counsel had been supplied with a copy of the transcript and roughly two months before it was physically possible to present his case to the first tier in the state appellate court system. This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent, and timely manner ...

We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal ...

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed ... as a result of the judgment which has ... been satisfied." Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick v. United States* (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of "moral turpitude" even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category ...

This case certainly meets that test for survival. Without pausing to canvas the possibilities in detail, we note that New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial ... and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime ... There are doubtless other collateral consequences. Moreover, we see no relevance in the fact that Sibron is a multiple offender. Morgan was a multiple offender ... and so was Pollard ... A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount

a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past. It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record. The question of the validity of a criminal conviction can arise in many contexts ... and the sooner the issue is fully litigated the better for all concerned ...

Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*. The case is not moot . ...

Excerpted by Kimberly Clairmont

Richardson v. Wright

405 U.S. 208 (1972)

Decision: Reversed
Vote: Per Curiam
Majority: Burger, joined by Stewart, White, Blackmun, Powell, Rehnquist
Dissent: Brennan, joined by Douglas, Marshall
Dissent: Douglas

PER CURIAM.

We noted probable jurisdiction of these appeals ... to consider the applicability of *Goldberg v. Kelly*, (1970), to the suspension and termination of disability benefit payments pursuant to § 225 of the Social Security Act, and implementing regulations of the Department of Health, Education, and Welfare. Shortly before oral argument, we were advised that the Secretary had adopted new regulations, effective December 27, 1971, governing the procedures to be followed by the Social Security Administration in determining whether to suspend or terminate disability benefits. These procedures include the requirement that a recipient of benefits be given notice of a proposed suspension and the reasons therefore, plus an opportunity to submit rebuttal evidence. In light of that development, we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute. If that process results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an oral presentation. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise. Accordingly, we vacate the judgment of the District Court for the District of Columbia ... with direction to that court to remand the cause to the Secretary and to retain jurisdiction for such further proceedings, if any, as may be necessary upon completion of the administrative procedure.

Vacated and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

I respectfully dissent. The Court justifies today's *sua sponte* action on the ground that, if reprocessing under the Secretary's new regulations

"results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation."

Avoidance of unnecessary constitutional decisions is certainly a preferred practice when appropriate. But that course is inappropriate, indeed, irresponsible, in this instance. We will not avoid the necessity of deciding the important constitutional question presented by claimants even should they prevail upon the Secretary's reconsideration. The question is being pressed all over the country. The Secretary's brief lists no less than seven cases presenting it with respect to disability benefits, and 10 cases presenting it with respect to nondisability benefits ...

Excerpted by Kimberly Clairmont

Roe v. Wade

410 U.S. 113, 125 (1973)

> Decision: Reversed
> Vote: 7-2
> Majority: Blackmun, Burger, Douglas, Brennan, Stewart, Marshall, Powell
> Concurrence: Douglas
> Concurrence: Stewart
> Concurrence: Burger
> Dissent: White, Rehnquist

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe v. Bolton* (1973), present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue ...

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history ...

Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes ...

She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated ...

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action ... He alleged that ... the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine ...

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast v. Cohen*, (1968), and *Sierra Club v. Morton*, (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor? ...

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, (1950) ... But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." ...

...

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

Excerpted by Kimberly Clairmont

West VA v. EPA

597 U.S. ___ (2022)

> Decision: Reversed
> Vote: 6-3
> Majority: Roberts, joined by Gorsuch, Alito, Thomas, Barrett, Kavanaugh
> Concur: Gorsuch, joined by Alito
> Dissent: Kagan, joined by Breyer and Sotomayor

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

...

First, after the decision, EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new Section 111(d) rule. Second, on EPA's request, the lower court stayed the part of its judgment that vacated the repeal, pending that new rulemaking. "These circumstances," says the Government, "have *mooted* the prior dispute as to the CPP Repeal Rule's legality." ... (emphasis added).

That Freudian slip, however, reveals the basic flaw in the Government's argument: It is the doctrine of mootness, not standing, that addresses whether "an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit." *Genesis HealthCare Corp v. Symczyk* (2013) ... The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot ...

A finding of mootness in the case is [the respondent's] voluntary conduct ... Although the Government briefly argues that the lower court's stay of its mandate extinguished the controversy, it cites no authority for that proposition, and it does not make sense: Lower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review. So the Government's mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule.

But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." ... Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach ... We do not dismiss a case as moot in such circumstances ... The case thus remains justiciable, and we may turn to the merits. ...

Excerpted by Kimberly Clairmont

Ripeness

Trump v. New York

592 U.S. ___ (2020)

> Decision: Reversed
> Vote: Per Curiam
> Dissent: Breyer, joined by Sotomayor, Kagan

PER CURIAM.

...

Congress has given both the Secretary of Commerce and the President functions to perform in the enumeration and apportionment process. The Secretary must "take a decennial census of population ... in such form and content as he may determine," 13 U. S. C. §141(a), and then must report to the President "[t]he tabulation of total population by States" under the census "as required for the apportionment," §141(b). The President in turn must transmit to Congress a "statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained" under the census. 46 Stat. 26, 2 U. S. C. §2a(a). In that statement, the President must apply a mathematical formula called the "method of equal proportions" to the population counts in order to calculate the number of House seats for each State.

This past July, the President issued a memorandum to the Secretary respecting the apportionment following the 2020 census. The memorandum announced a policy of excluding "from the apportionment base aliens who are not in a lawful immigration status." To facilitate implementation "to the maximum extent feasible and consistent with the discretion delegated to the executive branch," the President ordered the Secretary, in preparing his §141(b) report, "to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy." ... The President directed the Secretary to include such information in addition to a tabulation of population according to the criteria promulgated by the Census Bureau for counting each State's residents.

This case arises from one of several challenges to the memorandum brought by various States, local governments, organizations, and individuals. A three-judge District Court held that the plaintiffs, appellees here, had standing to proceed in federal court because the memorandum was chilling aliens and their families from responding to the census, thereby degrading the quality of census data used to allocate federal funds and forcing some plaintiffs to divert resources to combat the chilling effect ...

A foundational principle of Article III is that "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." ... As the plaintiffs concede, any chilling effect from the memorandum dissipated upon the conclusion of the census response period. The plaintiffs now seek to substitute an alternative theory of

a "legally cognizable injury" premised on the threatened impact of an unlawful apportionment on congressional representation and federal funding ... As the case comes to us, however, we conclude that it does not—at this time—present a dispute "appropriately resolved through the judicial process." ...

Two related doctrines of justiciability—each originating in the case-or-controversy requirement of Article III— underlie this determination ... First, a plaintiff must demonstrate standing, including "an injury that is concrete particularized, and imminent rather than conjectural or hypothetical." ... Second, the case must be "ripe"—not dependent on "contingent future events that may not occur as anticipated, or indeed may not occur at all." ...

At present, this case is riddled with contingencies and speculation that impede judicial review. The President, to be sure, has made clear his desire to exclude aliens without lawful status from the apportionment base. But the President qualified his directive by providing that the Secretary should gather information "to the extent practicable" and that aliens should be excluded "to the extent feasible." ... Any prediction how the Executive Branch might eventually implement this general statement of policy is "no more than conjecture" at this time ...

While the plaintiffs agree that the dispute will take a more concrete shape once the Secretary delivers his report under §141(b) ... they insist that the record already establishes a "substantial risk" of reduced representation and federal resources, *Clapper v Amnesty Int'l* (2013). That conclusion, however, involves a significant degree of guesswork. Unlike other pre-apportionment challenges, the Secretary has not altered census operations in a concrete manner that will predictably change the count ... The count here is complete; the present dispute involves the apportionment process, which remains at a preliminary stage. The Government's eventual action will reflect both legal and practical constraints, making any prediction about future injury just that—a prediction ...

At the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature. Consistent with our determination that standing has not been shown and that the case is not ripe, we express no view on the merits of the constitutional and related statutory claims presented. We hold only that they are not suitable for adjudication at this time.

The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Excerpted by Kimberly Clairmont

Standing

Flast v. Cohen

392 U.S. 83 (1968)

> Decision: Reversed
> Vote: 8-1
> Majority: Warren, Black, Douglas, Brennan, Stewart, White, Marshall
> Concurrence: Stewart
> Concurrence: Fortas
> Concurrence: Douglas
> Dissent: Harlan

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In *Frothingham v. Mellon,* (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment ...

The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment ...

While disclaiming any intent to challenge as unconstitutional all programs under Title I of the [Elementary and Secondary Education Act of 1965], the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." Such expenditures of federal tax funds, appellants alleged, violate the First Amendment because "they constitute a law respecting an establishment of religion" and because "they prohibit the free exercise of religion on the part of the [appellants] ... by reason of the fact that they constitute compulsory taxation for religious purposes."

The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions are deemed within the authority and intent of the Act, "the lees from approving any expenditure of federal funds for the allegedly unconstitutional purposes ...

The Government moved to dismiss the complaint on the ground that appellants lacked standing to maintain the action. District Judge Frankel, who considered the motion, recognized that *Frothingham v. Mellon*, (1923), provided "powerful" support for the Government's position, but he ruled that the standing question was of sufficient substance to warrant the convening of a three-judge court to decide the question ... The three-judge court received briefs and heard arguments limited to the standing question, and the court ruled on the authority of *Frothingham* that appellants lacked standing. Judge Frankel dissented ... From the dismissal of their complaint on that ground, appellants appealed directly to this Court ... and we noted probable jurisdiction ...

This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham v. Mellon*, and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921 ...

The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the several States by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax liability and "thereby take her property without due process of law ... " The Court noted that a federal taxpayer's "interest in the moneys of the Treasury ... is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, ... [is] remote, fluctuating and uncertain." ... As a result the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing ...

To some degree, the fear expressed in *Frothingham* that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to the decision in *Frothingham* ... [I]ts very existence suggests that we should undertake a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits ...

In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government ... In part, those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary ... to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts ...

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "[j]usticiability is ... not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures ... "

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is "not always clearly distinguished from the constitutional limitation." *Barrows v. Jackson* (1953) ... For example, in his concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936), Mr. Justice Brandeis listed seven rules developed by this Court "for its own governance" to avoid passing prematurely on constitutional questions. Because the rules operate in "cases confessedly within [the Court's] jurisdiction," ... they find their source in policy, rather than purely constitutional, considerations ... The "many subtle pressures" which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours ...

Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and notion the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." ...

Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that [federal taxpayer] status and the type of legislative enactment attacked ... It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education,* (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general ...

[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which

operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness, and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases, such as *Frothingham,* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

While we express no view at all on the merits of appellants' claims in this case, their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.

Reversed.

Excerpted by Kimberly Clairmont

Lujan v. Defenders of Wildlife

504 U.S. 555, 560-61 (1992)

> Decision: Reversed
> Vote: 6-3
> Majority: Scalia (Parts I, II, III-A, IV), joined by Rehnquist, White, Kennedy, Souter, and Thomas
> Plurality: Scalia (Part III-B), joined by Rehnquist, White, and Thomas
> Concur: Kennedy, joined by Souter
> Concur: Stevens
> Dissent: Blackmun, joined by O'Connor

JUSTICE SCALIA delivered the opinion of the Court.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 892, as amended, 16 U. S. C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

...

The ESA, 87 Stat. 884, as amended ... seeks to protect species of animals against threats to their continuing existence caused by man ... The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. Section 7(a)(2) of the Act then provides, in pertinent part:

"Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) ... promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was ... promulgated in 1986.

Shortly thereafter, respondents ... filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation ...

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain ... " One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III–"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, (1990)-is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III ...

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical,"' *Whitmore*. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision ... "

The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, (1989), and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish ...

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability ...

And the affiants' profession of an "inten[t]" to return to the places they had visited before-where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species-is simply not enough. Such "some day" intentions-without any description of concrete plans, or indeed even any specification of when the some day will be-do not support a finding of the "actual or imminent" injury that our cases require.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm ...

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are]wst , even when premised on allegations of several instances of violations of law ... rarely if ever appropriate for federal court adjudication."

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority ...

We have consistently held that a plaintiff raising only a generally available grievance about government- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no

more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy. For example, in *Fairchild v. Hughes*, (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified ...

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont

The Executive

Case List

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Mississippi v. Johnson (1867)
Bush v. Gore (2000)

Appointment and Removal Powers

Myers v. United States (1926)
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Zivotofsky v. Kerry (2015)
Trump v. Hawaii (2018)

Structure of the Presidency

Mississippi v. Johnson

71 U.S. 475 (1867)

> Decision: Denied
> Vote: 9-0
> Majority: Chase, joined by Wayne, Nelson, Grier, Clifford, Swayne, Miller, Davis, and Field

The CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts ...

The single point which requires consideration is this: can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty the performance of which may, in proper cases, be required of the head of a department by judicial process is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law ...

[With a ministerial duty, there is] no room for the exercise of judgment. The law required the performance of a single specific act, and that performance ... might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and, among these laws, the acts named in the bill. By the first of these acts, he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

It is true that, in the instance before us, the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent, and this is of much weight against it.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose in any case to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished in principle from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case, could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

DENIED.

Excerpted by Alexandria Metzdorf

Bush v. Gore

531 U.S. 98 (2000)

> Decision: Reversed and remanded
> Vote: 7-2
> Per Curiam
> Concurrence: Rehnquist, joined by Scalia and Thomas
> Dissent: Stevens, joined by Ginsburg and Breyer
> Dissent: Souter, joined by Breyer, Stevens, and Ginsburg (all but Part III)
> Dissent: Ginsburg, joined by Stevens, Souter, and Breyer (Part I)
> Dissent: Breyer, joined by Stevens, Ginsburg (except Part I-A-1), and Souter (Part I)

PER CURIAM.

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President. The State Supreme Court noted that petitioner George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand ... The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican candidates for President and Vice President, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the application as a petition for a writ of certiorari, and granted certiorari ...

On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner Bush had received 2,909,135 votes, and respondent Gore had received 2,907,351 votes, a margin of 1,784 for Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent ... of the votes cast," an automatic machine recount was conducted ... the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions ...

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification ... He sought relief pursuant to §

102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court ...

The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes") ... Noting the closeness of the election, the court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter ... '" The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances ... " the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes ... to do so forthwith, said tabulation to take place in the individual counties where the ballots are located ... "

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause ...

When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter ...

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another ...

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations. In some cases a piece of the card-a chad-is hanging, say, by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment ...

As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another ...

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote ... And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment ...

Each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two

candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way ...

In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied ...

Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary ...

Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed ...

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf

Appointment and Removal Powers

Myers v. United States

272 U.S. 52 (1926)

> Decision: Affirmed
> Vote: 6-3
> Majority: Taft, joined by Van Devanter, Sutherland, Butler, Sanford, Stone
> Dissent: Holmes
> Dissent: McReynolds
> Dissent: Brandeis

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents the question whether, under the Constitution, the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers ... was, on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation, and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71 ...

[By the law] under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that

"Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

The Senate did not consent to the President's removal of Myers during his term. If this statute, in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the Senate, is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full term, and the judgment of the Court of Claims must be reversed. The Government maintains that the requirement is invalid for the reason that, under Article

II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate ... We are therefore confronted by the constitutional question, and cannot avoid it ...

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II ... provides for removal from office by impeachment ...

It was pointed out in this great debate [constitutional convention] that the power of removal, though equally essential to the executive power is different in its nature from that of appointment. Madison, 1 Annals of Congress, 497 et seq.; Clymer, 1 Annals, 489; Sedgwick, 1 Annals, 522; Ames, 1 Annals, 541, 542; Hartley, 1 Annals, 481. A veto by the Senate-a part of the legislative branch of the government-upon removals is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men, or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefor be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

...

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President, alone and unaided, could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. *Wilcox v. Jackson* (1839) ... It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood ...

It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient, but it includes a change of the power of appointment from the President with the consent of the Senate. Congress

must determine first that the office is inferior, and second that it is willing that the office shall be filled by appointment by some other authority than the President with the consent of the Senate. That the latter may be an important consideration is manifest, and is the subject of comment by this Court in its opinion in the case of *Shurtleff v. United States,* (1903), where this Court said:

"To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication ... "

[P]ostmasters were all by law appointed by the Postmaster General. This was because Congress ... so provided. But thereafter, Congress required certain classes of them to be, as they now are, appointed by the President with the consent of the Senate. This is an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and, until it is willing to vest their appointment in the head of the Department, they will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution.

Summing up, then, the facts as to acquiescence by all branches of the Government in the legislative decision of 1789, as to executive officers, whether superior or inferior, we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government.

Article II grants to the President ... the general administrative control of those executing the laws, including the power of appointment and removal of executive officers ... the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not, by implication, extend to removals the Senate's power of checking appointments, and ... to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed ...

While this Court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct, and it therefore follows that the Tenure of Office Act of 1867, insofar as it attempted to prevent the President from removing executive officer who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid. This leads to an affirmance of the judgment of the Court of Claims.

Judgment affirmed.

Excerpted by Alexandria Metzdorf

Humphrey's Executor v. United States

295 U.S. 602 (1935)

> Decision: Affirmed
> Vote: 9-0
> Majority: Sutherland, joined by Hughes, Van Devanter, McReynolds, Brandeis, Butler, Stone, Roberts, and Cardozo

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions ... in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground 'that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,' but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: 'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'

The commissioner declined to resign; and on October 7, 1933, the President wrote him: 'Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of

the President to remove a commissioner except upon one or more of the causes named?

If the foregoing question is answered in the affirmative, then—

2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?'

The Federal Trade Commission Act ... creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and section 1 provides: 'Not more than three of the commissioners shall be members of the same political party. ... '

[The Act] in part provides that:

'Unfair methods of competition in commerce are declared unlawful.

The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce ... '

First. The question first to be considered is whether, by the provisions of section 1 ... the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff v. United States*, (1903) ...

The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents ... The words of the act are definite and unambiguous.

... The fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience' ...

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law ...

[T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment

without the leave or hindrance of any other official ... To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

... Second. To support its contention that the removal provision ... is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States* (1926) ... [T]he narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis* ...

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially ... To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government ... If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution ... We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power ... continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted;

and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will ...

A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612 ...

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes.

Question No. 2, Yes.

It is so ordered.

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Morrison v. Olson

487 U.S. 654 (1988)

> Decision: Reversed
> Vote: 7-1
> Majority: Rehnquist, joined by Brennan, White, Marshall, Blackmun, Stevens, and O'Connor
> Dissent: Scalia

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978 ... We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

Briefly stated, Title VI of the Ethics in Government Act ... allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws ... The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter ... If ... the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel ... "

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice ... " The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity ... the counsel's powers include "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States ... " ... An independent counsel has "full authority to dismiss matters within [his or her] prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent" with Department of Justice policy ...

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides:

"An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General ... "

If an independent counsel is removed pursuant to this section, the Attorney General is required to submit a report to both the Special Division and the Judiciary Committees of the Senate and the House "specifying the facts found and the ultimate grounds for such removal." § 596(a)(2). Under the current version of the Act, an independent counsel can obtain judicial review of the Attorney General's action by filing a civil action in the United States District Court for the District of Columbia ... The reviewing court is authorized to grant reinstatement or "other appropriate relief." § 596(a)(3) ...

The other provision governing the tenure of the independent counsel defines the procedures for "terminating" the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act ...

Finally, the Act provides for congressional oversight of the activities of independent counsel ...

On April 23, 1986, the Special Division appointed James C. McKay as independent counsel to investigate "whether the testimony of ... Olson and his revision of such testimony on March 10, 1983, violated either 18 U. S. C. § 1505 or § 1001, or any other provision of federal law ... "

McKay later resigned as independent counsel, and on May 29, 1986, the Division appointed appellant Morrison as his replacement, with the same jurisdiction ...

[I]n May and June 1987, appellant caused a grand jury to issue and serve ... on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act were unconstitutional and that appellant accordingly had no authority to proceed ...

The initial question is, accordingly, whether appellant is an "inferior" or a "principal" officer ... If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause. The line between "inferior" and "principal" officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn ... [I]n our view appellant clearly falls on the "inferior officer" side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree "inferior" in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties ... Admittedly, the Act delegates to appellant "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," § 594(a), but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department ...

Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration ... and duties" of the independent counsel, *Germaine*, are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

This conclusion is consistent with our few previous decisions that considered the question whether a particular Government official is a "principal" or an "inferior" officer ...

Appellees argue that even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of "interbranch appointments," in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: " ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments." On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law ... "

We also note that the history of the Clause provides no support for appellees' position ...

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, *Ex parte Siebold* (1879) itself suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint ... In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court ...

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." § 596(a)(1) ... There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. § 596(a)(3). In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor v. United States*, (1935), and *Wiener v. United States*, (1958), than to *Myers* or *Bowsher* ...

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in Humphrey's Executor rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers*, not *Humphrey's Executor*. And, under *Myers*, the President must have absolute discretion to discharge "purely" executive officials at will ...

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove

an official cannot be made to turn on whether or not that official is classified as "purely executive ... " The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President ... but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role ... But as the Court noted in *Wiener*:

"The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure ... "

[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause ... we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President ...

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act ... Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws ...

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches ... We have not hesitated to invalidate provisions of law which violate this principle. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence ... " In the often-quoted words of Justice Jackson:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (concurring opinion).

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch ... Indeed, with the exception of the power of impeachment — which applies to all officers of the United States — Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. § 592(g). Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, § 595(a), functions that we have recognized generally as being incidental to the legislative function of Congress ...

Similarly, we do not think that the Act works any judicial usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." ... In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. ... [T]he various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch. The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch ... or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions ... " It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity ... The Act ... gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore

Reversed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

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NLRB v. Canning

573 U.S. 513 (2014)

> Decision: Affirmed
> Vote: 9-0
> Majority: Breyer, joined by Kennedy, Ginsburg, Sotomayor, and Kagan
> Concurrence: Scalia (in judgment), joined by Roberts, Thomas, and Alito

Note: A *pro forma* session is defined as "From the Latin, meaning 'as a matter of form,' a pro forma session is a brief meeting of the Senate, often only a few minutes in duration." https://www.senate.gov/general/Features/Sessions.htm#:~:text=Pro%20Forma%20Session%3A%20From%20the,following%20the%20November%20general%20elections.

Visit https://www.c-span.org/video/?526638-1/senate-pro-forma-session to see the c-span to view a pro forma session.

Justice Breyer delivered the opinion of the Court.

Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." U. S. Const., Art. II, §2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, §2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (i.e., a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "pro forma session[s]," with "no business ... transacted," every Tuesday and Friday through January 20, 2012 ... In calculating the length of a recess are we to ignore the pro forma sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these pro forma sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to execute the agreement and to make employees whole for any losses ...

The Pepsi-Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act ...

The three members in question were Sharon Block, Richard Griffin, and Terence Flynn. In 2011 the President had nominated each of them to the Board. As of January 2012, Flynn's nomination had been pending in the Senate awaiting confirmation for approximately a year. The nominations of each of the other two had been pending for a few weeks. On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day ... Pursuant to that resolution, the Senate held pro forma sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012 ... The President's January 4 appointments were made between the January 3 and January 6 pro forma sessions. In the distributor's view, each pro forma session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3-day adjournment, which is not long enough to trigger the Recess Appointments Clause.

The Court of Appeals agreed that the appointments fell outside the scope of the Clause. But the court set forth different reasons ... Since the second session of the 112th Congress began on January 3, 2012, the day before the President's appointments, those appointments occurred during an intra-session recess, and the appointments consequently fell outside the scope of the Clause ...

We asked the parties to address not only the Court of Appeals' interpretation of the Clause but also the distributor's initial argument, namely, "[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions ... "

... [T]he Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for "the assistance of subordinates," *Myers v. United States*, (1926), and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year ... We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, in interpreting the Clause, we put significant weight upon historical practice. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government. Long ago Chief Justice Marshall wrote that

"a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *McCulloch v. Maryland*, (1819) ...

The first question concerns the scope of the phrase "the recess of the Senate ... " The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an "inter-session recess ... " The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will "adjourn sine die," i.e., without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such "intra-session recess" by adopting a resolution stating that it will "adjourn" to a fixed date, a few days or weeks or even months later. All agree that the phrase "the recess of the Senate" covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase "the recess" includes an intra-session recess of substantial length ...

History ... shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas) ... In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments, writing "[w]e have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned" during the "first session of the Fortieth Congress" was "legally filled by appointment of the President alone." *Gould v. United States*, (1884) ...

... [R]estricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century ...

[A] 3-day recess would be too short ... The Adjournments Clause reflects the fact that a 3-day break is not a significant interruption of legislative business. As the Solicitor General says, it is constitutionally de minimis. A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power.

In sum, we conclude that the phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, §5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well.

The second question concerns the scope of the phrase "vacancies that may happen during the recess of the Senate." Art. II, §2, cl. 3 ... All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy ...

This power is important. The Congressional Research Service is "unaware of any official source of information tracking the dates of vacancies in federal offices ... " Nonetheless, we have enough information to believe that the Presidents since Madison have made many recess appointments filling vacancies that initially occurred prior to a recess ...

[T]he President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer ...

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase "all vacancies" includes vacancies that come into existence while the Senate is in session.

The third question concerns the calculation of the length of the Senate's "recess." On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene "pro forma session[s]" only, with "no business ... transacted," on every Tuesday and Friday from December 20, 2011, through January 20, 2012 ... At the end of each pro forma session, the Senate would "adjourn until" the following pro forma session. Ibid. During that period, the Senate convened and adjourned as agreed. It held pro forma sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each pro forma session, it adjourned until the time and date of the next ...

The Solicitor General argues that we must treat the pro forma sessions as periods of recess. He says that these "sessions" were sessions in name only because the Senate was in recess as a functional matter. The Senate, he contends, remained in a single, unbroken recess from January 3, when the second session of the 112th Congress began by operation of the Twentieth Amendment, until January 23, when the Senate reconvened to do regular business.

In our view, however, the pro forma sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here ...

[W]e conclude that we must give great weight to the Senate's own determination of when it is and when it is not in session. But our deference to the Senate cannot be absolute. When the Senate is without the capacity to act, under its own rules, it is not in session even if it so declares ... In that circumstance, the Senate is not simply unlikely or unwilling to act upon nominations of the President. It is unable to do so. The purpose of the Clause is to ensure the continued functioning of the Federal Government while the Senate is unavailable ... This purpose would count for little were we to treat the Senate as though it were in session even when it lacks the ability to provide its "advice and consent." Art. II, §2, cl. 2. Accordingly, we conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the pro forma sessions were sessions for purposes of the Clause. First, the Senate said it was in session. The Journal of the Senate and the Congressional Record indicate that the Senate convened for a series of twice-weekly "sessions" from December 20 through January 20 ...

Second, the Senate's rules make clear that during its pro forma sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During any pro forma session, the Senate could have conducted business simply by passing a unanimous consent agreement ... It is consequently unsurprising that the Senate has enacted legislation during pro forma sessions even when it has said that no business will be transacted. Indeed, the Senate passed a bill by unanimous consent during the second pro forma session after its December 17 adjournment ...

The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

It is so ordered.

Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, concurring in the judgment.

Except where the Constitution or a valid federal law provides otherwise, all "Officers of the United States" must be appointed by the President "by and with the Advice and Consent of the Senate." U. S. Const., Art. II, §2, cl. 2. That general rule is subject to an exception: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.,* §2, cl. 3. This case requires us to decide whether the Recess Appointments Clause authorized three appointments made by President Obama to the National Labor Relations Board in January 2012 without the Senate's consent.

To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in "the Recess of the Senate," that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that "happen during the Recess," that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and struc ture, and both were well understood at the founding. The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet either condition ...

The Court's decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates. To reach that result, the majority casts aside

the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best. The majority's insistence on deferring to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government. I concur in the judgment only ...

The first question presented is whether "the Recess of the Senate," during which the President's recess-appointment power is active, is (a) the period between two of the Senate's formal sessions, or (b) any break in the Senate's proceedings. I would hold that "the Recess" is the gap between sessions and that the appointments at issue here are invalid because they undisputedly were made *during* the Senate's session. The Court's contrary conclusion—that "the Recess" includes "breaks in the midst of a session," *ante,* at 9—is inconsistent with the Constitution's text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power (thus defined) that overstep the judicial role. And although the majority relies heavily on "historical practice," no practice worthy of our deference supports the majority's conclusion on this issue ...

What does all this amount to? In short: Intra-session recess appointments were virtually unheard of for the first 130 years of the Republic, were deemed unconstitutional by the first Attorney General to address them, were not openly defended by the Executive until 1921, were not made in significant numbers until after World War II, and have been repeatedly criticized as unconstitutional by Senators of both parties. It is astonishing for the majority to assert that this history lends "strong support," *ante,* at 11, to its interpretation of the Recess Appointments Clause.

The second question presented is whether vacancies that "happen during the Recess of the Senate," which the President is empowered to fill with recess appointments, are (a) vacancies that *arise* during the recess, or (b) all vacancies that *exist* during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled, and I would hold that the appointments at issue here—which undisputedly filled pre-recess vacancies—are invalid for that reason as well as for the reason that they were made during the session. The Court's contrary conclusion is inconsistent with the Constitution's text and structure, and it further undermines the balance the Framers struck between Presidential and Senatorial power. Historical practice also fails to support the majority's conclusion on this issue ...

In sum: Washington's and Adams' Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940, and is arguably inconsistent with legislation in place from 1940 to the present. The Solicitor General has identified only about 100 appointments that have ever been made under the broader reading, and while it seems likely that a good deal more have been made in the last few decades, there is good reason to doubt that many were made before 1940 (since the appointees could not have been compensated). I can conceive of no sane constitutional theory under which this evidence of "historical practice"—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch ...

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice ...

The real tragedy of today's decision is not simply the abolition of the Constitution's limits on the recess-appointment power and the substitution of a novel framework invented by this Court. It is the damage done to our separation-of-powers jurisprudence more generally. It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment. Our failure to do so today will resonate well beyond the particular dispute at hand. Sad, but true: The Court's embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

I concur in the judgment only.

Excerpted by Alexandria Metzdorf

Lucia v. SEC

585 U.S. ___ (2018)

> Decision: Reversed and remanded
> Vote: 7-2
> Majority: Kagan, joined by Roberts, Kennedy, Thomas, Alito, and Gorsuch
> Concurrence: Thomas, joined by Gorsuch
> Concur/dissent: Breyer, joined by Ginsburg, and Sotomayor (Part III only)
> Dissent: Sotomayor, joined by Ginsburg

Justice Kagan delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees ... This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag* v. *Commissioner*, (1991), we hold that they do ...

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding ... But the Commission also may, and typically does, delegate that task to an ALJ ... The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all ...

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding … As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial. *Butz* v. *Economou*, (1978) …

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, and assigned ALJ Cameron Elliot to adjudicate the case. After nine days of testimony and argument, Judge Elliot issued an initial decision concluding that Lucia had violated the Act and imposing sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry …

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, the Commission's ALJs are "Officers of the United States" and thus subject to the Appointments Clause … [T]he Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members … As a result, Lucia contended, Judge Elliot lacked constitutional authority to do his job …

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so.

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine v. US* (1879) held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent … " Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley v. Valeo* (1976) then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States … " The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary … [I]n *Freytag* v. *Commissioner*, (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court … In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider …

This Court held that the Tax Court's STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law ... They serve on an ongoing, rather than a "temporary [or] episodic[,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code.

For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause ... This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder* v. *United States*, (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official ... And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Note: In June of 2020, Lucia entered a settlement with the SEC which banned Lucia from the securities industry, though he could reapply for admittance, and included a fine of $25,000.00. (see https://www.investmentnews.com/sec-ray-lucia-settle-lawsuit-194238, last accessed on April 27, 2023.)

Executive Privilege

United States v. Nixon

418 U.S. 683 (1974)

> Decision: Affirmed
> Vote: 8-0
> Majority: Burger, joined by Douglas, Brennan, Stewart, White, Marshall, Blackmun, and Powell

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This litigation presents for review the denial of a motion ... to quash a third-party subpoena duces tecum issued ... pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers ...

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator ...

[W]e turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce ... " The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is ... "

Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers ...

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell v. McCormack,* (1969) ... And in *Baker v. Carr* (1961), the Court stated:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government ... We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion ...

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere ... insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts ... [W]e find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence ...

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President ...

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately ... The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica*, (1973), the Court of Appeals held that such Presidential communications are "presumptively privileged," and this position is accepted by both parties in the present litigation ...

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States* (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense ...

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself ... " These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth ...

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities ...

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution ...

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the consti-

tutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was "essential to the justice of the [pending criminal] case ... " Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and ordered an in camera examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the in camera examination of Presidential materials or communications delivered under the compulsion of the subpoena duces tecum ...

It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the *Burr* case, was extraordinarily careful to point out that

"[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary ... in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in United States v. Burr, supra, and will

discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

Original excerpt in Lawrence Lessig, Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment, published by H2O. Further excerpted by Alexandria Metzdorf. Licensed under CC BY-NC-SA.

Nixon v. Administrator of General Services

433 U.S. 425 (1977)

> Decision: Affirmed
> Majority: Brennan, joined by Marshall, Stevens, White (except Part VII), Blackmun (Part VII only), Powell (except for Parts IV and V)
> Concurrence: Stevens
> Concurrence: White (in part and in judgment)
> Concurrence: Blackmun (in part and in judgment)
> Concurrence: Powell (in part and in judgment)
> Dissent: Burger
> Dissent: Rehnquist

MR. JUSTICE BRENNAN delivered the opinion of the Court.

... The Presidential Recordings and Materials Preservation Act (hereafter Act), directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) the separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

The materials at issue consist of some 42 million pages of documents and some 880 tape recordings of conversations. Upon his resignation, appellant directed Government archivists to pack and ship the materials to him in California. This shipment was delayed when the Watergate Special Prosecutor advised President Ford of his continuing need for the materials ...

Appellant argues broadly that the Act encroaches upon the Presidential prerogative to control internal operations of the Presidential office, and therefore offends the autonomy of the Executive Branch ...

First, appellant contends that Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure. To do so, appellant contends, constitutes, without more, an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch.

Second, appellant contends, somewhat more narrowly, that, by authorizing the Administrator to take custody of all Presidential materials in a "broad, undifferentiated" manner, and authorizing future publication except where a privilege is affirmatively established, the Act offends the presumptive confidentiality of Presidential communications recognized in *United States v. Nixon* (1974) ... Appellant asserts that, unlike the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters, which appellant concedes may be asserted only by an incumbent President, a more generalized Presidential privilege survives the termination of the President-adviser relationship much as the attorney-client privilege survives the relationship that creates it ... Finally, appellant contends that the Act's authorization of the process of screening the materials itself violates the privilege, and will chill the future exercise of constitutionally protected executive functions, thereby impairing the ability of future Presidents to obtain the candid advice necessary to the conduct of their constitutionally imposed duties.

We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees ...

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress ...

The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face ...

Having concluded that the separation of powers principle is not necessarily violated by the Administrator's taking custody of and screening appellant's papers, we next consider appellant's more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny ...

[In *US v. Nixon*,] the Court recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities, but distinguished a President's 'broad, undifferentiated claim of public interest in the confidentiality of such [communications]' from the more particularized and less qualified privilege relating to the need 'to protect military, diplomatic, or sensitive national security secrets ... '

Unlike *United States v. Nixon,* in which appellant asserted a claim of absolute Presidential privilege against inquiry by the coordinate Judicial Branch, this case initially involves appellant's assertion of a privilege against the very Executive Branch in whose name the privilege is invoked ...

Nevertheless, we think that the Solicitor General states the sounder view, and we adopt it:

"This Court held in *United States v. Nixon* ... that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."

At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly ...

The appellant bases his claim of Presidential privilege in this case on the assertion that the potential disclosure of communications given to the appellant in confidence would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking ...

There is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and eventual disclosure ...

We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers. We agree with the District Court that, thus framed, the question is readily resolved. The screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns. These very personnel have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality ... Appellant has suggested no reason why review under the instant Act, rather than the Presidential Libraries Act, is significantly more likely to impair confidentiality, nor has he called into question the District Court's finding that the archivists' "record for discretion in handling confidential material is unblemished ... "

Substantial public interests that led Congress to seek to preserve appellant's materials were the desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation. Thus, by preserving these materials, the Act may be thought to aid the legislative process, and thus to be within the scope of Congress' broad investigative power ...

In light of these objectives, the scheme adopted by Congress for preservation of the appellant's Presidential materials cannot be said to be overbroad ...

In short, we conclude that the screening process contemplated by the Act will not constitute a more severe intrusion into Presidential confidentiality than the *in camera* inspection by the District Court approved in *United States v. Nixon* ... Thus, there is no basis for appellant's claim that the Act "reverses" the presumption in favor of confidentiality of Presidential papers recognized in *United States v. Nixon.* Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions, on their face, are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act, on its face, does not violate the Presidential privilege.

Excerpted by Alexandria Metzdorf

Nixon v. Fitzgerald

457 U.S. 731 (1982)

> Decision: Reversed and remanded
> Majority: Powell, joined by Burger, Rehnquist, Stevens, and O'Connor
> Concurrence: Burger
> Dissent: White, joined by Brennan, Marshall, and Blackmun
> Dissent: Blackmun, joined by Brennan, and Marshall

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

In January, 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the Armed Forces.

... Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the Presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the CA transport plane could approximate $2 billion. He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal ... petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the administration. It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.

Fitzgerald's proposed reassignment encountered resistance within the administration. In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that

"'Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game ... '"
In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional Committee. The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction ... public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished. But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

"I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it, and I stick by it."

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."

... Fitzgerald filed a suit for damages in the United States District Court ...

The District Court dismissed the action under the District of Columbia's 3-year statute of limitations ... and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield ... The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dismissal, at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the administration ... Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court ...

Following the remand and extensive discovery thereafter, Fitzgerald filed a second amended complaint in the District Court on July 5, 1978. It was in this amended complaint ... that Fitzgerald first named the petitioner Nixon as a party defendant ... Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution. The court also ruled that petitioner was not entitled to claim absolute Presidential immunity ...

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue ...

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts. Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

"There are ... incidental powers belonging to the executive department which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them. ... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office, and, for this purpose, his person must be deemed, in civil cases at least, to possess an official inviolability." 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833).

... Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government ... In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

...

In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office ... In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility ...

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

Excerpted by Alexandria Metzdorf

Harlow v. Fitzgerald

457 U.S. 800 (1982)

> Decision: Vacated and remanded
> Majority: Powell, joined by Brennan, Marshall, Blackmun, Rehnquist, Stevens, and O'Connor
> Concurrence: Brennan, joined by Marshall, and Blackmun
> Concurrence: Brennan, joined by White, Marshall, and Blackmun
> Concurrence: Rehnquist
> Dissent: Burger

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

In this suit for civil damages, petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon ...

Together with their codefendant Richard Nixon, petitioners Harlow and Butterfield moved for summary judgment on February 12, 1980. In denying the motion, the District Court upheld the legal sufficiency of Fitzgerald's ... claim under the First Amendment and his "inferred" statutory causes of action under 5 USC § 7211 ... The court found that genuine issues of disputed fact remained for resolution at trial. It also ruled that petitioners were not entitled to absolute immunity.

Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed the appeal without opinion. Never having determined the immunity available to the senior aides and advisers of the President of the United States, we granted certiorari ...

Our decisions have recognized immunity defenses of two kinds. For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity ... " Our decisions ... have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials ... executive officers engaged in adjudicative functions ... and the President of the United States ...

For executive officials in general, however, our cases make plain that qualified immunity represents the norm ...

Petitioners argue that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides. In deciding this claim, we do not write on an empty page. In *Butz v. Economou* (1978), the Secretary of Agriculture — a Cabinet official directly accountable to the President — asserted a defense of absolute official immunity from suit for civil damages. We rejected his claim. In so doing, we did not question the power or the importance of the Secretary's office. Nor did we doubt the importance to the President of loyal and efficient subordinates in executing his duties of office. Yet we found these factors, alone, to be insufficient to justify absolute immunity ...

Having decided in *Butz* that Members of the Cabinet ordinarily enjoy only qualified immunity from suit, we conclude today that it would be equally untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House. Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. The considerations that supported our decision in *Butz* apply with equal force to this case. It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

In disputing the controlling authority of Butz, petitioners rely on the principles developed in *Gravel v. United States* (1972) ... [where] we endorsed the view that "it is literally impossible ... for Members of Congress to perform their legislative tasks without the help of aides and assistants," and that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. ... "

Petitioners contend that the rationale of *Gravel* mandates a similar "derivative" immunity for the chief aides of the President of the United States. Emphasizing that the President must delegate a large measure of authority to execute the duties of his office, they argue that recognition of derivative absolute immunity is made essential by all the considerations that support absolute immunity for the President himself ...

If the President's aides are derivatively immune because they are essential to the functioning of the Presidency, so should the Members of the Cabinet — Presidential subordinates some of whose essential roles are acknowledged by the Constitution itself — be absolutely immune. Yet we implicitly rejected such derivative immunity in *Butz* ...

For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. But a "special functions" rationale does not warrant a blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station ...

Applying these standards to the claims advanced by petitioners Harlow and Butterfield, we cannot conclude on the record before us that either has shown that "public policy requires [for any of the functions of his office] an exemption of [absolute] scope ... " Nor, assuming that petitioners did have functions for which absolute immunity would be warranted, could we now conclude that the acts charged in this lawsuit — if taken at all — would lie within the protected area ...

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree ...

In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz.* It is this recognition that has required the denial of absolute immunity to most public officers ... [T]here is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties," *Gregoire v. Biddle* (1949) ...

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo* (1980). Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland* (1975). The subjective component refers to "permissible intentions."

Characteristically, the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity

would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury. ... "

Consistently with the balance at which we aimed in *Butz,* we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette* (1978).

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment ...

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson v. Ray* (1967).

In this case, petitioners have asked us to hold that the respondent's pretrial showings were insufficient to survive their motion for summary judgment. We think it appropriate, however, to remand the case to the District Court for its reconsideration of this issue in light of this opinion. The trial court is more familiar with the record so far developed, and also is better situated to make any such further findings as may be necessary.

The judgment of the Court of Appeals is vacated, and the case is remanded for further action consistent with this opinion.

So ordered.

Excerpted by Alexandria Metzdorf

Clinton v. Jones

520 U.S. 681 (1997)

> Decision: Affirmed
> Vote: 9-0
> Majority: Stevens, joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg
> Concurrence: Breyer

Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she ... [filed] a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants ...

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent-working as a state employee-staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made "abhorrent ... " sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner's alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred.

Respondent seeks actual damages of $75,000, and punitive damages of $100,000. Her complaint contains four counts. The first charges that petitioner, acting under color of state law, deprived her of rights protected by the Constitution ... The second charges that petitioner and Ferguson engaged in a conspiracy to violate her federal rights, also actionable under federal law. The third is a state common law claim for intentional infliction of emotional distress, grounded primarily on the incident at the hotel. The fourth count, also based on state law, is for defamation, embracing both the comments allegedly made to the press by Ferguson and the statements of petitioner's agents. Inasmuch as the legal sufficiency of the claims has not yet been challenged, we assume, without deciding, that each of the four counts states a

cause of action as a matter of law. With the exception of the last charge, which arguably may involve conduct within the outer perimeter of the President's official responsibilities, it is perfectly clear that the alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office ...

In response to the complaint, petitioner promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity ...

The District Judge denied the motion to dismiss on immunity grounds and ruled that discovery in the case could go forward, but ordered any trial stayed until the end of petitioner's Presidency ...

Both parties appealed ...

The President, represented by private counsel, filed a petition for certiorari. The Solicitor General, representing the United States, supported the petition, arguing that the decision of the Court of Appeals was "fundamentally mistaken" and created "serious risks for the institution of the Presidency ... '

While our decision to grant the petition expressed no judgment concerning the merits of the case, it does reflect our appraisal of its importance. The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration.

It is ... appropriate to identify two important constitutional issues not encompassed within the questions presented by the petition for certiorari that we need not address today ...

First, because the claim of immunity is asserted in a federal court and relies heavily on the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two, it is not necessary to consider or decide whether a comparable claim might succeed in a state tribunal ...

Second, our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.

Petitioner's principal submission-that "in all but the most exceptional cases ... " the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office-cannot be sustained on the basis of precedent.

Only three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office ... [N]one of those cases sheds any light on the constitutional issue before us.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct ... We explained in *Ferri v. Ackerman*, (1979):

"The conduct of ... official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy ... The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion."

That rationale provided the principal basis for our holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts," *Fitzgerald* ... Our central concern was to avoid rendering the President "unduly cautious in the discharge of his official duties ... "

This reasoning provides no support for an immunity for unofficial conduct. As we explained in *Fitzgerald*, "the sphere of protected action must be related closely to the immunity's justifying purposes." Because of the President's broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity ...

Moreover, when defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." [*Fitzgerald*] Hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity ... As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it ... "

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that-given the nature of the office-the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed ...

It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government ... [F]or example, the Congress may not exercise the judicial power to revise final judgments ... or the executive power to manage an airport ...

Of course the lines between the powers of the three branches are not always neatly defined. But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as "executive." Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies ...

As a factual matter, petitioner contends that this particular case-as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn-may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. As we have already noted, in the more than 200-year history of the Republic, only three sitting

Presidents have been subjected to suits for their private actions ... If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions ... The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe. *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) ...

Second, it is also settled that the President is subject to judicial process in appropriate circumstances ... As we explained, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances ... "

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty ...

In sum, " [i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions ... We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay "in all but the most exceptional cases ... " Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the "exceptional case" subcategory. In all events, the question whether a specific case should receive exceptional treatment is more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution ...

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant ... Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment ... Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests ... If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Original excerpt in Lawrence Lessig, Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment, published by H2O. Further excerpted by Alexandria Metzdorf. Licensed under CC BY-NC-SA.

Trump v. Thompson

No. 21A272 (2022)

Donald J. Trump, Former President of the United States v. Bennie G. Thompson, in his official capacity as Chairman of the United States House Selection Committee to Investigate the January 6th Attack on the United States Capitol (2022)

On application for stay of mandate and injunction pending review

The application for stay of mandate and injunction pending review presented to The Chief Justice and by him referred to the Court is denied. The questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns. The Court of Appeals, however, had no occasion to decide these questions because it analyzed and rejected President Trump's privilege claims "under any of the tests [he] advocated," *Trump v. Thompson*, (CADC 2021), without regard to his status as former President ... Because the Court of Appeals concluded that President Trump's claims would have failed even if he were the incumbent, his status as former President necessarily made no difference to the court's decision ...

Statement of Kavanaugh, J.

The Court of Appeals suggested that a former President may not successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, at least if the current President does not support the privilege claim. As this Court's order today makes clear, those portions of the Court of Appeals' opinion were dicta and should not be considered binding precedent going forward. Moreover, I respectfully disagree with the Court of Appeals on that point. A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications.

As this Court stated in *United States v. Nixon,* (1974), the executive privilege for Presidential communications is rooted in Article II of the Constitution and is "fundamental to the operation of Government." ... By protecting the confidentiality of those internal communications, the Presidential communications privilege facilitates candid advice and deliberations, and it leads to more informed and better Presidential decisionmaking.

...

To be clear, to say that a former President can invoke the privilege for Presidential communications that occurred during his Presidency does not mean that the privilege is absolute or cannot be overcome. The tests set forth in *Nixon*, and *Senate Select Committee on Presidential Campaign Activities v. Nixon*, (CADC 1974) (en banc), may apply to a former President's privilege claim as they do to a current President's privilege claim. Moreover, it could be argued that the strength of a privilege claim should diminish to some extent as the years pass after a former President's term in office ... In all events, the Nixon and Senate Select Committee tests would provide substantial protection for Presidential communications, while still requiring disclosure in certain circumstances.

The Court of Appeals concluded that the privilege claim at issue here would not succeed even under the Nixon and Senate Select Committee tests. Therefore, as this Court's order today makes clear, the Court of Appeals' broader statements questioning whether a former President may successfully invoke the Presidential communications privilege if the current President does not support the claim were dicta and should not be considered binding precedent going forward.

Excerpted by Rorie Solberg

Domestic Powers of the President

In re Neagle

135 U.S. 1 (1890)

> Decision: Affirmed
> Vote: 6-2
> Majority: Miller, joined by Bradley, Harlan, Gray, Blatchford, and Brewer
> Dissent: Lamar, joined by Fuller
> Not participating: Field

Mr. Justice Miller, on behalf of the court, stated the case as follows:

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. T. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition.

...

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge, the homicide was committed for which eagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the Court is by law held, and, having left

that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer ... [Sawyer ordered a writ of habeas corpus and the Sheriff's office certified that Neagle was held based on a warrant from the township of Stockton.]

...

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin ... A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on habeas corpus."

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

MR. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held

"in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States,"

there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court ...

We have no doubt that Mr. Justice Field, when attacked by Terry, was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing

out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that, upon this occasion, it should be shown that the act for which Neagle is imprisoned as done by virtue of an act of Congress ... But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that, if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited ...

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

[T]he law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety ... [besides] that, if he was murdered, his murderer would be subject to the laws of a State, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies ...

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained would be an endless task. We have selected these as being the most forcible expressions of the views of the court having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises ...

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared

to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments ... These aid him in the performance of the great duties of his office, and represent him in a thousand acts ... thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

... [I]f the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

...

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that, where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection ...

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty ...

That there is a peace of the United States, that a man assaulting a judge of the United States while in the discharge of his duties violates that peace, that, in such case, the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California, are questions too clear to need argument to prove them ...

... [I]t is urged against the relief sought by this writ of habeas corpus that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language ...

If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well founded belief, he was justified in taking the life of Terry as the only means of preventing the death of the man who was intended to be his victim; that, in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.

Justice Field did not sit at the hearing of this case, and took no part in its decision.

Excerpted by Alexandria Metzdorf

Ex Parte Grossman

267 U.S. 87 (1925)

> Decision: Reversed
> Vote: 9-0
> Majority: Taft, joined by Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an original petition in this Court for a writ of habeas corpus by Philip Grossman against Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Illinois. The respondent has answered the rule to show cause. The facts are not in dispute.

On November 24, 1920, the United States filed a bill in equity against Philip ... averring that Grossman was maintaining a nuisance at his place of business in Chicago by sales of liquor in violation of the Act and asking an injunction to abate the same. Two days later, the District Judge granted a temporary order. January 11, 1921, an information was filed against Grossman, charging that, after the restraining order had been served on him, he had sold to several persons liquor to be drunk on his premises. He was arrested, tried, found guilty of contempt and sentenced to imprisonment in the Chicago

House of Correction for one year and to pay a fine of $1,000 to the United States and costs ... In December, 1923, the President issued a pardon in which he commuted the sentence of Grossman to the fine of $1,000 on condition that the fine be paid. The pardon was accepted, the fine was paid, and the defendant was released. In May, 1924, however, the District Court committed Grossman to the Chicago House of Correction to serve the sentence notwithstanding the pardon. ... The only question raised by the pleadings herein is that of the power of the President to grant the pardon.

The argument for the respondent is that the President's power extends only to offenses against the United States, and a contempt of Court is not such an offense, that offenses against the United States are not common law offenses, but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law ... that the context of the Constitution shows that the word "offences" is used in that instrument only to include crimes and misdemeanors triable by jury, and not contempts of the dignity and authority of the federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood ...

The King of England, before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crime and misdemeanors and as he has done to the present day ...

[L]ong before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor ... The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law ...

In our own law, the same distinction clearly appears ... [I]t is not the fact of punishment, but rather its character and purpose, that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts, the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.

With this authoritative background of the common law and English history before the American Revolution to show that criminal contempts were within the understood scope of the pardoning power of the Executive, we come now to the history of the clause in the Constitutional Convention of 1787 ... The Committee on Style reported this clause as it now is: "and he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment ... "

We have given the history of the clause to show that the words "for offences against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States, as distinguished from offenses against the States. It cannot be supposed that the Committee on Revision, by adding these words, or the Convention, by accepting them, intended *sub silentio* to narrow the scope of a pardon from one at common law, or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution ...

Nothing in the ordinary meaning of the words "offences against the United States" excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States ... and so must be an offense against the United States. Moreover, this Court has held that the general statute of limitation, which forbids prosecutions "for any offense unless instituted within three years next after such offense shall have been committed," applies to criminal contempts ...

Finally, it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers ...

The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. [I]ndependence and separation between the three branches ... are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the Judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. *Ex parte Garland,* (1866). Negatively, one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the others is qualified, and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction ...

If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment, rather than to a narrow and strained construction of the general powers of the President. The power of a court to protect itself and its usefulness by punishing contemnors is, of course, necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that, in order to avoid possible mistake, undue prejudice or needless severity, the chance of par-

don should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity.

It goes without saying that nowhere is there a more earnest will to maintain the independence of federal courts and the preservation of every legitimate safeguard of their effectiveness afforded by the Constitution than in this Court. But the qualified independence which they fortunately enjoy is not likely to be permanently strengthened by ignoring precedent and practice and minimizing the importance of the coordinating checks and balances of the Constitution.

The rule is made absolute, and the petitioner is discharged.

[*Reversed*.]

Excerpted by Alexandria Metzdorf

Korematsu v. United States

323 U.S. 214 (1944)

> Decision: Affirmed
> Vote: 6-3
> Majority: Black, joined by Stone, Reed, Frankfurter, Douglas, and Rutledge
> Concurrence: Frankfurter
> Dissent: Roberts
> Dissent: Murphy
> Dissent: Jackson

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed ... and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942 ... which provides that

'whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.'

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that

'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.'

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a 'protection against espionage and against sabotage.' In *Kiyoshi Hirabayashi v. United States,* we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as ... a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case,

'we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.'

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country ... The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan ...

We uphold the exclusion order as of the time it was made and when the petitioner violated it ... In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens ... But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

...

It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us ...

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly

constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Kiyoshi Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated ...

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102 ... establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Mitsuye Endo*, demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, supra, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case [before] the court. I might agree with the court's disposition of the hypothetical case ... The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it.

But the facts above recited, and those set forth in *Ex parte Metsuye Endo*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

Original excerpt in Lawrence Lessig, Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment, published by H2O. Further excerpted by Alexandria Metzdorf. Licensed under CC BY-NC-SA.

Youngstown Sheet and Tube v. Sawyer

343 U.S. 579 (1952)

> Decision: Affirmed
> Vote: 6-3
> Majority: Black, joined by Frankfurter, Douglas, Jackson, and Burton
> Concurrence: Frankfurter
> Concurrence: Douglas
> Concurrence: Jackson
> Concurrence: Burton
> Concurrence: Clark
> Dissent: Vinson, joined by Reed, and Minton

MR. JUSTICE BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements ... On April 4, 1952, the Union gave notice of a nationwide strike called to begin at 12:01 a.m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340 ... The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action ... Twelve days later he sent a second message ... Congress has taken no action.

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions ...

Two crucial issues have developed: First. Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? Second. If so, is the seizure order within the constitutional power of the President?

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions ... However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes ... as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency ... Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining ... Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances ...

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President ... "; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States ... " After granting many powers to the Congress,

Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress —it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question ... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The judgment of the District Court is

Affirmed.

Justice Jackson, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety ... The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization —and lose sight of enduring consequences upon the balanced power structure of our Republic ...

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maxi-

mum, for it includes all that he possesses in his own right plus all that Congress can delegate ... In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category ...

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government ... another, condemnation of facilities, including temporary use under the power of eminent domain ... The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests ... None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses

could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones.

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image ...

The clause on which the Government next relies is that "The President shall be Commander in Chief of the Army and Navy of the United States ... " It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

That seems to be the logic of an argument tendered at our bar—that the President having, on his own responsibility, sent American troops abroad derives from that act "affirmative power" to seize the means of producing a supply of steel for them. To quote, "Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers." Thus, it is said, he has invested himself with "war powers."

I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture ... I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it.

Assuming that we are in a war de facto, whether it is or is not a war de jure, does that empower the Commander in Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power "to raise and support Armies" and "to provide and maintain a Navy." This certainly lays upon Congress primary responsibility for supplying the armed forces ...

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and

navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. ... " Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights ...

While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by the command functions usual to the topmost officer of the army and navy. Even then, heed has been taken of any efforts of Congress to negative his authority ...

The Solicitor General ... grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy ...

The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it ... they made no express provision for exercise of extraordinary authority because of a crisis ... I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so ...

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness ...

... I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review ... at the expense of Congress ...

The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up ...

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Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.

501 U.S. 252 (1991)

> Decision: Reversed
> Vote: 6-3
> Majority: Stevens, joined by Blackmun, O'Connor, Scalia, Kennedy, and Souter
> Dissent: White, joined by Rehnquist, and Marshall/p>

JUSTICE STEVENS delivered the opinion of the Court.

An Act of Congress authorizing the transfer of operating control of two major airports from the Federal Government to the Metropolitan Washington Airports Authority (MWAA) conditioned the transfer on the creation by MWAA of a unique "Board of Review" composed of nine Members of Congress and vested with veto power over decisions made by MWAA's Board of Directors ... The principal question presented is whether this unusual statutory condition violates the constitutional principle of separation of powers ... We conclude, as did the Court of Appeals for the District of Columbia Circuit, that the condition is unconstitutional.

In 1940, Congress authorized the Executive Branch to acquire a tract of land a few miles from the Capitol and to construct what is now Washington National Airport (National). From the time it opened until 1987, National was owned and operated by the Federal Government ...

Despite the FAA's history of profitable operation of National and excellent management of both airports, the Secretary of Transportation concluded that necessary capital improvements could not be financed for either National or Dulles unless control of the airports was transferred to a regional authority with power to raise money by selling tax-exempt bonds ... In 1984, she therefore appointed an advisory commission to develop a plan for the creation of such a regional authority.

The Commission recommended that the proposed authority be created by a congressionally approved compact between Virginia and the District ... [a] Board of Review "shall consist" of nine Members of the Congress, eight of whom serve on committees with jurisdiction over transportation issues and none of whom may be a Member from Maryland, Virginia, or the District of Columbia ... Subparagraph (4)(B) details the actions that must be submitted to the Board of Review for approval, which include adoption of a budget ... and appointment of the chief executive officer of the Authority ... Subparagraph (4)(D) explains that disapproval by the Board will prevent submitted actions from taking effect ... Other significant provisions of the Act include subparagraph (5), which authorizes the Board of Review to require Authority directors to consider any action relating to the airports ... subsection (g), which requires that any action changing the hours of operation at either National or Dulles be taken by regulation and therefore be subject to veto by the Board of Review ... and subsection (h), which contains a provision disabling MWAA's Board of Directors from performing any action subject to the veto power if a court should hold that the Board of Review provisions of the Act are invalid ...

Petitioners argue that this case does not raise any separation-of-powers issue because the Board of Review neither exercises federal power nor acts as an agent of Congress. Examining the origin and structure of the Board, we conclude that petitioners are incorrect.

Petitioners lay great stress on the fact that the Board of Review was established by the bylaws of MWAA, which was created by legislation enacted by the Commonwealth of Virginia and the District of Columbia ... [W]e believe the fact that the Board of Review was created by state enactments is not enough to immunize it from separation-of-powers review. Several factors combine to mandate this result.

Control over National and Dulles was originally in federal hands, and was transferred to MWAA only subject to the condition that the States create the Board of Review. Congress placed such significance on the Board that it required that the Board's invalidation prevent MWAA from taking any action that would have been subject to Board oversight ... Moreover, the Federal Government has a strong and continuing interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business, especially to the work of Congress, whose Members must maintain offices in both Washington and the districts that they represent and must shuttle back and forth according to the dictates of busy and often unpredictable schedules. This federal interest was identified in the preamble to the Transfer Act ... justified a Presidential appointee on the Board of Directors, and motivated the creation of the Board of Review, the structure and the powers of which Congress mandated in detail ... Most significant, membership on the Board of Review is limited to federal officials, specifically members of congressional committees charged with authority over air transportation.

That the Members of Congress who serve on the Board nominally serve "in their individual capacities, as representatives of users" of the airports ... does not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes. As we recently held, "separation-of-powers analysis does not turn on the labeling of an activity," *Mistretta v. United States*, (1989). The Transfer Act imposes no requirement that the Members of Congress who are appointed to the Board actually be users of the airports. Rather, the Act imposes the requirement that the Board members have congressional responsibilities related to the federal regulation of air transportation. These facts belie the ipse dixit that the Board members will act "in their individual capacities."

Although the legislative history is not necessary to our conclusion that the Board members act in their official congressional capacities, the floor debates in the House confirm our view ... [Rep. Smith:] "Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority ... We are getting our cake and eating it too ... The beauty of the deal is that Congress retains its control without spending a dime ... "

We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny ...

We must therefore consider whether the powers of the Board of Review may, consistent with the separation of powers, be exercised by an agent of Congress.

Because National and Dulles are the property of the Federal Government and their operations directly affect interstate commerce, there is no doubt concerning the ultimate power of Congress to enact legislation defining the policies that govern those operations ... The question presented is only whether the Legislature has followed a constitutionally acceptable procedure in delegating decisionmaking authority to the Board of Review ...

To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." *J. W. Hampton, Jr., & Co. v. United States*, (1928). And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I ...

The first constraint is illustrated by the Court's holdings in *Springer v. Philippine Islands*, (1928) ... *Springer* involved the validity of Acts of the Philippine Legislature that authorized a committee of three—two legislators and one executive—to vote corporate stock owned by the Philippine Government. Because the Organic Act of the Philippine Islands incorporated the separation-of-powers principle, and because the challenged statute authorized two legislators to perform the executive function of controlling the management of the government-owned corporations, the Court held the statutes invalid ...

The second constraint is illustrated by our decision in Chadha. That case involved the validity of a statute that authorized either House of Congress by resolution to invalidate a decision by the Attorney General to allow a deportable alien to remain in the United States. Congress had the power to achieve that result through legislation, but the statute was nevertheless invalid because Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I.

Respondents rely on both of these constraints in their challenge to the Board of Review ... If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7. In short, when Congress "[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch," it must take that action by the procedures authorized in the Constitution ...

It is so ordered.

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Clinton v. City of New York

524 U.S. 417 (1998)

> Decision: Affirmed
> Vote: 6-3
> Majority: Stevens, joined by Rehnquist, Kennedy, Souter, Thomas, and Ginsburg
> Concurrence: Kennedy
> Concur/dissent: Scalia, joined by O'Connor, and Breyer (Part III)
> Dissent: Breyer, joined by O'Connor, and Scalia (Part III only)

Justice Stevens delivered the opinion of the Court.

The Line Item Veto Act (Act) ... was enacted in April 1996 and became effective on January 1, 1997. The following day, six Members of Congress who had voted against the Act brought suit in the District Court for the District of Columbia challenging its constitutionality ... We determined, however, that the Members of Congress did not have standing to sue because they had not "alleged a sufficiently concrete injury to have established Article III standing," *Raines* v. *Byrd,* (1997); thus, "[i]n ... light of [the] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," id., at 820, we remanded the case to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

Less than two months after our decision in that case, the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997 ... Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid, 985 F. Supp. 168, 177182 (1998), and we again expedited our review, 522 U. S. 1144 (1998). We now hold that these appellees have standing to challenge the constitutionality of the Act and, reaching the merits, we agree that the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution.

...

Title XIX of the Social Security Act, 79 Stat. 343, as amended, authorizes the Federal Government to transfer huge sums of money to the States to help finance medical care for the indigent. In 1991, Congress directed that those federal subsidies be reduced by the amount of certain taxes levied by the States on health care providers. In 1994, the Department of Health and Human Services (HHS) notified the State of New York that 15 of its taxes were covered by the 1991 Act, and that as of June 30, 1994, the statute therefore required New York to return $955 million to the United States ...

New York turned to Congress for relief. On August 5, 1997, Congress enacted a law that resolved the issue in New York's favor ...

On August 11, 1997, the President sent identical notices to the Senate and to the House of Representatives canceling "one item of new direct spending," specifying § 4722(c) as that item, and stating that he had determined that "this cancellation will reduce the Federal budget deficit ... "

In § 968 of the Taxpayer Relief Act of 1997, Congress amended § 1042 of the Internal Revenue Code to permit owners of certain food refiners and processors to defer the recognition of gain if they sell their stock to eligible farmers' cooperatives ... The purpose of the amendment, as repeatedly explained by its sponsors, was "to facilitate the transfer of refiners and processors to farmers' cooperatives ... " The amendment to § 1042 was one of the 79 "limited tax benefits" authorized by the Taxpayer Relief Act of 1997 and specifically identified in Title XVII of that Act as "subject to [the] line item veto."

On the same date that he canceled the "item of new direct spending" involving New York's health care programs, the President also canceled this limited tax benefit ...

Appellees filed two separate actions against the President and other federal officials challenging these two cancellations. The plaintiffs in the first case are the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The plaintiffs in the second are a farmers' cooperative consisting of about 30 potato growers in Idaho and an individual farmer who is a member and officer of the cooperative ...

As in the prior challenge to the Line Item Veto Act, we initially confront jurisdictional questions.

In both the New York and the Snake River cases, the Government argues that the appellees are not actually injured because the claims are too speculative and, in any event, the claims are advanced by the wrong parties. We find no merit in the suggestion that New York's injury is merely speculative because HHS has not yet acted on the State's waiver requests ...

The Snake River farmers' cooperative also suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants ...

Thus, we are satisfied that both of these actions are Article III "Cases" that we have a duty to decide.

The Line Item Veto Act gives the President the power to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." It is undisputed that the New York case involves an "item of new direct spending" and that the Snake River case involves a "limited tax benefit" as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority ... It is undisputed that the President meticulously followed these procedures in these cases ...

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "[R]epeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha*, (1983) ...

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire

bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes ...

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on *Field v. Clark*, (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items "is, in practical effect, no more and no less than the power to `decline to spend' specified sums of money, or to `decline to implement' specified tax measures ... " Neither argument is persuasive ...

[T]he conclusion in *Field v. Clark* that the suspensions mandated by the Tariff Act were not exercises of legislative power does not undermine our opinion that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7 ...

The cited statutes all relate to foreign trade, and this Court has recognized that in the foreign affairs arena, the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States v. Curtiss-Wright Export Corp.*, (1936) ... Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution ...

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds ... It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

Although they are implicit in what we have already written, the profound importance of these cases makes it appropriate to emphasize three points.

First, we express no opinion about the wisdom of the procedures authorized by the Line Item Veto Act ...

Second, although appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the "finely wrought" procedure commanded by the Constitution ...

Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution ...

If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. *Cf. U. S. Term Limits, Inc. v. Thornton*, (1995).

The judgment of the District Court is affirmed.

It is so ordered.

Justice Scalia, with whom Justice O'Connor joins, and with whom Justice Breyer joins as to Part III, concurring in part and dissenting in part.

Today the Court acknowledges the" 'overriding and timehonored concern about keeping the Judiciary's power within its proper constitutional sphere.'" *Ante,* at 421, quoting *Raines* v. *Byrd,* (1997). It proceeds, however, to ignore the prescribed statutory limits of our jurisdiction by permitting the expedited-review provisions of the Line Item Veto Act to be invoked by persons who are not "individual[s]," and to ignore the constitutional limits of our jurisdiction by permitting one party to challenge the Government's denial to an*other party* of favorable tax treatment from which the first party might, but just as likely might not, gain a concrete benefit. In my view, the Snake River appellees lack standing ... the New York appellees have standing ...

I agree with the Court that the New York appellees have standing to challenge the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an "item of new direct spending." ... The tax liability they will incur under New York law is a concrete and particularized injury, fairly traceable to the President's action, and avoided if that action is undone. Unlike the Court, however, I do not believe that Executive cancellation of this item of direct spending violates the Presentment Clause.

The Presentment Clause requires, in relevant part, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." U. S. Const., Art. I, § 7, cl. 2. There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only *after* the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to "cancel"-prevent from "having legal force or effect"-certain parts of duly enacted statutes.

...

As much as the Court goes on about Art. I, § 7, therefore, that provision does not demand the result the Court reaches. It no more categorically prohibits the Executive *reduction* of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive *augmentation* of congressional dispositions in the course of implementing statutes that authorize such augmentation-generally known as substantive rulemaking ...

I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch. I may note, to begin with, that the Line Item Veto Act is not the first statute to authorize the President to "cancel" spending items. In *Bowsher* v. *Synar,* (1986), we addressed the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, which required the President, if the federal budget deficit exceeded a certain amount, to issue a "sequestra-

tion" order mandating spending reductions specified by the Comptroller General, § 902. The effect of sequestration was that "amounts sequestered ... shall be *permanently cancelled."* § 902(a)(4) (emphasis added). We held that the Act was unconstitutional, not because it impermissibly gave the Executive legislative power, but because it gave the Comptroller General, an officer of the Legislative Branch over whom Congress retained removal power, "the ultimate authority to determine the budget cuts to be made," "functions ... *plainly entailing execution of the law in constitutional terms,"* (emphasis added). The President's discretion under the Line Item Veto Act is certainly broader than the Comptroller General's discretion was under the 1985 Act, but it is no broader than the discretion traditionally granted the President in his execution of spending laws.

Insofar as the degree of political, "lawmaking" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the Nation ...

Certain Presidents have claimed Executive authority to withhold appropriated funds even *absent* an express conferral of discretion to do so ...

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead-authorizing the President to "cancel" an item of spending-is technically different. But the technical difference does not relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which *is* at issue here, is preeminently not a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

I would hold that the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an item of direct spending does not violate the Constitution. Because I find no party before us who has standing to challenge the President's cancellation of § 968 of the Taxpayer Relief Act of 1997, I do not reach the question whether that violates the Constitution.

For the foregoing reasons, I respectfully dissent.

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West Virginia v. EPA

597 U.S. ___ (2022)

> Decision: Reversed and remanded
> Vote: 6-3
> Majority: Roberts joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett
> Concurrence: Gorsuch, joined by Alito
> Dissent: Kagan, joined by Breyer and Sotomayor

Chief Justice Roberts delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air ... In each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" ...

In 2015 ... EPA issued a new rule [the Clean Power Plan] concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources ...

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act. ...

... [In 2019,] the Agency replaced the Clean Power Plan ... [with] the Affordable Clean Energy (ACE) Rule. ...

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE Rule ...

The Court of Appeals consolidated all 12 petitions for review into one case. It then held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. The Court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. It also vacated and remanded the replacement rule, the ACE Rule. ...

Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." *E. Gellhorn & P. Verkuil,* (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims ...

... Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct ...

The major questions doctrine ... refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted ...

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air v. EPA* (2014) ... The Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself ... This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation" into an entirely different kind.

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide ... trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise not traditionally needed in EPA regulatory development." *EPA, Fiscal Year 2016* (2015) ...

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter ... But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust ...

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times ...

The only question ... we answer, is ... whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no. Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York v. United States,* (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'

The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on these interests. *NFIB v. OSHA,* (2022) (Gorsuch, J., concurring) When agencies seek to resolve major questions, they at least [must] act with clear congressional authorization and ... not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them.

Justice Kagan, dissenting.

The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change. ...

The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. ... That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases. ...

The majority thinks ... that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action ... The majority labels that view the "major questions doctrine," and claims to find support for it in our case law ... But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. ...

First, Members of Congress ... know they don't know enough—to regulate sensibly on an issue ... they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies ... Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. ... Over time, the administrative delegations Congress has made have helped to build a modern Nation ... It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines. ...

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't ... Courts should be modest. Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan ... In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Ethan Derstine, Gabriel Thomison, and Eduardo Vidal

Presidential Powers in Foreign Affairs

Prize Cases

67 U.S. 635 (1863)

> Decision: Affirmed
> Vote: 5-4
> Majority: Grier, joined by Wayne, Swayne, Miller, and Davis
> Dissent: Nelson, joined by Taney, Catron, and Clifford

Mr. Justice GRIER.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

...

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification has not been, and cannot be disputed.

To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto,* and the neutral must have knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other ...

The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other ...

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars ...

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case ...

On this first question, therefore, we are of the opinion that the President had a right, *jure belli,* to institute a blockade of ports in possession of the States in rebellion which neutrals are bound to regard.

We come now to the consideration of the second question. What is included in the term "enemies' property?"

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property," whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy by capturing his property on the high seas.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own ... They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution ...

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battlefield or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional!!!" Now it is a proposition never doubted that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights ... Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war cannot be a subject of complaint by the party to

whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force — south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are nonetheless enemies because they are traitors ...

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner ...

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory ...

... According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and, when caught, her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the *Alabama* might approach, and, if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurd is a "*felo de se.*"

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

[*It is so ordered.*]

Excerpted by Alexandria Metzdorf

United States v. Curtiss-Wright Export Corp

299 U.S. 304 (1936)

> Decision: Reversed
> Vote: 7-1
> Majority: Sutherland, joined by Hughes, Van Devanter, Brandeis, Butler, Roberts, and Cardozo
> Dissent: McReynolds
> Not participating: Stone

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress ... The Joint Resolution follows ... "That if the President finds that the prohibition of the sale of arms and munitions of war ... to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries ... it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress ... "

It is contended that ... the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion, and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive ...

The determination which we are called to make, therefore, is whether the Joint Resolution, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power ... may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

... [W]e first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs ... there are differences between them, and ... these differences are fundamental ...

The two classes of powers are different both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative

powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter v. Carter Coal Co. (1936) ... International powers ... were transmitted to the United States by some other source [outside the Constitution].* During the colonial period, those powers were possessed exclusively by, and were entirely under the control of, the Crown ...

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency — namely the Continental Congress ... That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end, and forms of government change; but sovereignty survives ...

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality ... As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family ...

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. ... [T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it ...

[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved ...

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action or, indeed, whether he shall act at all — may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed ...

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs ...

[W]e conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly, and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject ...

We proceed, then, to a consideration of the second and third grounds of the demurrers which, as we have said, the court below rejected.

The Executive proclamation recites,

"I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics *and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution ...* "

...

The judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with the foregoing opinion.

Reversed.

Mr. Justice Stone took no part in the consideration or decision of this case.

Excerpted by Alexandria Metzdorf

Dames & Moore v. Regan

453 U.S. 654 (1981)

> Decision: Affirmed
> Majority: Rehnquist, joined by Burger, Brennan, Stewart, White, Marshall, and Blackmun
> Concur/dissent: Powell
> Concurrence: Stevens (in part)

Justice REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the matter in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison

writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis deTocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge ... may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.*, (Frankfurter, J., concurring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran ...

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. *Ashwander v. TVA* (1936) (Brandeis concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence is especially true here. We attempt to lay down no general "guidelines" covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case ...

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act (hereinafter IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of "all property and interests in property of the Government of Iran ... "

On December 19, 1979, petitioner Dames & Moore filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Petitioner contended ... that it was owed $3,436,694.30 plus interest for services performed under the contract prior to the date of termination ...

The District Court issued orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement ... The Agreement stated that "[i]t is the purpose of [the United States and Iran] ... to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.". In furtherance of this goal, the Agreement called for the establishment of an Iran-United States

Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable ... in the courts of any nation in accordance with its laws." Under the Agreement, the United States is obligated

"to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

In addition, the United States must "act to bring about the transfer" by July 19, 1981, of all Iranian assets held in this country by American banks. One billion dollars of these assets will be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the Claims Tribunal.

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the agreement ...

On February 24, 1981, President Reagan issued an Executive Order in which he "ratified" the January 19th Executive Orders ... Moreover, he "suspended" all "claims which may be presented to the ... Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due.

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization ... The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment. However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above ...

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) ... Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case ...

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however, has principally relied on § 203 of the IEEPA, as authorization for these actions. Section 1702(a)(1) provides in part:

"At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise ...

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

"by any person, or with respect to any property, subject to the jurisdiction of the United States."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention ...

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5(b) of the Trading With the Enemy Act (hereinafter TWEA) ... from which the pertinent language of § 1702 is directly drawn, reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls."

We do not agree and refuse to read out of § 1702 all meaning to the words "transfer," "compel," or "nullify." Nothing in the legislative history of either § 1702 or § 5(b) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, e. g., *Orvis v. Brownell*, (1953). Although Congress intended to limit the President's emergency power in peacetime, we do not think the changes brought about by the enactment of the IEEPA in any way affected the authority of the President to take the specific actions taken here. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury Regulations provided that "unless licensed" any attachment is null and void, and all licenses "may be amended, modified, or revoked at any time." § 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President. ... " *Propper v. Clark*, (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country ...

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown* (Jackson,

J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President ... and that we are not prepared to say.

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294 the President purported to act under authority of both the IEEPA and 22 U.S.C. § 1732, the so-called "Hostage Act."

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit ... is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. *The Marschalk Co. v. Iran National Airlines Corp*., (1981).

...

We are reluctant to conclude that this provision [of the Hostage Act of 1868] constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will ... These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely because of their American citizenship ...

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case ... [T]he IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns ...

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted ... Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially ... in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig v. Agee* [1981]. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the Pres-

ident broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown* (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President ...

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement ...

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate ...

[T]he inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294 ... Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent. ... " *United States v. Midwest Oil Co.,* (1915) ... Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers ...

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,12 Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities ... But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

It is so ordered.

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Zivotofsky v. Kerry

576 U.S. 1 (2015)

> Decision: Affirmed
> Vote: 6-3
> Majority: Kennedy, joined by Ginsburg, Breyer, Sotomayor, and Kagan
> Concurrence: Breyer
> Concur/dissent: Thomas
> Dissent: Roberts, joined by Alito
> Dissent: Scalia, joined by Roberts, and Alito

Justice KENNEDY delivered the opinion of the Court.

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation's foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel ... "

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Department's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth ... " If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem."

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act ... Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel ... "

When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states ... " The President concluded, "U.S. policy regarding Jerusalem has not changed ... "

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (concurring opinion) ... [W]hen "the President takes measures incompatible with the expressed or implied will of Congress ... he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue ...

In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." In so doing the Secretary acknowledges the President's power is "at its lowest ebb ... " Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone ...

Recognition is a "formal acknowledgment" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state ... " Recognition is often effected by an express "written or oral declaration ... " It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents ...

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers." Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention ...

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state ... It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations ...

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, § 2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls."

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador ... The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that

would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here. Art. II, § 1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal ...

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces ... "

Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question ...

Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President ...

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem ...

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city

of Jerusalem." That is, § 214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, § 214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem."

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination ...

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State ... As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition ... The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy ... If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country ... But the Secretary will not list a sovereign that contradicts the President's recognition policy in a passport. Thus, the Secretary will not list "Israel" in a passport as the country containing Jerusalem ...

From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports ... The Court does not question the power of Congress to enact passport legislation of wide scope ...

The problem with § 214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. *Freytag v. Commissioner*, (1991). To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional ...

In holding § 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

Excerpted by Alexandria Metzdorf

Justice Scalia, with whom The Chief Justice and Justice Alito join, dissenting.

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. The royal prerogative included the "sole power of sending ambassadors to foreign states, and receiving them at home," the sole authority to "make treaties, leagues, and alliances with foreign states and princes," "the sole prerogative of making war and peace," and the "sole power of raising and regulating fleets and armies." W. Blackstone, Commentaries. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments. The Constitution gave the President the "executive Power," authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, §8. "Fully eleven of the powers that Article I, §8 grants Congress deal in some way with foreign affairs." L. Tribe, American Constitutional Law, §5–18, p. 965.

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

The political branches of our Government agree on the real-world fact that Israel controls the city of Jerusalem ... They disagree, however, about how official documents should record the birthplace of an American citizen born in Jerusalem. The Executive does not accept any state's claim to sovereignty over Jerusalem, and it maintains that the birthplace designation "Israel" would clash with this stance of neutrality. But the National Legislature has enacted a statute that provides: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, §214(d). Menachem Zivotofsky's parents seek enforcement of this statutory right in the issuance of their son's passport and consular report of birth abroad ...

Before turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. Congress's power to "establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, enables it to grant American citizenship to someone born abroad. *United States* v. *Wong Kim Ark*., (1898). The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power

"carries with it all those incidental powers which are necessary to its complete and effectual execution." *Cohens* v. *Virginia*, (1821). Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." ...

No doubt congressional discretion in executing legislative powers has its limits; Congress's chosen approach must be not only "necessary" to carrying its powers into execution, but also "proper." Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, §214(d) does not transgress any such restriction.

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law ...

To know all this is to realize at once that §214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

...

The best indication that §214(d) does not concern recognition comes from the State Department's policies concerning Taiwan. According to the Solicitor General, the United States "acknowledges the Chinese position" that Taiwan is a part of China, but "does not take a position" of its own on that issue. Brief for Respondent 51–52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as "China." It indeed *insisted* on doing so until Congress passed a law (on which §214(d) was modeled) giving citizens the option to have their birthplaces recorded as "Taiwan." The Solicitor General explains that the designation "China" "involves a geographic description, not an assertion that Taiwan is ... part of sovereign China." Brief for Respondent 51–52. Quite so. Section 214(d) likewise calls for nothing beyond a "geographic description"; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel ...

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies ...

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory "are legitimate in the eyes of the United States," *ante,* at 11. Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides ...

No consistent or coherent theory supports the Court's decision ...

International disputes about statehood and territory are neither rare nor obscure. Leading foreign debates during the 19th century concerned how the United States should respond to revolutions in Latin America, Texas, Mexico, Hawaii, Cuba. During the 20th century, attitudes toward Communist governments in Russia and China became conspicuous subjects of agitation. Disagreements about Taiwan, Kashmir, and Crimea remain prominent today. A President empowered to decide all questions relating to these matters, immune from laws embodying congressional disagreement with his position, would have un- controlled mastery of a vast share of the Nation's foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies. Under the Constitution they approved, Congress may require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem.

I dissent.

Excerpted by Rorie Solberg

Trump v. Hawaii

585 U.S. ___ (2018)

> Decision: Reversed and remanded
> Vote: 5-4
> Majority: Roberts, joined by Kennedy, Thomas, Alito, and Gorsuch
> Concurrence: Kennedy
> Concurrence: Thomas
> Dissent: Breyer, joined by Kagan
> Dissent: Sotomayor, joined by Ginsburg

Chief Justice Roberts delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens when- ever he finds that their entry "would be detrimental to the interests of the United States." 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645 (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment ...

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as "at risk" of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists.

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq ...

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA) ... Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam ...

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa ... Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA— 8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas ...

§1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ... whose entry to suspend ... for how long ... and on what conditions ... It is therefore unsurprising that we have previously observed that §1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA ...

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States."

The President has undoubtedly fulfilled that requirement here ... The Proclamation therefore "craft[ed] ... country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur."

Plaintiffs ... argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to *make* a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under §1182(f) ...

Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations ... To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals ...

In short, the language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority ...

Plaintiffs' structural argument starts with the premise that §1182(f) does not give the President authority to countermand Congress's considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it ...

We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation's vetting system ...

Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation §1(h). Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not *require* that systemic problems such as the lack of reliable

information be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall ...

Although plaintiffs claim that their reading preserves for the President a flexible power to "supplement" the INA, their understanding of the President's authority is remarkably cramped: He may suspend entry by classes of aliens "similar in nature" to the existing categories of inadmissibility—but not too similar—or only in response to "some exigent circumstance" that Congress did not already touch on in the INA ... In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in §1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other "interests of the United States."

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under §1182(f) ...

Plaintiffs' final statutory argument is that the President's entry suspension violates §1152(a)(1)(A), which provides that "no person shall ... be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in §1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that §1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in §1152(a)(1)(A) ...

[W]e reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission) into the United States. First, any alien who is inadmissible under §1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U. S. C. §1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"—including §1182(f).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility into the United States, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which §1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end ...

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims ...

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... " Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on ... "

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility ...

A conventional application of *Kleidienst v. Mandel (1972)*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order ... For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare ... desire to harm a politically unpopular group." *Department of Agriculture* v. *Moreno*, (1973) ...

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus ... " [B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks ...

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks ... "

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas ... These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas ...

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants ... The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver ...

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim ...

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the

facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a "prudential rule of avoiding constitutional questions." *Zobrest* v. *Catalina Foothills School Dist.*, (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.

The Establishment Clause forbids government policies "respecting an establishment of religion." U. S. Const., Amdt. 1. The "clearest command" of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. *Larson* v. *Valente* (1982); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, (1993) ...

"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County* v. *American Civil Liberties Union of Ky.*, (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion ...

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, *ante,* at 27–28, that highly abridged account does not tell even half of the story ... The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

...

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. *Ante,* at 29. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications ...

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu* v. *United States*, (1944). See Brief for Japanese American Citizens League as *Amicus Curiae*. In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. *Adarand Constructors, Inc.* v. *Peña*, (1995) (Ginsburg, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as *Amicus Curiae* 12–14. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's

supposed inability to assimilate and desire to harm the United States. See *Korematsu*, (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect ... And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." (Murphy, J., dissenting). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure. *Id.,* at 245–246.

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind ... This formal repudiation of a shameful precedent is laud- able and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another. *Ante,* at 38.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

Excerpted by Alexandria Metzdorf

Legislative Powers

Case List

Sources and Scope of Legislative Powers

Chae Chan Ping v. United States (1889)
McGrain v. Daugherty (1927)
Watkins v. United States (1957)
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Sources and Scope of Legislative Powers

McCulloch v. Maryland

17 U.S. 316 (1819)

> Decision: Reversed
> Vote: 6-0
> Majority: Marshall, joined by Washington, Johnson, Livingston, Todd, Duvall, and Story

MARSHALL, Ch. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government ...

The first question made in the cause is—has congress power to incorporate a bank? ... The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation ...

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law ...

... [T]he counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument ... was a mere proposal ... when it came from their hands ...

This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject — by assembling in convention. It is true, they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the

States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments ...

The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negatived, by the State Governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties ...

From these conventions, the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties ...

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist ...

[T]he government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it ...

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described ... A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation ...

Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government ... may ... erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power ... if the government of the Union is restrained from creating a corporation ... on the single reason that the creation of a corporation is an act of sovereignty ... there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means ... those who contend that it may not ... take upon themselves the burden of establishing that exception ...

In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other ... Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time ...

To [Congress'] enumeration of powers is added, that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' The counsel for the state of Maryland have urged various arguments, to prove that this clause, though, in terms, a grant of power, is not so, in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation ...

Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned ...

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress

would have some choice of means ... This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the National Legislature under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form, as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional ...

After the most deliberate consideration, it is the unanimous and decided opinion of this Court that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock and being conducive to the complete accomplishment of the object, are equally constitutional ...

It being the opinion of the Court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the State of Maryland may, without violating the Constitution, tax that branch? [See *McCulloch v. Maryland* in the Federalism chapter.]

Excerpted by Alexandria Metzdorf

Chae Chan Ping v. United States

130 U.S. 581 (1889)

> Decision: Affirmed
> Vote: Unanimous
> Majority: Field,, joined by Fuller, Miller, Bradley, Harlan, Gray, Blatchford, and Lamar

MR. JUSTICE FIELD delivered the opinion of the Court.

The appeal involves a consideration of the validity of the Act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress ...

British subjects in China were often subjected not only to the violence of mobs, but to insults and outrages from local authorities of the country, which led to retaliatory measures for the punishment of the aggressors. To such an extent were these measures carried and such resistance offered to them that in 1856, the two countries were in open war ... England requested of the President the concurrence and active cooperation of the United States ... [A]s the rights of citizens of the United States might be seriously affected by the results of existing hostilities, and commercial intercourse between the United States and China be disturbed, it was deemed advisable to send to China a minister plenipotentiary to represent our government and watch our interests there. Accordingly, Mr. William B. Reed, of Philadelphia, was appointed such minister, and instructed, while abstaining from any direct interference, to aid by peaceful cooperation the objects the allied forces were seeking to accomplish ... Through him a new treaty was negotiated with the Chinese government. It was concluded in June, 1858, and ratified in August of the following year ...

[A]dditional articles to the treaty of 1858 were agreed upon which gave expression to the general desire that the two nations and their peoples should be drawn closer together. The new articles, eight in number, were agreed to on the 28th of July, 1868, and ratifications of them were exchanged at Pekin in November of the following year ...

"ARTICLE VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation, and reciprocally, Chinese subjects visiting or residing in the United shall enjoy the same privileges, immunities,

and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States ... "

The discovery of gold in California in 1848, as is well known, was followed by a large immigration thither from all parts of the world, attracted not only by the hope of gain from the mines, but from the great prices paid for all kinds of labor. The news of the discovery penetrated China, and laborers came from there in great numbers, a few with their own means, but by far the greater number under contract with employers for whose benefit they worked. These laborers readily secured employment ... They were generally industrious and frugal. Not being accompanied by families except in rare instances, their expenses were small and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

The differences of race added greatly to the difficulties of the situation ... As they grew in numbers each year, the people of the coast saw, or believed they saw, in the facility of immigration and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation ...

So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific coast and from private individuals that Congress was impelled to act on the subject. Many persons, however, both in and out of Congress, were of opinion that so long as the treaty remained unmodified, legislation restricting immigration would be a breach of faith with China. A statute was accordingly passed appropriating money to send commissioners to China to act with our minister there in negotiating and concluding by treaty a settlement of such matters of interest between the two governments as might be confided to them ... Such commissioners were appointed, and as the result of their negotiations the supplementary treaty of November 17, 1880, was concluded and ratified in May of the following year.

The government of China thus agreed that notwithstanding the stipulations of former treaties, the United States might regulate, limit, or suspend the coming of Chinese laborers, or their residence therein, without absolutely forbidding it, whenever in their opinion the interests of the country, or of any part of it, might require such action. Legislation for such regulation, limitation, or suspension was entrusted to the discretion of our government, with the condition that it should only be such as might be necessary for that purpose, and that the immigrants should not be maltreated or abused. On the 6th of May, 1882, an act of Congress was approved to carry this supplementary treaty into effect ... It is entitled "An act to execute certain treaty stipulations relating to Chinese." Its first section declares that after 90 days from the passage of the act, and for the period of ten years from its date, the coming of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come, to remain within the United States. The second makes it a misdemeanor, punishable by fine, to which imprisonment may be added, for the master of any vessel knowingly to bring within the United States from a foreign country, and land, any such Chinese laborer. The third provides that those two sections shall not apply to Chinese laborers who were in the United States November 17, 1880, or who shall come within ninety days after the passage of the act.

The enforcement of this act with respect to laborers who were in the United States on November 17, 1880, was attended with great embarrassment from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath. This fact led to a desire for further legislation restricting the evidence receivable, and the amendatory Act of July 5, 1884, was accordingly passed ... [T]he amendatory act of 1884 declared that the certificate which the laborer must obtain "shall be the only evidence permissible to establish his right of reentry" into the United States ...

The same difficulties and embarrassments continued with respect to the proof of their former residence. Parties were able to pass successfully the required examination as to their residence before November 17, 1880, who, it was generally believed, had never visited our shores. To prevent the possibility of the policy of excluding Chinese laborers being evaded, the Act of October 1, 1888, the validity of which is the subject of consideration in this case, was passed ...

Here, the objection made is that the act of 1888 impairs a right vested under the treaty of 1880, as a law of the United States, and the statutes of 1882 and of 1884 passed in execution of it. It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid, or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control ...

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth, and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects ...

The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the Act of October 1, 1888, to return to the United States after their departure is held at the will of the government, revocable at any time at its pleasure. Whether a proper consideration by our government of its previous laws or a proper respect for the nation whose subjects are affected by its action ought to have qualified its inhibition and made it applicable only to persons departing from the country after the

passage of the act are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property capable of sale and transfer, or other disposition, not such as are personal and untransferable in their character ...

The act vested in the President power to order all such aliens as he should judge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machination against the government, to depart out of the territory of the United States within such time as should be expressed in his order. There were other provisions also distinguishing it from the act under consideration. The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States.

Order affirmed.

Excerpted by Alexandria Metzdorf

McGrain v. Daughterty

273 U.S. 135 (1927)

> Decision: Reversed
> Vote: Unanimous
> Majority: Van Devanter, joined by Taft, Holmes, McReynolds, Brandeis, Sutherland, Butler, and Sanford
> Not Participating: Stone

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is an appeal from the final order in a proceeding in habeas corpus discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice ...

Harry M. Daugherty became the Attorney General March 5, 1921, and held that office until March 28, 1924, when he resigned. Late in that period, various charges of misfeasance and nonfeasance in the Department of Justice after he became its supervising head were brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated ... The Senate ... passed, and invited the House of Representatives to pass (and that body did pass) two measures taking important litigation then in immediate contemplation out of the control of the Department of Justice and placing the same in charge of special counsel to be appointed by the President ...

In the course of the investigation, the committee issued and caused to be duly served on Mally S. Daugherty — who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio — a subpoena commanding him to appear before the committee for the purpose of giving testimony ...

The witness failed to appear.

A little later in the course of the investigation, the committee issued and caused to be duly served on the same witness another subpoena, commanding him to appear before it for the purpose of giving testimony relating to the subject under consideration, nothing being said in this subpoena about bringing records, books, or papers. The witness again failed to appear, and no excuse was offered by him for either failure.

The committee then made a report to the Senate stating that the subpoenas had been issued, that, according to the officer's returns — copies of which accompanied the report — the witness was personally served, and that he had failed and refused to appear. After a reading of the report, the Senate adopted a resolution ... "that the president of the Senate *pro tempore* issue his warrant commanding the sergeant at arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate *pro tempore* to propound, and to keep the said M. S. Daugherty in custody to await the further order of the Senate ... "

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded, whereupon the witness petitioned the federal district court in Cincinnati for a writ of habeas corpus. The writ was granted and the deputy made due return, setting forth the warrant and the cause of the detention. After a hearing, the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate, in directing the investigation and in ordering the attachment, exceeded its powers under the Constitution ...

[T]he principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate, or the House of Representatives, both being on the same plane in this regard, has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose ...

The Constitution provides for a Congress, consisting of a Senate and House of Representatives, and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs. 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently ... But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures ...

[T]he two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective, and the other that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied ...

We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history — the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action — and both houses have employed the power accordingly up to the present time. The Acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful ...

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period, the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate — indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised ...

We come now to the question whether it sufficiently appears that the purpose for which the witness' testimony was sought was to obtain information in aid of the legislative function ...

We are of opinion that the ... object of the investigation and of the effort to secure the witness' testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice — whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and pros-

ecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers, specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit ...

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee, and that the district court erred in discharging him from custody under the attachment ...

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.

Excerpted by Alexandria Metzdorf

Watkins v. United States

354 U.S. 178 (1957)

> Decision: Reversed and remanded
> Vote: 6-1
> Majority: Warren, joined by Black, Frankfurter, Douglas, Harlan, and Brennan
> Concurrence: Frankfurter
> Dissent: Clark
> Not Participating: Burton, Whittaker

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is a review by certiorari of a conviction under 2 U.S.C. § 192 for "contempt of Congress." The misdemeanor is alleged to have been committed during a hearing before a congressional investigating committee. It is not the case of a truculent or contumacious witness who refuses to answer all questions or who, by boisterous or discourteous conduct, disturbs the decorum of the committee room. Petitioner was prosecuted for refusing to make certain disclosures which he asserted to be beyond the authority of the committee to demand. The controversy thus rests upon fundamental principles of the power of the Congress and the limitations upon that power. We approach the questions presented with conscious awareness of the far-reaching ramifications that can follow from a decision of this nature.

On April 29, 1954, petitioner appeared as a witness in compliance with a subpoena issued by a Subcommittee of the Committee on Un-American Activities of the House of Representatives. The Subcommittee elicited from petitioner a description of his background in labor union activities ...

Petitioner's name had been mentioned by two witnesses who testified before the Committee at prior hearings. In September, 1952, one Donald O. Spencer admitted having been a Communist from 1943 to 1946. He declared that he had been recruited into the Party with the endorsement and prior approval of petitioner, whom he identified as the then District Vice-President of the Farm Equipment Workers. Spencer also mentioned that petitioner had attended meetings at which only card-carrying Communists were admitted. A month before petitioner testified, one Walter Rumsey stated that he had been recruited into the Party by petitioner. Rumsey added that he had paid Party dues to, and later collected dues from, petitioner, who had assumed the name, Sam Brown. Rumsey told the Committee that he left the Party in 1944.

Petitioner answered these allegations freely and without reservation. His attitude toward the inquiry is clearly revealed from the statement he made when the questioning turned to the subject of his past conduct, associations and predilections:

The character of petitioner's testimony on these matters can perhaps best be summarized by the Government's own appraisal in its brief:

"A more complete and candid statement of his past political associations and activities (treating the Communist Party for present purposes as a mere political party) can hardly be imagined. Petitioner certainly was not attempting to conceal or withhold from the Committee his own past political associations, predilections, and preferences. Furthermore, petitioner told the Committee that he was entirely willing to identify for the Committee, and answer any questions it might have concerning, 'those persons whom I knew to be members of the Communist Party,' provided that, 'to [his] best knowledge and belief,' they still were members of the Party ... "

The Subcommittee, too, was apparently satisfied with petitioner's disclosures. After some further discussion elaborating on the statement, counsel for the Committee turned to another aspect of Rumsey's testimony. Rumsey had identified a group of persons whom he had known as members of the Communist Party, and counsel began to read this list of names to petitioner. Petitioner stated that he did not know several of the persons. Of those whom he did know, he refused to tell whether he knew them to have been members of the Communist Party ...

'I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates.'

The Chairman of the Committee submitted a report of petitioner's refusal to answer questions to the House of Representatives ... The House directed the Speaker to certify the Committee's report to the United States Attorney for initiation of criminal prosecution ... A seven-count indictment was returned ...

... We granted certiorari because of the very important questions of constitutional law presented.

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad ... But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... Nor is the Congress a law enforcement or trial

agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees, and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action ...

Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. We do not underestimate the difficulties that would attend such an undertaking. It is manifest that, despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred ... The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly ...

The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act. To carry out this mission, committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony. In this case, only two men exercised that authority in demanding information over petitioner's protest.

An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them ... Those instructions are embodied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress ...

[Congress] defines the Committee's authority as follows:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of "un-American"? What is that single, solitary "principle of the form of government as guaranteed by our Constitution"? ... At one time,

perhaps, the resolution might have been read narrowly to confine the Committee to the subject of propaganda. The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date.

The members of the Committee have clearly demonstrated that they did not feel themselves restricted in any way to propaganda in the narrow sense of the word ...

It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vaueness' must be avoided here as in all other crimes. There are several sources that can outline the 'question under inquiry' in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members ofthe committee, or even the nature of the proceedings themselves, might sometimes make the topic clear. This case demonstrates, however, that these sources often leave the matter in grave doubt.

...

[W]e remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.

The statement of the Committee Chairman in this case, in response to petitioner's protest, was woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry. Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.

We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice. That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions to dismiss the indictment.

It is so ordered.

Excerpted by Alexandria Metzdorf

Barenblatt v. United States

360 U.S. 109 (1959)

> Decision: Affirmed
> Vote: 5-4
> Majority: Harlan, joined by Frankfurter, Clark, Whittaker, and Stewart
> Dissent: Black, joined by Warren and Douglas
> Dissent: Brennan

MR. JUSTICE HARLAN delivered the opinion of the Court.

Once more the Court is required to resolve the conflicting constitutional claims of congressional power, and of an individual's right to resist its exercise. The congressional power in question concerns the internal process of Congress in moving within its legislative domain; it involves the utilization of its committees to secure "testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain v. Daugherty,* (1927) ... The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government ... And Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly, in the context of this case, the relevant limitations of the Bill of Rights ...

We here review petitioner's conviction under 2 U.S.C. § 192 for contempt of Congress, arising from his refusal to answer certain questions put to him by a Subcommittee of the House Committee on Un-American Activities during the course of an inquiry concerning alleged Communist infiltration into the field of education ...

[P]etitioner objected generally to the right of the Subcommittee to inquire into his "political" and "religious" beliefs or any "other personal and private affairs" or "associational activities," upon grounds set forth in a previously prepared memorandum which he was allowed to file with the Subcommittee ...

Following receipt of the Subcommittee's report of these occurrences, the House duly certified the matter to the District of Columbia United States Attorney for contempt proceedings. An indictment in five Counts, each embracing one of petitioner's several refusals to answer, ensued. With the consent of both sides, the case was tried to the court without a jury, and, upon conviction under all Counts, a general sentence of six months' imprisonment and a fine of $250 was imposed ...

Petitioner's various contentions resolve themselves into three propositions: first, the compelling of testimony by the Subcommittee was neither legislatively authorized nor constitutionally permissible because of the vagueness of Rule XI of the House of Representatives, Eighty-third Congress, the charter of authority of the parent Committee. Second, petitioner was not adequately apprised of the pertinency of the Subcommittee's questions to the subject matter of the inquiry. Third, the questions petitioner refused to answer infringed rights protected by the First Amendment.

At the outset, it should be noted that Rule XI authorized this Subcommittee to compel testimony within the framework of the investigative authority conferred on the Un-American Activities Committee ...

[T]he legislative gloss on Rule XI is again compelling. Not only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work ... The field of "Communist influences in education" was one of the items contained in the Committee's 1947 program. Other investigations including education took place in 1952 and 1953. And, in 1953, after the Committee had instituted the investigation involved in this case, the desirability of investigating Communism in education was specifically discussed during consideration of its appropriation for that year, which, after controversial debate, was approved.

In this framework of the Committee's history, we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable, and that, independently of whatever bearing the broad scope of Rule XI may have on the issue of "pertinency" in a given investigation into Communist activities, as in *Watkins,* the Rule cannot be said to be constitutionally infirm on the score of vagueness. The constitutional permissibility of that authority otherwise is a matter to be discussed later.

Pertinency Claim

Undeniably, a conviction for contempt under 2 U.S.C. § 192 cannot stand unless the questions asked are pertinent to the subject matter of the investigation ...

First of all, it goes without saying that the scope of the Committee's authority was for the House, not a witness, to determine, subject to the ultimate reviewing responsibility of this Court. What we deal with here is whether petitioner was sufficiently apprised of "the topic under inquiry" thus authorized "and the connective reasoning whereby the precise questions asked relate [d] to it ... " In light of his prepared memorandum of constitutional objections, there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did ... In addition, the other sources of this information which we recognized in *Watkins* leave no room for a "pertinency" objection on this record. The subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education ...

[P]etitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency, of course, was clear beyond doubt.

Petitioner's contentions on this aspect of the case cannot be sustained.

Our function at this point is purely one of constitutional adjudication in the particular case and upon the particular record before us, not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field.

The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the First Amendment, which, of course, reach and limit congressional investigations.

Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown ...

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable ... Justification for its exercise, in turn, rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress. On these premises, this Court, in its constitutional adjudications, has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which, in a different context, would certainly have raised constitutional issues of the gravest character ...

The constitutional legislative power of Congress in this instance is beyond question.

Finally, the record is barren of other factors which, in themselves, might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.

We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that, therefore, the provisions of the First Amendment have not been offended.

We hold that petitioner's conviction for contempt of Congress discloses no infirmity, and that the judgment of the Court of Appeals must be

Affirmed.

Excerpted by Alexandria Metzdorf

South Carolina v. Katzenbach

383 U.S. 301 (1966)

> Decision: Dismissed
> Vote: 9-0
> Majority: Warren, joined by Douglas, Clark, Harlan, Brennan, Stewart, White, and Fortas
> Concur/dissent: Black

Mr. Chief Justice WARREN delivered the opinion of the Court.

By leave of the Court, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965 violate the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General ...

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by 'appropriate' measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting ...

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment ...

The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870, which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year to provide for detailed federal supervision of the electoral process, from

registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894. The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote ...

Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread 'pattern or practice ... '

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination ...

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4(a)—(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4(a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6(b), 7, 9, and 13(a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination ...

The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a 'test or device,' and (2) the Director of the Census has determined that less than 50% of its voting age residents were registered on November 1, 1964, or voted in the presidential election of November 1964 ...

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the amici curiae also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4(a)—(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6(b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the amici curiae maintain that §§ 4(a) and 5, buttressed by § 14(b) of the Act, abridge due process by limiting litigation to a distant forum.

Some of these contentions may be dismissed at the outset. The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court ... The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

... The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting ...

Section 1 of the Fifteenth Amendment declares that '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice ...

Section 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in s 1. 'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation Some legislation is contemplated to make the (Civil War) amendments fully effective ... ' Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld ...

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' *McCulloch v. Maryland*, (1819) ...

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons v. Ogden*, (1824).

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared ...

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them.51 We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.'

The bill of complaint is dismissed.

Bill dismissed.

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United States v. Comstock

560 U.S. 126 (2010)

> Decision: reversed and remanded
> Vote: 7-2
> Majority: Breyer, joined by Roberts, Stevens, Ginsburg, and Sotomayor
> Concurrence: Kennedy (in judgment)
> Concurrence: Alito (in judgment)
> Dissent: Thomas, joined by Scalia (all but Part III-A-1-b)

Justice Breyer delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released ... Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." *McCulloch* v. *Maryland*, (1819)

The federal statute before us allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," §4248, if that individual (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that mental illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious difficulty in refraining from sexually violent conduct or child molestation if released."

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described, *i.e.*, that he has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others ...

If the Government proves its claims by "clear and convincing evidence," the court will order the prisoner's continued commitment in "the custody of the Attorney General," who must "make all reasonable efforts to cause" the State where that person was tried, or the State where he is domiciled, to "assume responsibility for his custody, care, and treatment ... " But if, "notwithstanding such efforts, neither such State will assume such responsibility," then "the Attorney General shall place the person for treatment in a suitable [federal] facility."

Confinement in the federal facility will last until either (1) the person's mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State

assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. §§4248(d)(1)–(2). The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals.

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case ...

Each of the five respondents moved to dismiss the civil-commitment proceeding on constitutional grounds ... [They claim] Congress exceeded the powers granted to it by Art. I, §8 of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause ...

The Government sought certiorari, and we granted its request ...

The question presented is whether the Necessary and Proper Clause, Art. I, §8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. *Addington* v. *Texas*, (1979). In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact §4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation ...

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power ...

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to "counterfeiting," "treason," or "Piracies and Felonies committed on the high Seas" or "against the Law of Nations," Art. I, §8, cls. 6, 10; Art. III, §3, nonetheless grants Congress broad authority to create such crimes ... And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth ...

Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers "vested by" the "Constitution in the Government of the United States," Art. I, §8, cl. 18—authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal

action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment ...

Aside from its specific focus on sexually dangerous persons, §4248 is similar to the provisions first enacted in 1949. Cf. §4246. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose ...

Moreover, §4248 is "reasonably adapted" to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," §4247(a)(6), would pose an especially high danger to the public if released. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to "legal residence in any State" by incarcerating them in remote federal prisons. Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that §4248 satisfies "review for means-end rationality," *i.e.*, that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority ...

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that §4248 violates the Tenth Amendment because it "invades the province of state sovereignty" in an area typically left to state control ... But the Tenth Amendment's text is clear: "The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Emphasis added.) The powers "delegated to the United States by the Constitution" include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution "reserved to the States ... "

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. §4248(d). He must also immediately "release" that person "to the appropriate official of" either State "if such State will assume [such] responsibility." And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody.

Fifth, the links between §4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents ...

[E]very such statute must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under §4248 as well. Thus, we must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general "police power, which the Founders denied the National Government and reposed in the States." As the Solicitor General repeatedly confirmed at oral argument, §4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners ... Indeed, the Solicitor General argues that "the Federal Government would not have ... the power to commit a person who ... has been released from prison and whose period of supervised release is also completed." Thus, far from a "general police power," §4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system ...

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress' power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf

Qualifications and Privileges

Powell v. McCormack

395 U.S. 486 (1969)

> Decision: remanded, reversed in part and affirmed in part
> Vote: 8-1
> Majority: Warren, joined by Black, Douglas, Harlan, Brennan, White, and Marshall
> Concurrence: Douglas
> Dissent: Stewart

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In November, 1966, petitioner Adam Clayton Powell, Jr., was duly elected from the 18th Congressional District of New York to serve in the United States House of Representatives for the 90th Congress. However, pursuant to a House resolution, he was not permitted to take his seat. Powell (and some of the voters of his district) then filed suit in Federal District Court, claiming that the House could exclude him only if it found he failed to meet the standing requirements of age, citizenship, and residence contained in Art. I, § 2, of the Constitution — requirements the House specifically found Powell met — and thus had excluded him unconstitutionally.

During the 89th Congress, a Special Subcommittee on Contracts of the Committee on House Administration conducted an investigation into the expenditures of the Committee on Education and Labor, of which petitioner Adam Clayton Powell, Jr., was chairman. The Special Subcommittee issued a report concluding that Powell and certain staff employees had deceived the House authorities as to travel expenses. The report also indicated there was strong evidence that certain illegal salary payments had been made to Powell's wife at his direction ... No formal action was taken during the 89th Congress. However, prior to the organization of the 90th Congress, the Democratic members-elect met in caucus and voted to remove Powell as chairman of the Committee on Education and Labor ...

The Select Committee, composed of nine lawyer-members, issued an invitation to Powell to testify before the Committee. The invitation letter stated that the scope of the testimony and investigation would include Powell's qualifications as to age, citizenship, and residency; his involvement in a civil suit (in which he had been held in contempt), and "[m]atters of ... alleged official misconduct since January 3, 1961 ... " Powell appeared at the Committee hearing held on February 8, 1967. After the Committee denied in part Powell's request that certain adversary-type procedures be followed, Powell testified. He would, however, give information relating only to his age, citizenship, and residency; upon the advice of counsel, he refused to answer other questions ...

Then, on February 23, 1967, the Committee issued its report, finding that Powell met the standing qualifications of Art. I, § 2 ... However, the Committee further reported that Powell had asserted an unwarranted privilege and immunity from the processes of the courts of New York; that he had wrongfully diverted House funds for the use of others and himself,

and that he had made false reports on expenditures of foreign currency to the Committee on House Administration. The Committee recommended that Powell be sworn and seated as a member of the 90th Congress, but that he be censured by the House, fined $40,000, and be deprived of his seniority.

The report was presented to the House on March 1, 1967, and the House debated the Select Committee's proposed resolution. At the conclusion of the debate, by a vote of 222 to 202 the House rejected a motion to bring the resolution to a vote. An amendment to the resolution was then offered; it called for the exclusion of Powell and a declaration that his seat was vacant. The Speaker ruled that a majority vote of the House would be sufficient to pass the resolution if it were so amended ... After further debate, the amendment was adopted by a vote of 248 to 176. Then the House adopted by a vote of 307 to 116 House Resolution No. 278 in its amended form, thereby excluding Powell and directing that the Speaker notify the Governor of New York that the seat was vacant ...

Petitioners asked that a three-judge court be convened. Further, they requested that the District Court grant a permanent injunction restraining respondents from executing the House Resolution, and enjoining the Speaker from refusing to administer the oath, the Clerk from refusing to perform the duties due a Representative, the Sergeant at Arms from refusing to pay Powell his salary, and the Doorkeeper from refusing to admit Powell to the Chamber. The complaint also requested a declaratory judgment that Powell's exclusion was unconstitutional.

The District Court granted respondents' motion to dismiss the complaint "for want of jurisdiction of the subject matter." The Court of Appeals for the District of Columbia Circuit affirmed on somewhat different grounds, with each judge of the panel filing a separate opinion. We granted certiorari. While the case was pending on our docket, the 90th Congress officially terminated, and the 91st Congress was seated. In November, 1968, Powell was again elected as the representative of the 18th Congressional District of New York, and he was seated by the 91st Congress. The resolution seating Powell also fined him $25,000. Respondents then filed a suggestion of mootness. We postponed further consideration of this suggestion to a hearing on the merits ...

As we pointed out in *Baker v. Carr*, (1962), there is a significant difference between determining whether a federal court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'

In *Baker v. Carr*, we noted that a federal district court lacks jurisdiction over the subject matter (1) if the cause does not 'arise under' the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a 'case or controversy' within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute. And, as in Baker v. Carr, supra, our determination (see Part VI, B(1) infra) that this cause presents no non-justiciable 'political question' disposes of respondents' contentions that this cause is not a 'case or controversy ... '

Respondents first contend that this is not a case 'arising under' the Constitution within the meaning of Art. III ...

We reject this contention. Article III, s 1, provides that the 'judicial Power shall be vested in one supreme Court, and in such inferior Courts as the Congress may establish.' Further, § 2 mandates that the 'judicial Power shall extend to all Cases arising under this Constitution.' It has long been held that a suit 'arises under' the Constitution if a petitioner's claim 'will be sustained if the Constitution (is) given one construction and will be defeated if (it is) given another ... '

Any bar to federal courts reviewing the judgments made by the House or Senate in excluding a member arises from the allocation of powers between the two branches of the Federal Government (a question of justiciability), and not from the petitioners' failure to state a claim based on federal law.

Respondents next contend that the Court of Appeals erred in ruling that petitioners' suit is authorized by a jurisdictional statute, i.e., 28 U.S.C. § 1331(a). Section 1331(a) provides that district courts shall have jurisdiction in 'all civil actions wherein the matter in controversy arises under the Constitution.' ...

We have noted that the grant of jurisdiction in § 1331(a), while made in the language used in Art. III, is not in all respects co-extensive with the potential for federal jurisdiction found in Art. III ... Nevertheless, it has generally been recognized that the intent of the drafters was to provide a broad jurisdictional grant to the federal courts ... And, as noted above, the resolution of this case depends directly on construction of the Constitution. The Court has consistently held such suits are authorized by the statute ...

... [W]e turn to the question whether the case is justiciable. Two determinations must be made in this regard. First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution.

In deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.' *Baker v. Carr* ...

Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to 'mold effective relief for resolving this case.' ...

We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued ... The availability of declaratory relief depends on whether there is a live dispute between the parties, *Golden v. Zwickler*, (1969), and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate ... We thus conclude that in terms of the general criteria of justiciability, this case is justiciable.

Respondents maintain that even if this case is otherwise justiciable, it presents only a political question ...

Respondents' first contention is that this case presents a political question because under Art. I, § 5, there has been a 'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power' to determine Powell's qualifications. Thus it is argued that the House, and the House alone, has power to determine who is qualified to be a member ...

... [W]hether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve for the first time in this case ...

In order to determine the scope of any 'textual commitment' under Art. I, § 5, we necessarily must determine the meaning of the phrase to 'be the Judge of the Qualifications of its own Members ... ' Our examination of the relevant historical materials leads us to the conclusion that petitioners are correct and that the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution ...

The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787. *See Myers v. United States*, (1926). And, what evidence we have of Congress' early understanding confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership ...

A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them ... ' As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning ... against 'vesting an improper & dangerous power in the Legislature.' Moreover, it would effectively nullify the Convention's decision to require a two-thirds vote for expulsion. Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

For these reasons, we have concluded that Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the 'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims ...

Thus, we conclude that petitioners' claim is not barred by the political question doctrine, and, having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable.

To summarize, we have determined the following: (1) This case has not been mooted by Powell's seating in the 91st Congress. (2) Although this action should be dismissed against respondent Congressmen, it may be sustained against their agents. (3) The 90th Congress' denial of membership to Powell cannot be treated as an expulsion. (4) We have jurisdiction over the subject matter of this controversy. (5) The case is justiciable.

Further, analysis of the 'textual commitment' under Art. I, § 5 ... has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution. Respondents concede that Powell met these. Thus, there is no need to remand this case to determine whether he was entitled to be seated in the 90th Congress. Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.

Petitioners seek additional forms of equitable relief, including mandamus for the release of petitioner Powell's backpay. The propriety of such remedies, however, is more appropriately considered in the first instance by the courts below. Therefore, as to respondents McCormack, Albert, Ford, Celler, and Moore, the judgment of the Court of Appeals for the District of Columbia Circuit is affirmed. As to respondents Jennings, Johnson, and Miller, the judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded to the United States District Court for the District of Columbia with instructions to enter a declaratory judgment and for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, dissenting.

I believe that events which have taken place since certiorari was granted in this case on November 18, 1968, have rendered it moot, and that the Court should therefore refrain from deciding the novel, difficult, and delicate constitutional questions which the case presented at its inception.

The essential purpose of this lawsuit by Congressman Powell and members of his constituency was to regain the seat from which he was barred by the 90th Congress. That purpose, however, became impossible of attainment on January 3, 1969, when the 90th Congress passed into history and the 91st Congress came into being. On that date, the petitioners' prayer for a judicial decree restraining enforcement of House Resolution No. 278 and commanding the respondents to admit Congressman Powell to membership in the 90th Congress became incontestably moot.

The petitioners assert that actions of the House of Representatives of the 91st Congress have prolonged the controversy raised by Powell's exclusion and preserved the need for a judicial declaration in this case. I believe, to the contrary, that the conduct of the present House of Representatives confirms the mootness of the petitioners' suit against the 90th Congress. Had Powell been excluded from the 91st Congress, he might argue that there was a "continuing controversy" concerning the exclusion attacked in this case. And such an argument might be sound even though the present House of Representatives is a distinct legislative body, rather than a continuation of its predecessor, and though any grievance caused by conduct of the 91st Congress is not redressable in this action. But on January 3, 1969, the House of Representatives of the 91st Congress admitted Congressman Powell to membership, and he now sits as the Representative of the 18th Congressional District of New York. With the 90th Congress terminated and Powell now a member of the 91st, it cannot seriously be contended that there remains a judicial controversy between these parties over the power of the House of Representatives to exclude Powell and the power of a court to order him reseated ...

The passage of time and intervening events have, therefore, made it impossible to afford the petitioners the principal relief they sought in this case. If any aspect of the case remains alive, it is only Congressman Powell's individual claim for the salary of which he was deprived by his absence from the 90th Congress. But even if that claim can be said to prevent this controversy from being moot, which I doubt, there is no need to reach the fundamental constitutional issues that the Court today undertakes to decide.

This Court has not in the past found that an incidental claim for back pay preserves the controversy between a legislator and the legislative body which evicted him, once the term of his eviction has expired. *Alejandrino v. Quezon [1926],* was a case nearly identical to that before the Court today. The petitioner was a member of the Senate of the Philippines who

had been suspended for one year for assaulting a colleague. He brought an action in the Supreme Court of the Philippines against the elected members of the Senate and its officers and employees (the President, Secretary, Sergeant at Arms, and Paymaster), seeking a writ of mandamus and an injunction restoring him to his seat and to all the privileges and emoluments of office. The Supreme Court of the Philippines dismissed the action for want of jurisdiction, and Alejandrino brought the case here, arguing that the suspension was not authorized by the Philippine Autonomy Act, a statute which incorporated most of the provisions of Article I of the United States Constitution. Because the period of the suspension had expired while the case was pending on certiorari, a unanimous Court, in an opinion by Chief Justice Taft, vacated the judgment and remanded the case with directions to dismiss it as moot ...

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Gravel v. United States

408 U.S. 606 (1972)

> Decision: vacated and remanded
> Vote: 5-4
> Majority: White, joined by Burger, Blackmun, Powell, and Rehnquist
> Dissent: Stewart (in part)
> Dissent: Douglas
> Dissent: Brennan, joined by Douglas and Marshall

Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled History of the United States Decision-Making Process on Viet Nam Policy. This document, popularly known as the Pentagon Papers, bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 73), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371) ...

It appeared that, on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing. Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon Press and that members of Gravel's staff had talked with Webber as editor of M.I.T. Press ...

Agreeing that Senator and aide were one for the purposes of the Speech or Debate Clause, and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative duties. Although it did not consider private publication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common law privilege akin to the judicially created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. *See Barr v. Matteo,* (1959). This privilege, fashioned by the Court of Appeals, would not protect third parties from similar inquiries before the grand jury ...

The United States petitioned for certiorari challenging the ruling that aides and other persons may not be questioned with respect to legislative acts and that an aide to a Member of Congress has a common law privilege not to testify before a grand jury with respect to private publication of materials introduced into a subcommittee record. Senator Gravel also petitioned for certiorari seeking reversal of the Court of Appeals insofar as it held private publication unprotected by the Speech or Debate Clause and asserting that the protective order of the Court of Appeals too narrowly protected against inquiries that a grand jury could direct to third parties. We granted both petitions.

Because the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime. Our frame of reference is Art. I, § 6, cl. 1, of the Constitution ...

The last sentence of the Clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the Clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long v. Ansell,* (1934) ...

It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members ...

Senator Gravel disavows any assertion of general immunity from the criminal law. But he points out that the last portion of § 6 affords Members of Congress another vital privilege they may not be questioned in any other place for any speech or debate in either House. The claim is not that, while one part of § 6 generally permits prosecutions for treason, felony, and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause, at the very least, protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible.

The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer either in terms of questions or in terms of defending himself from prosecution — for the events that occurred at the subcommittee meeting ...

Even so, the United States strongly urges that, because the Speech or Debate Clause confers a privilege only upon "Senators and Representatives," Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position ...

... [B]oth courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that, if they are not so recognized, the central role of the Speech or Debate Clause — to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson,* (1966) — will inevitably be diminished and frustrated ...

The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf, and if, in all events, the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus, our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

We are convinced also that the Court of Appeals correctly determined that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution ...

Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," *United States v. Johnson,* (1966) and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it ... "

But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies — they may cajole, and exhort with respect to the administration of a federal statute — but such conduct, though generally done, is not protected legislative activity ...

Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record

and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publications. We cannot but conclude that the Senator's arrangements with beacon Press were not part and parcel of the legislative process ...

We must finally consider, in the light of the foregoing, whether the protective order entered by the Court of Appeals is an appropriate regulation of the pending grand jury proceedings.

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative act as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law, and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangement, if any, with respect to republication or with respect to third-party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury question relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appear to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides at the June 29, 1971, meeting of the subcommittee; (2) concerning the motives and purposes behind the Senator' conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third-party crime, concerning any act, in itself, not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated, and the cases are remanded to that court for further proceedings consistent with this opinion.

So ordered.

Excerpted by Alexandria Metzdorf

U.S. Term Limits, Inc. v. Thornton

514 U.S. 779 (1995)

> Decision: affirmed
> Vote: 5-4
> Majority: Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer
> Concurrence: Kennedy
> Dissent: Thomas, joined by Rehnquist, O'Connor, and Scalia

JUSTICE STEVENS delivered the opinion of the Court.

The Constitution sets forth qualifications for membership in the Congress of the United States. Article I, § 2, cl. 2, which applies to the House of Representatives, provides:

"No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen ... " [A similar clause applies to the Senate.]

Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree with that holding. Such a state-imposed restriction is contrary to the "fundamental principle of our representative democracy," embodied in the Constitution, that "the people should choose whom they please to govern them." *Powell* v. *McCormack* (1969). Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.

At the general election on November 3, 1992, the voters of Arkansas adopted Amendment 73 to their State Constitution. Proposed as a "Term Limitation Amendment ... " The limitations in Amendment 73 apply to three categories of elected officials. Section 1 provides that no elected official in the executive branch of the state government may serve more than two 4-year terms. Section 2 applies to the legislative branch of the state government; it provides that no member of the Arkansas House of Representatives may serve more than three 2-year terms and no member of the Arkansas Senate may serve more than two 4-year terms. Section 3, the provision at issue in these cases, applies to the Arkansas Congressional Delegation ...

[T]he constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members ...

Our decision in *Powell* and its historical analysis were consistent with prior decisions from state courts ...

[A]fter examining *Powell's* historical analysis and its articulation of the "basic principles of our democratic system," we reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are "fixed," at least in the sense that they may not be supplemented by Congress.

Our reaffirmation of *Powell* does not necessarily resolve the specific questions presented in these cases. For petitioners argue that whatever the constitutionality of additional qualifications for membership imposed by Congress, the historical and textual materials discussed in *Powell* do not support the conclusion that the Constitution prohibits additional qualifications imposed by States. In the absence of such a constitutional prohibition, petitioners argue, the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications ...

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications ...

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. ... No state can say, that it has reserved, what it never possessed ... " 1 Story §627.

Two other sections of the Constitution further support our view of the Framers' vision. First, consistent with Story's view, the Constitution provides that the salaries of representatives should "be ascertained by Law, and paid out of the Treasury of the United States," Art. I, § 6, rather than by individual States. The salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States. Second, the provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States ...

In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist ...

Petitioners attempt to overcome this formidable array of evidence against the States' power to impose qualifications by arguing that the practice of the States immediately after the adoption of the Constitution demonstrates their understanding that they possessed such power. One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States, especially when no court has ever upheld a state-imposed qualification of any sort. But petitioners' argument is unpersuasive even on its own terms. At the time of the Convention, "[a]lmost all the State Constitutions required members of their Legislatures to possess considerable property." Despite this near uniformity, only one because the voters of Arkansas, in adopting Amendment 73, were acting as citizens of the State of Arkansas, and not as citizens of the National Government. The people of the State of Arkansas have no more power than does the Arkansas Legislature to supplement the qualifications for service in Congress. As Chief Justice Marshall emphasized in *McCulloch,* "Those means are not given by the people of a particular State, not given by the constituents of the legislature, ... but by the people of all the States ... "

In sum, the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in *Powell,* reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution ...

Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification, and because Amendment 73 is a permissible exercise of state power to regulate the "Times, Places and Manner of holding Elections." We reject these contentions.

Unlike §§ 1 and 2 of Amendment 73, which create absolute bars to service for long-term incumbents running for state office, § 3 merely provides that certain Senators and Representatives shall not be certified as candidates and shall not have their names appear on the ballot. They may run as write-in candidates and, if elected, they may serve. Petitioners contend that only a legal bar to service creates an impermissible qualification, and that Amendment 73 is therefore consistent with the Constitution ...

In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an "effort to dress eligibility to stand for Congress in ballot access clothing," because the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." We must, of course, accept the state court's view of the purpose of its own law: We are thus authoritatively informed that the sole purpose of § 3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution. Indeed, it cannot be seriously contended that the intent behind Amendment 73 is other than to prevent the election of incumbents. The preamble of Amendment 73 states explicitly: "[T]he people of Arkansas ... herein limit the terms of elected officials." Sections 1 and 2 create absolute limits on the number of terms that may be served. There is no hint that § 3 was intended to have any other purpose ...

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. Over half the States have adopted measures that impose such limits on some offices either directly or indirectly, and the Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve. Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish.

On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this longstanding debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather-as have other important changes in the electoral process through the amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a "more perfect Union."

The judgment is affirmed.

It is so ordered.

Justice Thomas, with whom the Chief Justice, Justice O'Connor, and Justice Scalia, join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

Because the majority fundamentally misunderstands the notion of "reserved" powers, I start with some first principles. Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so.

Our system of government rests on one overriding principle: All power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.

The ratification procedure erected by Article VII makes this point clear. The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only "between the States so ratifying the same," Art. VII; it did not bind the people of North Carolina until they had accepted it. In Madison's words, the popular consent upon which the Constitution's authority rests was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." The Federalist No. 39, p. 243 ...

When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States (and hence to entities accountable to the people of other States as well as to themselves). They affirmatively deprived their States of certain powers, see, *e. g.,* Art. I, § 10, and they affirmatively conferred certain powers upon the Federal Government, see, *e. g.,* Art. I, § 8. Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers ...

In each State, the remainder of the people's powers"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States," Arndt. lO-are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government ...

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States "are reserved to the States respectively, or to the people." With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which "reserved" powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State ...

In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them ...

The majority is therefore quite wrong to conclude that the people of the States cannot authorize their state governments to exercise any powers that were unknown to the States when the Federal Constitution was drafted. Indeed, the majority's position frustrates the apparent purpose of the Amendment's final phrase. The Amendment does not preempt any limitations on state power found in the state constitutions, as it might have done if it simply had said that the powers not delegated to the Federal Government are reserved to the States. But the Amendment also does not prevent the people of the States from amending their state constitutions to remove limitations that were in effect when the Federal Constitution and the Bill of Rights were ratified ...

I take it to be established, then, that the people of Arkansas do enjoy "reserved" powers over the selection of their representatives in Congress. Purporting to exercise those reserved powers, they have agreed among themselves that the candidates covered by § 3 of Amendment 73-those whom they have already elected to three or more terms in the House of Representatives or to two or more terms in the Senate-should not be eligible to appear on the ballot for reelection, but

should nonetheless be returned to Congress if enough voters are sufficiently enthusiastic about their candidacy to write in their names. Whatever one might think of the wisdom of this arrangement, we may not override the decision of the people of Arkansas unless something in the Federal Constitution deprives them of the power to enact such measures.

... the fact that the Constitution specifies certain qualifications that the Framers deemed necessary to protect the competence of the National Legislature does not imply that it strips the people of the individual States of the power to protect their own interests by adding other requirements for their own representatives.

... No matter how narrowly construed, however, today's decision reads the Qualifications Clauses to impose substantial implicit prohibitions on the States and the people of the States. I would not draw such an expansive negative inference from the fact that the Constitution requires Members of Congress to be a certain age, to be inhabitants of the States that they represent, and to have been United States citizens for a specified period. Rather, I would read the Qualifications Clauses to do no more than what they say. I respectfully dissent.

Excerpted by Alexandria Metzdorf and Rorie Solberg

The Commerce Clause

Case List

Defining Commerce

Gibbons v. Ogden (1824)
United States v. E.C. Knight Co. (1895)
Champion v. Ames (1903)
Hammer v. Dagenhart (1918)
Stafford v. Wallace (1922)

The New Deal and Redefining Commerce

Schechter Poultry Corp. v. United States (1935)
National Labor Relations Board v. Jones and Laughlin Steel Corp. (1937)
United States v. Darby Lumber Co. (1941)
Wickard v. Filburn (1942)

Commerce and the States

Cooley v. Board of Wardens (1852)
Southern Pacific Co. v. Arizona (1945)
Hunt v. WA State Apple Advertising Commission (1977)
Maine v. Taylor (1986)
Reno v. Condon (2000)
Granholm v. Heald (2005)
National Pork Producers Council v. Ross (2023)

Limits on Commerce Power in the Current Era

United States v. Lopez (1995)
United States v. Morrison (2000)
Gonzales v. Raich (2005)
National Federation of Independent Business v. Sebelius (2012)

Defining Commerce

Gibbons v. Ogden

22 U.S. 1 (1824)

> Decision: Reversed
> Vote: 8-0
> Majority: Marshall, joined by Washington, Todd, Duvall, and Story
> Concurrence: Johnson
> Not participating: Thompson

Syllabus

The laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coasting trade, which, being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

Mr. Chief Justice MARSHALL delivered the opinion of the Court ...

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws, and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion ... No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority, but it is the province of this Court ... not to bow to it implicitly, and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them ...

This instrument [the constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the

powers which are conferred, nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar or which we have been able to discern that prescribes this rule. We do not, therefore, think ourselves justified in adopting it ... If they contend only against that enlarged construction, which would intend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the construction would deny to the government those powers which the words of the Granted usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it impudent then we cannot perceive the propriety of this, strict construction, nor adopt it as the rule, by which the constitution is to be expounded ...

The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation, All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word or that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all that the exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted ...

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that "commerce," as the word is used in the Constitution, is a unit every part of which is indicated by the term.

If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State ...

We are now arrived at the inquiry — What is this power?

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar ...

The power of Congress, then, comprehends navigation; within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies ...

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations and among the several States be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally exercise the same power, within their respective jurisdictions ...

The sole question is can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion ...

In our complex system, presenting the rare and difficult scheme of one General Government whose action extends over the whole but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other ...

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until Congress should think proper to interpose, but the very enactment of such a law indicates an opinion that it was necessary, that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbours, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent, and

the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows conclusively an opinion that Congress could control the whole subject, and might adopt the system of the States or provide one of its own ...

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States" or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer against a right given by a law of the Union must be erroneous.

This opinion has been frequently expressed in this Court, and is founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law ...

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct, and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire ...

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress ...

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being

propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union, and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress comes, we think, in direct collision with that act ...

Excerpted by Kimberly Clairmont

United States v. E.C. Knight Co.

156 U.S. 1 (1895)

> Decision: Affirmed
> Vote: 8-1
> Majority: Fuller, joined by Field, Gray, Brewer, Brown, Shiras, Jackson, and White
> Dissent: Harlan

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the Court.

By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them, the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the Act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief ... And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit ... That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce which, by the provisions of the act, could be rescinded, or operations thereunder arrested ...

In the view which we take of the case, we need not discuss whether, because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved, or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries, after becoming stockholders of the American Company, might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill ...

It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this Court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen — in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community — is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several states is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states, and if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof, and that which is not supreme must yield to that which is supreme.

"Commerce undoubtedly is traffic," said Chief Justice Marshall,

"but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. *Gibbons v. Ogden* ...

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that therefore the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense, and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of govern-

ment, and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not, of itself, make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce ...

And again, in *Kidd v. Pearson* ... And Mr. Justice Lamar remarked:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. ... If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate more or less clearly an interstate or foreign market? ... "

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable, and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in ... productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well settled principles that the Act of July 2, 1890, was framed ... Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations ... Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other states, and refined sugar was also for warded by the companies to other states for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce ... yet the act of Congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The circuit court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the circuit court of appears did not err in affirming that decree.

Decree affirmed.

MR. JUSTICE HARLAN, dissenting.

Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey for the purpose of buying, manufacturing, refining, and selling sugar in different parts of the country, had obtained the control of all the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations — the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House, and the other by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about thirty-three percent, and that of the Boston company about two percent, of the entire quantity of sugar refined in the United States.

In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation — using for that purpose its own stock — purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small in amount to be regarded in this discussion.

"The object," the court below said, "in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not, therefore, analyze the evidence upon this point. In its consideration of the important constitutional question presented, this Court assumes on the record before us that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or

suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade among the states in food products that are essential to the comfort of every household in the land.

The Court holds it to be vital in our system of government to recognize and give effect to both the commercial power of the nation and the police powers of the states, to the end that the Union be strengthened, and the autonomy of the states preserved. In this view I entirely concur ... But it is equally true that the preservation of the just authority of the general government is essential as well to the safety of the states as to the attainment of the important ends for which that government was ordained by the people of the United States, and the destruction of that authority would be fatal to the peace and wellbeing of the American people. The Constitution, which enumerates the powers committed to the nation for objects of interest to the people of all the states, should not therefore be subjected to an interpretation so rigid, technical, and narrow that those objects cannot be accomplished ...

Congress is invested with power to regulate commerce with foreign nations and among the several states. The power to regulate is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised whenever necessary throughout the territorial limits of the several states. *Cohens v. Virginia*. The power to make these regulations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." It is plenary ... It may be exercised "whenever the subject exists." *Gibbons v. Ogden* ...

What is commerce among the states? The decisions of this Court fully answer the question. "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse." It does not embrace the completely interior traffic of the respective states — that which is "carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states" — but it does embrace "every species of commercial intercourse" between the United States and foreign nations and among the states, and therefore it includes such traffic or trade, buying, selling, and interchange of commodities as directly affects or necessarily involves the interests of the people of the United States. "Commerce, as the word is used in the Constitution, is a unit," and

"cannot stop at the external boundary line of each state, but may be introduced into the interior. ... The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally.*"

These principles were announced in *Gibbons v. Ogden* ...

In the light of these principles, determining as well the scope of the power to regulate commerce among the states as the nature of such commerce, we are to inquire whether the Act of Congress of July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, is repugnant to the Constitution ...

It would seem to be indisputable that no *combination* of corporations or individuals can, *of right,* impose unlawful restraints upon interstate trade, whether upon transportation or upon such *interstate* intercourse and traffic as precede transportation, any more than it can, *of right,* impose unreasonable restraints upon the completely internal traffic of a state. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corporations or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of

its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce *among the states* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests ...

It has been argued that a combination between corporations of different states, or between the stockholders of such corporations, with the object and effect of controlling not simply the manufacture, but the price, of refined sugar throughout the whole of the United States — which is the case now before us — cannot be held to be in restraint of "commerce among the states," and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be *manufactured* in the several states ... But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at *combinations* that unduly restrain, because they monopolize, *the buying and selling of articles* which are to go into interstate commerce ...

The power of Congress covers and protects the absolute freedom of such intercourse and trade among the states as may or must succeed manufacture and precede transportation from the place of purchase ...

Excerpted by Kimberly Clairmont and Rorie Solberg

Champion v. Ames

188 U.S. 321 (1903)

> Decision: Affirmed
> Vote: 5-4
> Majority: Harlan, joined by Brown, White, McKenna, and Holmes
> Dissent: Fuller, joined by Brewer, Shiras, and Peckham

The appeal was from an order of the circuit court of the United States for the Northern District of Illinois dismissing a writ of habeas corpus sued out by the appellant Champion, who in his application complained that he was restrained of his liberty by the Marshal of the United States in violation of the Constitution and laws of the United States.

It appears that the accused was under indictment in the District Court of the United States for the Northern District of Texas for a conspiracy under section 5440 of the Revised Statues, providing that

"if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

He was arrested at Chicago under a warrant based upon a complaint in writing, under oath, charging him with conspiring with others ... to commit the offense ... the object of the arrest was to compel his appearance in the federal court in Texas to answer the indictment against him.

The first section of the act 1895, upon which the indictment was based, is as follows:

"§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

MR. JUSTICE HARLAN delivered the opinion of the Court.

The appellant insists that the carrying of lottery tickets from one state to another state by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, commerce among the states within the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" consequently, that Congress cannot make it an offense to cause such tickets to be carried from one state to another ...

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the states? ...

At the present term of the Court, we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley v. Kansas City Southern Railway,* (1903).

The cases cited ... sufficiently indicate the grounds upon which this Court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government

having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it, and that, in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts simply because, in their opinion, such regulations may not be the best or most effective that could be employed ...

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face, they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold, and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. That fact is not without significance in view of what this Court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts excluding lottery tickets from the mails and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred from one state to another by any means or method ...

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but by punishing those who cause them to be so carried. Congress in effect prohibits such carrying; that, in respect of the carrying from one state to another of articles or things that are, in fact or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit,* but only to regulate. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden,* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress, in prescribing a particular rule, has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers, *McCulloch v. Maryland,* (1819), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power ...

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the Act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute, Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this Court ...

In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states — perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this Court upon a former occasion may well be here repeated:

"The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." ...

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that, under its power to regulate commerce among the several states, Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state, and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is

Affirmed.

Excerpted by Kimberly Clairmont

Hammer v. Dagenhart

247 U.S. 251 (1918)

> Decision: Affirmed
> Vote: 5-4
> Majority: Day, joined by White, Pitney, Van Devanter, and McReynolds
> Dissent: Holmes, joined by McKenna, Brandeis, and Clarke

MR. JUSTICE DAY delivered the opinion of the court.

A bill was filed in the United States District Court ... by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here ...

The attack upon the act rests upon three propositions: first: it is not a regulation of interstate and foreign commerce; second: it contravenes the Tenth Amendment to the Constitution; third: it conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work ...

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution, which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking for this court and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving, and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with, and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate ...

In each of these instances, the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act, in its effect, does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States ... When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power ...

Over interstate transportation or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation ...

This principle has been recognized often in this court ... If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States ...

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States, laws have been passed fixing minimum wages for women, in others, the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress ...

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children ...

In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved ... The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government ...

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the States.

This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus, the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that, if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed.

For these reasons, we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

Excerpted by Kimberly Clairmont

Stafford v. Wallace

258 U.S. 495 (1922)

> Decision: Affirmed
> Vote: 7-1
> Majority: Taft, joined by McKenna, Holmes, Van Devanter, Pitney, Brandeis, and Clarke
> Dissent: McReynolds
> Not Participating: Day

MR. CHIEF JUSTICE TAFT ... delivered the opinion of the Court.

...

We have framed the statement of the case not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees of Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought

before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted ...

The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them ... to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice ... Title III concerns the stockyards, and provides for the supervision and control of the facilities furnished therein ... A stockyards is defined to be a place conducted for profit as a public market, with pens in which livestock are received and kept for sale or shipment in interstate commerce ... Stockyard owners, commission men, and dealers are recognized and defined, and the two latter are required to register. The act requires that all rates and charges for services and facilities in the stockyards and all practices in connection with the livestock passing through the yards shall be just, reasonable, nondiscriminatory, and nondeceptive, and that a schedule of such charges shall be kept open for public inspection, and only be changed after ten days' notice to the Secretary of Agriculture, who is made a tribunal to inquire as to the justice, reasonableness, and nondiscriminatory or nondeceptive character of every charge and practice, and to order that it cease, if found to offend, with the same provisions for appeal and enforcement in court as in the case of offending packers. The Secretary is given power to make rules and regulations to carry out the provisions ... and to prescribe how every packer, stockyard owner, commission man, and dealer shall keep accounts ...

The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act was exorbitant charges ... made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose livestock are being cared for and sold in the stockyards market, is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers, who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the livestock, in the *mala fides* of the sale, in the exorbitant prices obtained, and in the unreasonableness of the charges for services rendered ...

The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the livestock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act therefore treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East ... That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn v. Illinois* ... Nor is there any doubt that in the receipt of livestock by rail and in their delivery by rail the stockyards are an interstate commerce agency ... The only question here is whether the business done in the stockyards, between the receipt of the livestock in the yards and the shipment of them therefrom, is a part of interstate commerce or is so associated with it as to bring it within the power of national regulation. A similar question has been before this Court, and had great consideration in *Swift v. United States* ... The judgment in that case gives a clear and comprehensive exposition, which leaves to us in this case little but the obvious application of the principles there declared.

The application of the commerce clause of the Constitution in the *Swift* case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This Court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part ...

It is clear from this that, if the bill in the *Swift* case had averred that control of the stockyards and the commission men was one of the means used by the packers to make arbitrary prices in their plan of monopolizing the interstate commerce, the acts of the stockyards owners and commission men would have been regarded as directly affecting interstate commerce, and within the Anti-Trust Act. Congress has found as an evil to be apprehended and to be prevented by the act here in question in the use and control of stockyards and the commission men to promote a packers' monopoly of interstate commerce. The act finds and imports this injurious direct effect of such agencies upon interstate commerce, just as the intent of the conspiracy charged in the indictment in the *Swift* case tied together the parts of the scheme there attacked and imported their direct effect upon interstate commerce ...

There is nothing in the case to indicate that, if such an agency could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint.

As already noted, the word "commerce," when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which, in the judgment of Congress, are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within Congressional power, and valid.

Other objections are made to the act and its provisions as violative of other limitations of the Constitution, but the only one seriously pressed was that based on the commerce clause, and we do not deem it necessary to discuss the others.

The orders of the district court refusing the interlocutory injunctions are

Affirmed.

Excerpted by Kimberly Clairmont

The New Deal and Redefining Commerce

Schechter Poultry Corp. v. United States

295 U.S. 495 (1935)

> Decision: Affirmed in part and reversed in part
> Vote: 9-0
> Majority: Hughes, joined by Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Roberts
> Concurrence: Cardozo, joined by Stone

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen count of an indictment charging violations of what is known as the "Live Poultry Code," and on an additional count for conspiracy to commit such violations. By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the Code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress, and (3) that, in certain provisions, it was repugnant to the due process clause of the Fifth Amendment ...

A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City ... Defendants ordinarily purchase their live poultry ... the West Washington Market in New York City or at the railroad terminals serving the City, but occasionally they purchase ... Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets ... it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery ... Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under § 3 of the National Industrial Recovery Act. That section ... authorizes the President to approve "codes of fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of Title I of the Act. Such codes "shall not permit monopolies or monopolistic practices." ...

Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The Code has eight articles entitled (1) purposes, (2) definitions, (3) hours, (4) wages, (5) general labor provisions, (6) administration, (7) trade practice provisions, and (8) general.

The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." The Code is established as "a code of fair competition for the live poultry industry of the metropolitan area in and about the City of New York." ...

The Code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty (40) hours in any one week, and that no employee, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing " general labor provisions" prohibits the employment of any person under sixteen years of age, and declares that employees shall have the right of "collective bargaining," and freedom of choice with respect to labor organizations, in the terms of § 7(a) of the Act. The minimum number of employees who shall be employed by slaughterhouse operators is fixed, the number being graduated according to the average volume of weekly sales ...

The seventh article, containing "trade practice provisions," prohibits various practices which are said to constitute "unfair methods of competition." ...

The President approved the Code by an executive order in which he found that the application for his approval had been duly made in accordance with the provisions of Title I of the National Industrial Recovery Act, that there had been due notice and hearings, that the Code constituted "a code of fair competition" as contemplated by the Act, and complied with its pertinent provisions ...

First. Two preliminary points are stressed by the Government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment ...

The further point is urged that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort ... It involves the coercive exercise of the lawmaking power. The codes of fair competition which the state attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. The question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question ...

... Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by the legislature, is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations — whether Congress, in authorizing "codes of fair competition," has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others ...

Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies. By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the Act in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination ... When the [Interstate Commerce] Commission is authorized to issue ... a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation ...

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority this conferred is an unconstitutional delegation of legislative power ...

Third. The question of the application of the provisions of the Live Poultry Code to intrastate transactions. Although the validity of the codes (apart from the question of delegation) rests upon the commerce clause of the Constitution, § 3(a) is not, in terms, limited to interstate and foreign commerce. From the generality of its terms, and from the argument of the Government at the bar, it would appear that § 3(a) was designed to authorize codes without that limitation. But, under §

3(f), penalties are confined to violations of a code provision "in any transaction in or affecting interstate or foreign commerce." This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn, and to the sales there made to retail dealers and butchers ...

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived, and has become commingled with the mass of property within the State, and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce, and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce — where goods come to rest within a State temporarily and are later to go forward in interstate commerce — and with the regulations of transactions involved in that practical continuity of movement, are not applicable here ...

(2) Did the defendants' transactions directly "*affect*" interstate commerce, so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation "no matter what may be the source of the dangers which threaten it." *Southern Ry. Co. v. United States,* (1911) ... We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *The Shreveport Case (1914)* ...

This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions — as to hours and wages of employees and local sales – "*affected*" interstate commerce ...

The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co. v. United Mine Workers,* (1925). But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied ...

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets ... The persons employed in slaughtering and selling in local trade are not employed in interstate commerce ... The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce ... [T]he Government argues that hours and wages affect prices ... that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work translates his saving into lower prices; that this results in demands for a cheaper grade of goods, and that the cutting of prices brings about a demoralization of the price structure ... The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is, in itself, the permitted object of federal control, the extent of the regulation of cost would be a question of discretion, and not of power ...

It is not the province of the Court to consider the economic advantages or disadvantage of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act — the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting "the cumulative forces making for expanding commercial activity." Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt, through the provisions of the Code, to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power ...

On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transaction which affect interstate commerce only indirectly, we hold he code provisions here in question to be invalid and that the judgment of conviction must be reversed.

No. 864 — reversed. No. 86 — affirmed.

Excerpted by Kimberly Clairmont

National Labor Relations Board v. Jones and Laughlin Steel Corp.

301 U.S. 1 (1937)

> Decision: Reversed
> Vote: 5-4
> Majority: Hughes, joined by Brandeis, Stone, Roberts, and Cardozo
> Dissent: McReynolds, joined by Van Devanter, Sutherland, and Butler

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by ... a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power ... We granted certiorari.

The scheme of the National Labor Relations Act — which is too long to be quoted in full — may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce ...

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations, and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees, because they are not subject to regulation by the federal government ...

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: the corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania ... Approximately 75 percent of its product is shipped out of Pennsylvania ...

While respondent criticizes the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation,

the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point, it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The scope of the Act. — The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable, at best; that the Act is not a true regulation of such commerce or of matters which directly affect it, but, on the contrary, has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation ...

If this conception of terms, intent, and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system ...

The cardinal principle of statutory construction is to save, and not to destroy. We have repeatedly held that, as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act ...

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority ... The critical words of this provision, prescribing the limits of the Board's authority in dealing with he labor practices, are "affecting commerce." ...

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (§ 2(7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes ... It is the effect upon commerce, not the source of the injury, which is the cri-

terion ... Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether, in the instant case, the constitutional boundary has been passed ...

Third. The application of the Act to employees engaged in production. — The principle involved. — Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing, in itself, is not commerce ...

The Government ... urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. *Stafford v. Wallace,* (1922). The Court found that the stockyards were but a "throat" through which the current of Commerce flowed and the transactions which there occurred could not be separated from that movement.

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" ... to adopt measures "to promote its growth and insure its safety" ... "to foster, protect, control and restrain." ... Undoubtedly the scope of this power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government ... The question is necessarily one of degree. As the Court said in *Chicago Board of Trade v. Olsen* ... repeating what had been said in *Stafford v. Wallace, supra:*

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it." ...

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry, when separately viewed, is local ...

The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920, with its far-reaching consequences ... The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce, and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining ...

Our conclusion is that the order of the Board was within its competency, and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Excerpted by Kimberly Clairmont

United States v. Darby Lumber Co.

312 U.S. 100 (1941)

> Decision: Reversed
> Vote: 9-0
> Majority: Stone, joined by Hughes, Roberts, Black, Reed, Frankfurter, Douglas and Murphy

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether, in connection with such prohibitions, Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods, to-wit, lumber, for *interstate commerce.'"* ...

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act ... and the reports of Congressional committees proposing the legislation ... is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general wellbeing, and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him ...

The indictment charges that appellee is engaged, in the State of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to cus-

tomers outside the state, and that he does, in fact, so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages at less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of his employees as required by § 11(c) and the regulation of the administrator ... and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce." ...

Section 15(a)(1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them ...

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden, (1824)*. That power can neither be enlarged nor diminished by the exercise or nonexercise of state power ... Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states ...

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden,* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart,* (1918). In that case, it was held by a bare majority of the Court, over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested, that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property — a distinction which was novel when made and unsupported by any provision of the Constitution — has long since been abandoned ...

The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision, and that such vitality, as a precedent, as it then had, has long since been exhausted. It should be, and now is, overruled ...

Validity of the wage and hour requirements. Section 15(a)(2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's employees are not alleged to be "engaged in interstate commerce," the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce, and so affects it, as to be within the reach of the power of Congress to regulate it ...

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports ... that the "production for commerce" intended includes at least production of goods which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce ...

But it does not follow that Congress may not, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce ... A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce ... But, long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it ...

We think also that § 15(a)(2), now under consideration, is sustainable independently of § 15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions, and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has, in effect, condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce ...

Our conclusion is unaffected by the Tenth Amendment. which provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers ...

From the beginning and for many years, the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end ...

Validity of the requirement of records of wages and hours. § 15(a)(5) and § 11(c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter ... The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end ...

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of "not less than one and one-half times the regular rate" at which the worker is employed. Since our decision in *West Coast Hotel Co. v. Parrish*, it is no longer open to question that the fixing of a minimum wage is within the legislative power, and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours ...

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines is warned that he may be subject to the criminal penalties of the Act. No more is required ...

Reversed.

Excerpted by Kimberly Clairmont

Wickard v. Filburn

317 U.S. 111 (1942)

> Decision: Reversed
> Vote: 9-0
> Majority: Jackson, joined by Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States ... He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941 to the Agricultural Adjust-

ment Act of 1938 upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act, as amended and applicable to him, were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment ...

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre ... He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels [equivalent to 1,912 dry gallons], which, under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. The appellee has not paid the penalty ... The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien. The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards, the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat ... Loans and payments to wheat farmers are authorized in stated circumstances ...

It is urged that, under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration, since our decision in *United States v. Darby,* sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce, but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that, as related to wheat, in addition to its conventional meaning, it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of."

Hence, marketing quotas not only embrace all that may be sold without penalty, but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture ...

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production ... " are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects

thereof ... [Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce ...

When it first dealt with this new legislation [Interstate Commerce Act], the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress ... Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden* ...

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause ... has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." ...

Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion ...

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about $1.16 a bushel as compared with the world market price of 40 cents a bushel ...

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent, as well, to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial ...

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and, to that end, to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market, and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices ...

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated, and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation, we have nothing to do ...

In its effort to control total supply, the Government gave the farmer a choice which was, of course, designed to encourage cooperation and discourage non-cooperation. The farmer who planted within his allotment was in effect guaranteed a minimum return much above what his wheat would have brought if sold on a world market basis. Exemption from the applicability of quotas was made in favor of small producers. The farmer who produced in excess of his quota might escape penalty by delivering his wheat to the Secretary or by storing it with the privilege of sale without penalty in a later year to fill out his quota ...

The penalty provided by the amendment can be postponed or avoided ... He has made no effort to show that the value of his excess wheat consumed without threshing was less than it would have been had it been threshed while subject to

the statutory provisions in force at the time of planting. Concurrently with the increase in the amount of the penalty, Congress authorized a substantial increase in the amount of the loan which might be made to cooperators upon stored farm marketing excess wheat. That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law ...

Reversed.

Excerpted by Kimberly Clairmont

Commerce and the States

a.k.a. the Dormant Commerce Clause

Cooley v. Board of Wardens

53 U.S. 299 (1852)

> Decision: Affirmed
> Vote: 5-3
> Majority: Curtis, joined by Taney, Catron, Nelson and Grier
> Concurrence: Daniel
> Dissent: McLean, joined by Wayne
> Not participating: McKinley

Mr. Justice CURTIS delivered the opinion of the court.

...

[These cases] are actions to recover half pilotage fees under the 29th section of the act of the Legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the state has decided against a right claimed by him under the Constitution of the United States. That right is to be exempted from the payment of the sums of money demanded, pursuant to the State law above referred to, because that law contravenes several provisions of the Constitution of the United States.

The particular section of the state law drawn in question is as follows:

"That every ship or vessel arriving from or bound to any foreign port or place ... sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden ... And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master ... shall forfeit and pay to the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, &c., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that, in case of an inward-bound vessel, a pilot did not offer before she had reached Reedy Island, or, in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred."

It constitutes one section of "An act to establish a Board of Wardens for the port of Philadelphia, and for the regulation of Pilots and Pilotages, &c.," and the scope of the act is in conformity with the title to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions ... Like other laws, they are framed to meet the most usual cases ... they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation by taking on board a person peculiarly skilled to encounter or avoid them, upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places ... The laws of commercial states and countries have made an offer of pilotage service one of those cases, and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the Legislature of Pennsylvania, of the 11th of June, 1832, proves that the state had other objects in view than the regulation of pilotage ...

It must be remembered that the fair objects of a law imposing half-pilotage when a pilot is not received may be secured and at the same time some classes of vessels exempted from such charge. Thus, the very section of the act of 1803 now under consideration does not apply to coasting vessels of less burden than seventy-five tons, not to those bound to, or sailing from, a port in the river Delaware. The purpose of the law being to cause masters of such vessels as generally need a pilot to employ one, and to secure to the pilots a fair remuneration for cruising in search of vessels or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port, and it will be found by an examination of the different systems of these regulations which have from time to time been made in this and other countries that the legislative discretion has been constantly exercised in making discriminations founded on differences both in the character of the trade and the tonnage of vessels engaged therein.

We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade which would enable us to declare it to be other than a fair exercise of legislative discretion ...

For these reasons, we cannot yield our assent to the argument that this provision of law is in conflict with the second and third clauses of the tenth section of the first article of the Constitution, which prohibit a state, without the assent of Congress, from laying any imposts or duties, on imports or exports or tonnage ... and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports, or tonnage would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty or an impost on imports or exports may be levied under the name of pilot dues or penalties, and certainly it is the thing, and not the name, which is to be considered ...

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stat. at L. 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different states, or between ports of the United States and foreign countries, but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage ...

Nor should it be lost sight of that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several states over which it was one main object of the Constitution to create a national control. Conflicts between the laws of neighboring states and discriminations favorable or adverse to commerce with particular foreign nations might be created by state laws regulating pilotage, deeply affecting that equality of commercial rights and that freedom from state interference which those who formed the Constitution were so anxious to secure and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, Congress actually interposed to relieve the commerce of the country from serious embarrassment arising from the laws of different states situate upon waters which are the boundary between them ...

It becomes necessary therefore to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, sect. 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania now in question had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity,

"with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress?"

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate, for only a rule created by the sovereign power of a state acting in its legislative capacity can be deemed a law enacted by a state, and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to Congress did *per se* deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded, on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress as effectually and perfectly excludes the states from all future legislation on the subject as if express words had been used to exclude them. And, on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power, that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations ...

Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain ...

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce did not deprive the states of power to regulate pilots, and that, although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states ...

We are of opinion that this state law was enacted by virtue of a power residing in the state to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Excerpted by Kimberly Clairmont

Southern Pacific Co. v. Arizona

325 U.S. 761 (1945)

> Decision: Reversed
> Vote: 7-2
> Majority: Stone, joined by Roberts, Reed, Frankfurter, Murphy and Jackson
> Concurrence: Ruttledge
> Dissent: Black
> Dissent: Douglas

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The Arizona Train Limit Law of May 16, 1912 ... makes it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars, and authorizes the state to recover a money penalty for each violation of the Act. The questions for decision are whether Congress has, by legislative enactment, restricted the power of the states to regulate the length of interstate trains as a safety measure and, if not, whether the statute contravenes the commerce clause of the Federal Constitution.

In 1940, the State of Arizona brought suit in the Arizona Superior Court against appellant, the Southern Pacific Company, to recover the statutory penalties for operating within the state two interstate trains, one a passenger train of more than fourteen cars and one a freight train of more than seventy cars. Appellant answered, admitting the train operations but defended on the ground that the statute offends against the commerce clause and the due process clause of the Fourteenth Amendment, and conflicts with federal legislation ...

The [State] Supreme Court left undisturbed the findings of the trial court, and made no new findings. It held that the power of the state to regulate the length of interstate trains had not been restricted by Congressional action. It sustained the Act as a safety measure to reduce the number of accidents attributed to the operation of trains of more than the statutory maximum length, enacted by the state legislature in the exercise of its "police power." This power the court held extended to the regulation of the operations of interstate commerce in the interests of local health, safety and wellbeing. It thought that a state statute, enacted in the exercise of the police power and bearing some reasonable relation to the health, safety and wellbeing of the people of the state, of which the state legislature is the judge, was not to be judicially overturned notwithstanding its admittedly adverse effect on the operation of interstate trains ...

[T]he question here ... whether the grant of power to the [Interstate Commerce] Commission operated to supersede the state act ... We are of opinion that, in the absence of administrative implementation by the Commission, § 1 does not, of itself, curtail state power to regulate train lengths ... Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation ... it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it ... When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority ...

But ever since *Gibbons v. Ogden*, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority ...

In the application of these principles, some enactments may be found to be plainly within, and others plainly without, state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved ...

For a hundred years, it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that, in such cases, where Congress has not acted, this Court, and not the state legislature, is, under the commerce clause, the final arbiter of the competing demands of state and national interests ...

[I]n general, Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application ... and has been aware that, in their application, state laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment ... Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system ...

Hence, the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce ...

The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state, and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation, because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state ...

The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether, in the circumstances, the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts ...

... The accident rate in Arizona is much higher than on comparable lines elsewhere, where there is no regulation of length of trains. The record lends support to the trial court's conclusion that the train length limitation increased, rather than diminished, the number of accidents ...

We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords, at most, slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents ... Its undoubted effect on the commerce is the regulation, without securing uniformity, of the length of trains operated in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency. In these respects, the case differs from those where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains.

Here, we conclude that the state does go too far. Its regulation of train lengths ... passes beyond what is plainly essential for safety, since it does not appear that it will lessen, rather than increase, the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nationwide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern ...

The state is responsible for their safe and economical administration. Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic. The fact that they affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses. Their regulation is akin to quarantine measures, game laws, and like local [laws] ... with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce ...

Here, examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical, and efficient railway transportation service, which must prevail.

Reversed.

Excerpted by Kimberly Clairmont

Hunt v. Washington State Apple Advertising Commission

432 U.S. 333 (1977)

Decision: Affirmed
Vote: 8-0
Majority: Burger, joined by Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens
Not participating: Rehnquist

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, *inter alia,* all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard." ... In an action brought by the Washington State Apple Advertising Commission, a three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce ...

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce ... Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $1 million each year.

In addition to the inspection program, the state legislature has sought to enhance the market for Washington apples through the creation of a state agency, the Washington State Apple Advertising Commission, charged with the statutory duty of promoting and protecting the State's apple industry. The Commission itself is composed of 13 Washington apple growers and dealers who are nominated and elected within electoral districts by their fellow growers and dealers ...

Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of the North Carolina market, *i.e.,* repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers

entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence ...

[A]ppellants assert the Commission cannot rely on the injuries which the statute allegedly inflicts individually or collectively on Washington apple growers and dealers in order to confer standing on itself ...

The only question presented, therefore, is whether, on this record, the Commission's status as a state agency, rather than a traditional voluntary membership organization, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not. The Commission, while admittedly a state agency, for all practical purposes performs the functions of a traditional trade association representing the Washington apple industry. As previously noted, its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public education campaigns, and scientific research. It thus serves a specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation ...

Here the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence supporting the District Court's finding that individual growers and shippers lost accounts in North Carolina as a direct result of the statute. Obviously, those lost sales could lead to diminished profits. There is also evidence to support the finding that individual growers and dealers incurred substantial costs in complying with the statute ... Such costs of compliance are properly considered in computing the amount in controversy ...

We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples ...

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all, as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA, system because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry, and thus operated to its benefit.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage *vis-a-vis* local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct, and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that, before he could support such an exemption, he would "want to have the sentiment from our apple producers, *since they were mainly responsible for this legislation being passed ...* " (emphasis added). Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated.

The judgment of the District Court is

Affirmed.

Excerpted by Kimberly Clairmont

Maine v. Taylor

477 U.S. 131 (1986)

> Decision: Reversed
> Vote: 8-1
> Majority: Blackmun, joined by Burger, Brennan, White, Marshall, Powell, Rehnquist, and O'Connor
> Dissent: Stevens

JUSTICE BLACKMUN delivered the opinion of the Court.

Once again, a little fish has caused a commotion ... The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing.

Appellee Robert J. Taylor (hereafter Taylor or appellee) operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish ... he arranged to have 158,000 live golden shiners delivered to him from outside the State. The shipment was intercepted, and a federal grand jury in the District of Maine indicted Taylor for violating and conspiring to violate the Lacey Act Amendments of 1981 ... Section 3(a)(2)(A) of those Amendments, makes it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce ... any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."

Taylor moved to dismiss the indictment on the ground that Maine's import ban unconstitutionally burdens interstate commerce, and therefore may not form the basis for a federal prosecution under the Lacey Act. Maine ... intervened to defend the validity of its statute, arguing that the ban legitimately protects the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish. The District Court found the statute constitutional, and denied the motion to dismiss ... Taylor then entered a conditional plea of guilty ... reserving the right to appeal the District Court's ruling on the constitutional question. The Court of Appeals for the First Circuit reversed, agreeing with Taylor that the underlying state statute impermissibly restricts interstate trade ... Maine appealed. We set the case for plenary review ...

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church Inc* (1970) ... statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v. Oklahoma,*

(1979), that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose" and that this purpose could not be served as well by available nondiscriminatory means ...

The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of *Hughes v. Oklahoma,* notwithstanding Maine's argument that those requirements were waived by the Lacey Act Amendments of 1981. It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke,* (1984) ...

In this case, there simply is no unambiguous statement of any congressional intent whatsoever "to alter the limits of state power otherwise imposed by the Commerce Clause," *United States v. Public Utilities Comm'n of California,* (1953) ...

Maine's ban on the importation of live baitfish thus is constitutional only if it satisfies the requirements ordinarily applied under *Hughes v. Oklahoma* to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means ...

The evidentiary hearing on which the District Court based its conclusions was one before a Magistrate. Three scientific experts testified for the prosecution, and one for the defense. The prosecution experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries ... First, Maine's population of wild fish — including its own indigenous golden shiners — would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine ... Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways ...

Although statistical sampling and inspection techniques had been developed for salmonids (*i.e.,* salmon and trout), so that a shipment could be certified parasite-free based on a standardized examination of only some of the fish, no scientifically accepted procedures of this sort were available for baitfish ...

After reviewing the expert testimony presented to the Magistrate, however, we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible ...

Nor do we think that much doubt is cast on the legitimacy of Maine's purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually *per se* rule of invalidity." ... But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a "*post hoc* rationalization." ...

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," *Baldwin v. G. A. F. Seelig, Inc.,* (1935), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently," *Philadelphia v. New Jersey,* (1978). The judgment of the Court of Appeals setting aside appellee's conviction is therefore reversed.

It is so ordered.

Excerpted by Kimberly Clairmont

Reno v. Condon

528 U.S. 141 (2000)

> Decision: Reversed
> Vote: 9-0
> Majority: Rehnquist,, joined by Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer

REHNQUIST, C. J., delivered the opinion of the Court.

...

The DPPA [Driver's Privacy Protection Act] regulates the disclosure and resale of personal information contained in the records of state DMVs [Department of Motor Vehicles]. State DMVs require drivers and automobile owners to provide personal information, which may include a person's name, address, telephone number, vehicle description, Social Security number, medical information, and photograph, as a condition of obtaining a driver's license or registering an automobile. Congress found that many States, in turn, sell this personal information to individuals and businesses ...

The DPPA's ban on disclosure of personal information does not apply if drivers have consented to the release of their data. When we granted certiorari in this case, the DPPA provided that a DMV could obtain that consent either on a case-by-case basis or could imply consent if the State provided drivers with an opportunity to block disclosure of their personal information when they received or renewed their licenses and drivers did not avail themselves of that opportunity ... However, Public Law 106-69 ... which was signed into law on October 9, 1999, changed this "opt-out" alternative to an "opt-in" requirement. Under the amended DPPA, States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes ...

South Carolina law conflicts with the DPPA's provisions.

Under that law, the information contained in the State's DMV records is available to any person or entity that fills out a form listing the requester's name and address and stating that the information will not be used for telephone solicitation ... South Carolina's DMV retains a copy of all requests for information from the State's motor vehicle records, and it is required to release copies of all requests relating to a person upon that person's written petition ... State law authorizes the South Carolina DMV to charge a fee for releasing motor vehicle information, and it requires the DMV to allow drivers to prohibit the use of their motor vehicle information for certain commercial activities.

Following the DPPA's enactment, South Carolina and its Attorney General, respondent Condon, filed suit in the United States District Court for the District of South Carolina, alleging that the DPPA violates the Tenth and Eleventh Amendments to the United States Constitution. The District Court concluded that the Act is incompatible with the principles of federalism inherent in the Constitution's division of power between the States and the Federal Government ...

The United States asserts that the DPPA is a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause ... The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA regulates is a "thin[g] in interstate commerce," and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation ... We agree with the United States' contention. The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation ...

But the fact that drivers' personal information is, in the context of this case, an article in interstate commerce does not conclusively resolve the constitutionality of the DPPA. In *New York v. United States* (1992) and *Printz v. United States* (1997), we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment ...

We agree with South Carolina's assertion that the DPPA's provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either *New York* or *Printz*. We think, instead, that this case is governed by our decision in *South Carolina* v. *Baker,* (1988) ...

Like the statute at issue in *Baker,* the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

As a final matter, we turn to South Carolina's argument that the DPPA is unconstitutional because it regulates the States exclusively. The essence of South Carolina's argument is that Congress may only regulate the States by means of "generally applicable" laws, or laws that apply to individuals as well as States. But we need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally

applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information-the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.

The judgment of the Court of Appeals is therefore

Reversed.

Excerpted by Kimberly Clairmont

Granholm v. Heald

544 U.S. 460 (2005)

> Decision: Affirmed
> Vote: 5-5
> Majority: Kennedy, joined by Scalia, Souter, Ginsburg and Breyer
> Dissent: Stevens, joined by O'Connor
> Dissent: Thomas, joined by Rehnquist, Stevens and O'Connor

Justice Kennedy delivered the opinion of the Court.

These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and mechanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.

We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, §8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment of the Court of Appeals for the Second Circuit, which upheld the New York laws.

Like many other States, Michigan and New York regulate the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers ... The three-tier scheme is preserved by a complex set of overlapping state and federal regulations ... We have held previously that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment. *North Dakota* v. *United States* (1990) ... As relevant to today's cases, though, the three-tier system is, in broad terms

and with refinements to be discussed, mandated by Michigan and New York only for sales from out-of-state wineries. In-state wineries, by contrast, can obtain a license for direct sales to consumers. The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.

This discrimination substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business ...

Approximately 26 States allow some direct shipping of wine, with various restrictions. Thirteen of these States have reciprocity laws, which allow direct shipment from wineries outside the State, provided the State of origin affords similar nondiscriminatory treatment. *Id*., at 7—8. In many parts of the country, however, state laws that prohibit or severely restrict direct shipments deprive consumers of access to the direct market. According to the Federal Trade Commission (FTC), "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *Id*., at 3.

The wine producers in the cases before us are small wineries that rely on direct consumer sales as an important part of their businesses ... Even if the winery could find a Michigan wholesaler to distribute its wine, the wholesaler's markup would render shipment through the three-tier system economically infeasible.

We first address the background of the suit challenging the Michigan direct-shipment law. Most alcoholic beverages in Michigan are distributed through the State's three-tier system. Producers or distillers of alcoholic beverages, whether located in state or out of state, generally may sell only to licensed in-state wholesalers ... Licensed retailers are the final link in the chain, selling alcoholic beverages to consumers at retail locations and, subject to certain restrictions, through home delivery.

Under Michigan law, wine producers, as a general matter, must distribute their wine through wholesalers. There is, however, an exception for Michigan's approximately 40 in-state wineries, which are eligible for "wine maker" licenses that allow direct shipment to in-state consumers ... The cost of the license varies with the size of the winery ...

Some Michigan residents brought suit against various state officials in the United States District Court for the Eastern District of Michigan ... The plaintiffs contended that Michigan's direct-shipment laws discriminated against interstate commerce in violation of the Commerce Clause ... Both the State and the wholesalers argued that the ban on direct shipment from out-of-state wineries is a valid exercise of Michigan's power under §2 of the Twenty-first Amendment ...

New York's licensing scheme is somewhat different. It channels most wine sales through the three-tier system, but it too makes exceptions for in-state wineries. As in Michigan, the result is to allow local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers ... These licensees are authorized to deliver the wines of other wineries as well, §76—a(6)(a), but only if the wine is made from grapes "at least seventy-five percent the volume of which were grown in New York state," §3(20—a). An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of "a branch factory, office or storeroom within the state of New York." §3(37).

Juanita Swedenburg and David Lucas,, joined by three of their New York customers, brought suit in the Southern District of New York ... seeking, *inter alia*, a declaration that the State's limitations on the direct shipment of out-of-state wine violate the Commerce Clause. New York liquor wholesalers and representatives of New York liquor retailers intervened in support of the State ...

We consolidated these cases and granted certiorari on the following question: " 'Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of §2 of the Twenty-first Amendment?' "

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.,* (1994). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States ...

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests ...

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Riekhof & Sykuta, 27 Regulation, No. 3, at 30. Prior to 1986, all but three States prohibited direct-shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. *Ibid*. The current patchwork of laws–with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity–is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison,* (1951).

The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

The New York regulatory scheme differs from Michigan's in that it does not ban direct shipments altogether. Out-of-state wineries are instead required to establish a distribution operation in New York in order to gain the privilege of direct shipment. N. Y. ABC Law §§3(37), 96. This, though, is just an indirect way of subjecting out-of-state wineries, but not

local ones, to the three-tier system. New York and those allied with its interests defend the scheme by arguing that an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State. There is some confusion over the precise steps out-of-state wineries must take to gain access to the New York market, in part because no winery has run the State's regulatory gauntlet. New York's argument, in any event, is unconvincing.

The New York scheme grants in-state wineries access to the State's consumers on preferential terms ...

In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways. Out-of-state wineries that establish the requisite branch office and warehouse in New York are still ineligible for a "farm winery" license, the license that provides the most direct means of shipping to New York consumers ...

We have no difficulty concluding that New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws.

... The two States, however, contend their statutes are saved by §2 of the Twenty-first Amendment ...

The States' position is inconsistent with our precedents and with the Twenty-first Amendment's history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.

Before 1919, the temperance movement fought to curb the sale of alcoholic beverages one State at a time. The movement made progress, and many States passed laws restricting or prohibiting the sale of alcohol. This Court upheld state laws banning the production and sale of alcoholic beverages, *Mugler* v. *Kansas,* (1887), but was less solicitous of laws aimed at imports. In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.

These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor ... Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce ...

The ratification of the Eighteenth Amendment in 1919 provided a brief respite from the legal battles over the validity of state liquor regulations. With the ratification of the Twenty-first Amendment 14 years later, however, nationwide Prohibition came to an end. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. Section 2 of the Twenty-first Amendment is at issue here ...

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time ...

Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers ...

The modern §2 cases fall into three categories.

First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment ...

Second, the Court has held that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor ...

Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause ...

Our determination that the Michigan and New York direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We still must consider whether either State regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind* ... The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection. We consider each in turn.

The States, aided by several *amici,* claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking ...

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary ... Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, " 'want instant gratification.' " ...

Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones ...

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion ... New York and its supporting parties also advance a tax-collection justification for the State's direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries ...

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods ...

States have broad power to regulate liquor under §2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

We affirm the judgment of the Court of Appeals for the Sixth Circuit; and we reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with our opinion.

It is so ordered.

Excerpted by Rorie Solberg

National Pork Producers Council v. Ross

598 U.S. ___ (2023)

> Decision: Affirmed
> Vote: 9-0
> Majority/Plurality: Gorsuch,, joined by Thomas; Barrett (Parts I, II, III, IV-A, IV-B, IV-D, and V); Sotomayor, Kagan (Parts I, II, III, IV-A, IV-C, and V)
> Concurrence: Sotomayor (in part),, joined by Kagan
> Concurrence: Barrett (in part)
> Concur/dissent: Roberts,, joined by Alito, Kavanaugh, Jackson
> Concur/dissent: Kavanaugh

Justice Gorsuch announced the judgment of the Court and delivered the opinion of the Court, except as to Parts IV–B, IV–C, and IV–D.

What goods belong in our stores? Usually, consumer demand and local laws supply some of the answer. Recently, California adopted just such a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around. In response, two groups of out-of-state pork producers filed this lawsuit, arguing that the law unconstitutionally interferes with their preferred way of doing business in violation of this Court's dormant Commerce Clause precedents. Both the district court and court of appeals dismissed the producers' complaint for failing to state a claim ...

Modern American grocery stores offer a dizzying array of choice ... Products may be marketed as free range, wild caught, or graded by quality (prime, choice, select, and beyond). The pork products at issue here, too, sometimes come with "antibiotic-free" and "crate-free" labels ... Much of this product differentiation reflects consumer demand, informed by individual taste, health, or moral considerations ...

This case involves a challenge to a California law known as Proposition 12. In November 2018 and with the support of about 63% of participating voters, California adopted a ballot initiative that revised the State's existing standards for the in-state sale of eggs and announced new standards for the in-state sale of pork and veal products ... As relevant here, Proposition 12 forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are "confined in a cruel manner ... "

A spirited debate preceded the vote on Proposition 12. Proponents observed that, in some farming operations, pregnant pigs remain "[e]ncased" for 16 weeks in "fit-to-size" metal crates ... These animals may receive their only opportunity for exercise when they are moved to a separate barn to give birth and later returned for another 16 weeks of pregnancy confinement—with the cycle repeating until the pigs are slaughtered. Proponents hoped that Proposition 12 would go a long way toward eliminating pork sourced in this manner "from the California marketplace ... " Proponents also suggested that the law would have health benefits for consumers because "packing animals in tiny, filthy cages increases the risk of food poisoning.

Opponents pressed their case in strong terms too. They argued that existing farming practices did a better job of protecting animal welfare (for example, by preventing pig-on-pig aggression) and ensuring consumer health (by avoiding contamination) than Proposition 12 would ... They also warned voters that Proposition 12 would require some farmers and processors to incur new costs. Ones that might be "passed through" to California consumers ...

The Constitution vests Congress with the power to "regulate Commerce ... among the several States." Art. I, §8, cl. 3. Everyone agrees that Congress may seek to exercise this power to regulate the interstate trade of pork, much as it has done with various other products. Everyone agrees, too, that congressional enactments may preempt conflicting state laws. But everyone also agrees that we have nothing like that here. Despite the persistent efforts of certain pork producers, Congress has yet to adopt any statute that might displace Proposition 12 or laws regulating pork production in other States ...

Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also "contain[s] a further, negative command," one effectively forbidding the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines*, *Inc.*, (1995) ...

In its "modern" cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws "driven by ... 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors ... '"

Even under our received dormant Commerce Clause case law, petitioners begin in a tough spot. They do not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals. In fact, petitioners *disavow* any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones. As petitioners put it, "the dormant Commerce Clause ... bar on protectionist state statutes that discriminate against interstate commerce ... is not in issue here."

Having conceded that California's law does not implicate the antidiscrimination principle at the core of this Court's dormant Commerce Clause cases, petitioners are left to pursue two more ambitious theories. In the first, petitioners invoke what they call "extraterritoriality doctrine." *Id*., at 19. They contend that our dormant Commerce Clause cases suggest an additional and "almost *per se*" rule forbidding enforcement of state laws that have the "practical effect of controlling commerce outside the State," even when those laws do not purposely discriminate against out-of-state economic interests. *Ibid.* Petitioners further insist that Proposition 12 offends this "almost *per se*" rule because the law will impose substantial new costs on out-of-state pork producers who wish to sell their products in California ...

Petitioners say the "almost *per se*" rule they propose follows ineluctably from three cases ...

On their account, *Baldwin v. G. A. F. Seelig* (1935), *Brown-Forman v. New York State Liquor Authority* (1986), and *Healy v. Beer Institute* (1989) didn't just find an impermissible discriminatory purpose in the challenged laws; they also suggested an "almost *per se*" rule against state laws with "extraterritorial effects ... "

In our view, however, petitioners read too much into too little ... [T]he Court explained that the challenged statutes had a *specific* impermissible "extraterritorial effect"—they deliberately "prevent[ed out-of-state firms] from undertaking competitive pricing" or "deprive[d] businesses and consumers in other States of 'whatever competitive advantages they may possess ... ' "

In recognizing this much, we say nothing new. This Court has already described "[t]he rule that was applied in *Baldwin* and *Healy*" as addressing "price control or price affirmation statutes" that tied "the price of ... in-state products to out-of-state prices ... "

Consider, too, the strange places petitioners' alternative interpretation could lead. In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions ... Nor, as we have seen, is this a recent development. Since the founding, States have enacted an "immense mass" of "[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on commerce outside their borders. Petitioners' "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results. Can anyone really suppose *Baldwin*, *Brown-Forman*, and *Healy* meant to do so much?

...

In rejecting petitioners' "almost *per se*" theory we do not mean to trivialize the role territory and sovereign boundaries play in our federal system. But, by way of example, no one should think that one State may adopt a law exempting securities held by the residents of a second State from taxation in that second State. *Bonaparte* v. *Tax Court*, (1882). Nor, we have held, should anyone think one State may prosecute the citizen of another State for acts committed "outside [the first State's] jurisdiction" that are not "intended to produce [or that do not] produc[e] detrimental effects within it." *Strassheim v. Daily* (1911) ...

The antidiscrimination principle found in our dormant Commerce Clause cases may well represent one more effort to mediate competing claims of sovereign authority under our horizontal separation of powers. But none of this means, as petitioners suppose, that *any* question about the ability of a State to project its power extraterritorially must yield to an "almost *per se*" rule under the dormant Commerce Clause. This Court has never before claimed so much "ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, (2007). We see no reason to change course now.

Failing in their first theory, petitioners retreat to a second they associate with *Pike* v. *Bruce Church*, *Inc*., (1970). Under *Pike*, they say, a court must at least assess " 'the burden imposed on interstate commerce' " by a state law and prevent its enforcement if the law's burdens are " 'clearly excessive in relation to the putative local benefits.' " Petitioners then rattle off a litany of reasons why they believe the benefits Proposition 12 secures for Californians do not outweigh the costs it imposes on out-of-state economic interests ...

As this Court has previously explained, "no clear line" separates the *Pike* line of cases from our core antidiscrimination precedents. *General Motors Corp.* v. *Tracy*, 12 (1997). While many of our dormant Commerce Clause cases have asked whether a law exhibits " 'facial discrimination,' " "several cases that have purported to apply [*Pike,*] including *Pike* itself," have "turned in whole or in part on the discriminatory character of the challenged state regulations." *Ibid*. In other words, if some of our cases focus on whether a state law discriminates on its face, the *Pike* line serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose ...

Nor does any of this help petitioners in this case. They not only disavow any claim that Proposition 12 discriminates on its face. They nowhere suggest that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses. While this Court has left the "courtroom door open" to challenges premised on "even nondiscriminatory burdens," *Dept. of Revenue of Ky v. Davis*, (2008) and while "a small number of our cases have invalidated state laws ... that appear to have been genuinely nondiscriminatory," *Tracy*, petitioners' claim falls well outside *Pike*'s heartland ...

They urge us to read *Pike* as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits."

That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." *United Haulers* ...

This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind that would be necessary ... to satisfy [the] *Pike*" test as petitioners conceive it. *Davis* ...

On the "cost" side of the ledger, petitioners allege they will face increased production expenses because of Proposition 12. On the "benefits" side, petitioners acknowledge that Californians voted for Proposition 12 to vindicate a variety of interests, many noneconomic ... How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.* v. *Midwesco Enterprises*, *Inc.*, (1988) (Scalia, J., concurring in judgment).

Faced with this problem, petitioners reply that we should heavily discount the benefits of Proposition 12. They say that California has little interest in protecting the welfare of animals raised elsewhere and the law's health benefits are overblown. But along the way, petitioners offer notable concessions too. They acknowledge that States may sometimes ban the in-state sale of products they deem unethical or immoral without regard to where those products are made ...

So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. On the one hand, some out-of-state producers who choose to comply with Proposition 12 may incur new costs. On the other hand, the law serves moral and health interests of some (disputable) magnitude for in-state residents. Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours ...

If, as petitioners insist, California's law really does threaten a "massive" disruption of the pork industry ... pig husbandry really does " 'imperatively demand' " a single uniform nationwide rule ... they are free to petition Congress to intervene. Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country. And that body is certainly better positioned to claim democratic support for any policy choice it may make. But so far, Congress has declined the producers' sustained entreaties for new legislation ...

Petitioners would have us cast aside caution for boldness. They have failed—repeatedly—to persuade Congress to use its express Commerce Clause authority to adopt a uniform rule for pork production. And they disavow any reliance on this Court's core dormant Commerce Clause teachings focused on discriminatory state legislation. Instead, petitioners invite us to endorse two new theories of implied judicial power. They would have us recognize an "almost *per se*" rule against the enforcement of state laws that have "extraterritorial effects"—even though this Court has recognized since *Gibbons* that virtually all state laws create ripple effects beyond their borders. Alternatively, they would have us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result. Like the courts that faced this case before us, we decline both of petitioners' incautious invitations.

The judgment of the Ninth Circuit is

Affirmed.

Excerpted by Alexandria Metzdorf

Limits on Commerce Power in the Current Era

United States v. Lopez

514 U.S. 549 (1995)

> Decision: Affirmed
> Vote: 5-4
> Majority: Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas
> Concurrence: Kennedy, joined by O'Connor
> Concurrence: Thomas
> Dissent: Breyer, joined by Stevens, Souter, and Ginsburg
> Dissent: Stevens
> Dissent: Souter

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce ... among the several States. ... " ...

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises ... The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990 ...

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." ... Because of the importance of the issue, we granted certiorari, and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." ...

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *NLRB v. Jones & Laughlin Steel,* (1937), the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." ... (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce) *Wickard [v. Filburn* (1942)] ... (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce ...

[W]e have identified three broad categories of activity that Congress may regulate under its commerce power ... First, Congress may regulate the use of the channels of interstate commerce ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ... those activities that substantially affect interstate commerce ...

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause ... We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce ...

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce ...

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce ... the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." ... We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on inter-

state commerce ... ("Congress need [not] make particularized findings in order to legislate"). But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here ...

The Government's essential contention, *in fine,* is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce ... The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy ... The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce ...

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce ... Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate ...

In *Jones & Laughlin Steel [(1937)]*, we held that the question of congressional power under the Commerce Clause "is necessarily one of degree." To the same effect is the concurring opinion of Justice Cardozo in *Schecter Poultry [(1935)]* ...

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action ... The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated ... and that there never will be a distinction between what is truly national and what is truly local ... This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

Excerpted by Kimberly Clairmont

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce ... among the several States," U. S. Const., Art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce ...

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i.e.*, the effect of all guns possessed in or near schools). See, *e.g.*, *Wickard*. As this Court put the matter almost 50 years ago:

"[I]t is enough that the individual activity when multiplied into a general practice ... contains a threat to the interstate economy that requires preventative regulation." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, (1948) ...

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce–both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding. (emphasis added).

I recognize that we must judge this matter independently ... And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i.e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference ... And, it would seem particularly unfortunate to make the validity of the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance ...

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? ... As long as one views the commerce connection, not as a

"technical legal conception," but as "a practical one," *Swift & Co.* v. *United States*, (1905) ... the answer to this question must be yes. Numerous reports and studies–generated both inside and outside government–make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious ... Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy ...

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills ...

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education ...

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner city high school students and gun related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." And, the evidence of (1) the *extent* of the gun related violence problem, see *supra*, at 5, (2) the *extent* of the resulting negative effect on classroom learning, see *supra*, at 5-6, and (3) the *extent* of the consequent negative commercial effects, see *supra*, at 6-9, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial." ...

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. See *Heart of Atlanta Motel*, *Inc*. v. *United States*, (1964). It would recognize that, in today's economic world, gun related violence near the classroom makes a significant difference to our economic, as well as our social, well being. In accordance with well accepted precedent, such a holding would permit Congress "to act in terms of economic ... realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy." *North American Co.* v. *SEC*, (1946) ...

Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

Excerpted by Rorie Solberg

United States v. Morrison

529 U.S. 598 (2000)

> Decision: Affirmed
> Vote: 5-4
> Majority: Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas
> Concurrence: Thomas
> Dissent: Souter, joined by Stevens, Ginsburg, and Breyer
> Dissent: Breyer, Stevens, Souter, and Ginsburg (part I-A)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

...

In these cases we consider the constitutionality of 42 U. S. C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States* v. *Lopez,* (1995) ... we affirm.

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, "You better not have any ... diseases." In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and. ... " The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language." ...

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972 ... Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99-5, intervened to defend § 13981's constitutionality ...

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez,* we held that the Gun-Free School Zones Act of 1990, 18 U. S. C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. Several significant considerations contributed to our decision ...

[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case ... *Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor ...

The second consideration that we found important in analyzing § 922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce ... " Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce ...

Third, we noted that neither § 922(q) "nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone ... "

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated ... The United States argued that the possession of guns may lead to violent crime ...

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature ...

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." ...

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

Excerpted by Kimberly Clairmont

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard v. Filburn* [(1942)] ... The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.,* but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid*. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States* v. *Lopez,* (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce ... Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment ...

[Justice Souter then provides several examples of the factual findings.]

Based on the data thus partially summarized, Congress found that

"crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce ... [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products ... ." H. R. Conf. Rep. No. 103—711, p. 385 (1994) ...

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned ...

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. §8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta, supra* ...

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 14. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned ...

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, §8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress ...

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test ...

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal, Schechter,* and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup* v. *New York,* (1967) *(per curiam),* and *Miller* v. *California,* (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

Excerpted by Rorie Solberg

Gonzales v. Raich

545 U.S. 1 (2005)

> Decision: Vacated and remanded
> Vote: 6-3
> Majority: Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer
> Concurrence: Scalia (in judgment)
> Dissent: O'Connor, joined by Rehnquist and Thomas (all but part III)
> Dissent: Thomas

Justice Stevens delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law ...

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal ...

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA) ... to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts to obtain relief with conventional medications, and the opinions of their doctors concerning their need

to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity ...

[I]n 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. A number of noteworthy events precipitated this policy shift ... Finally, prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act ...

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause ...

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ... " and consequently control the market price ... a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets ... In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions ...

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor ... The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose ... " Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements ... Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval ... Accordingly, the mere fact that marijuana—like virtually every other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA ...

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any

conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be ... Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause ... so too state action cannot circumscribe Congress' plenary commerce power ...

So, from the "separate and distinct" class of activities identified by the Court of Appeals ... we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana." Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard* v. *Filburn* and the later cases endorsing its reasoning foreclose that claim.

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Kimberly Clairmont

National Federation of Independent Business v. Sebelius

567 U.S. 519 (2012)

> Decision: reversed in part and affirmed in part
> Vote: 5-4
> Majority: Roberts (parts I, II, and III-C), joined by Ginsburg, Breyer, Sotomayor, and Kagan
> Plurality: Roberts (part IV), joined by Breyer and Kagan
> Concurrence: Roberts (parts III-A, III-B, III-D)
> Concur/dissent: Ginsburg, joined by Sotomayor, Breyer, and Kagan (parts I, II, III, IV)
> Dissent: Scalia, joined by Kennedy, Thomas, Alito
> Dissent: Thomas

Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice Breyer and Justice Kagan join, and an opinion with respect to Parts III–A, III–B, and III–D ...

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions ...

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. §5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. §5000A(d). Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. See §5000A(f). But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance ...

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion ...

Amicus argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act because it functions like a tax. It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax ... "

The Code contains many provisions treating taxes and assessable penalties as distinct terms ... There would, for example, be no need for §6671(a) to deem "tax" to refer to certain assessable penalties if the Code already included all such penalties in the term "tax." Indeed, *amicus*'s earlier observation that the Code requires assessable penalties to be assessed and collected "in the same manner as taxes" makes little sense if assessable penalties are themselves taxes. In light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits ...

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's

power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax ...

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, §8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." ... And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." ... If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated ...

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them ...

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him ...

The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect ... If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature ...

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released ... and tolling state statutes of limitations while cases are *pending in federal court* ... The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power ...

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. 26 U. S. C. §5000A(a). Congress thought it could enact such

a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one ...

We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power ...

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution ... The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax ...

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry ... Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns ...

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax ...

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line ... The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate ... The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016 ... In the following years, the federal payment level gradually decreases, to a minimum of 90 percent ... In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will in-crease by approximately $100 billion per year, nearly 40 percent above current levels ...

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." ... Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such

a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers ...

Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts* v. *Mellon*, (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York [v. U.S.]* ... in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes ...

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." ...

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." ... A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically ...

In light of the Court's holding, the Secretary cannot apply §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains §1396c includes a severability clause confirming that we need go no further. That clause specifies that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." §1303. Today's holding does not affect the continued ap-plication of §1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds pro-vided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act ...

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

It is so ordered.

Excerpted by Kimberly Clairmont

The Taxing and Spending Clause

Case List

Taxing and Spending as Regulatory Power

McCray v. United States (1904)
Bailey v. Drexel Furniture Co. (1922)
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Defining the Taxing and Spending Power

United States v. Butler (1936)
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Restriction of State Revenue Power

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Taxing and Spending as Regulatory Power

McCray v. United States

195 U.S. 27 (1904)

> Decision: Affirmed
> Vote: 6-3
> Majority: White, joined by Harlan, Brewer, White, McKenna, Holmes and Day
> Dissenting: Chief Justice Fuller, Brown, Peckham

The judiciary is without authority to avoid an act of Congress lawfully exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress; nor can the judiciary inquire into the motive or purpose of Congress in adopting a statute levying an excise tax within its constitutional power.

While both the Fifth and Tenth Amendments qualify, insofar as they are applicable, all the provisions of the Constitution, nothing in either of them operates to take away the grant of power to tax conferred by the Constitution upon Congress, and that power being unrestrained except as limited by the Constitution, Congress may select the objects upon which the tax shall be levied, and, in exerting the power, no want of due process of law can possibly result, and the judiciary cannot usurp the functions of the legislature in order to control that branch of the Government in exercising its lawful functions.

The manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

There is such a distinction between natural butter artificially colored and oleomargarine artificially colored so as to cause it to look like butter that the taxing of the latter and not the former cannot be avoided as an arbitrary exertion of the taxing power of Congress without any basis of classification, taxing one article and excluding another of the same class.

The Oleomargarine Act of 1886, 24 Stat. 209, as amended by the act of 1902, 32 Stat. 93, imposing a tax of one quarter of one percent on oleomargarine not artificially colored any shade of yellow so as to look like butter and ten cents a pound if so colored, levies an excise tax, and is not unconstitutional as outside of the powers of Congress or an interference with the powers reserved to the States, nor can the judiciary declare the tax void because it is too high nor because it amounts to a destruction of the business of manufacturing oleomargarine, nor because it discriminates against oleomargarine and in favor of butter ...

The United States sued McCray for a statutory penalty of $50, alleging that, being a licensed retail dealer in oleomargarine, he had, in violation of the acts of Congress, knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there were affixed internal revenue stamps at the rate of one-fourth of a cent a pound, upon which the law required stamps at the rate of ten cents per pound ...

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court ...

2d. *Did Congress in passing the acts which are assailed, exert a power not conferred by the Constitution?*

That the acts in question, on their face, impose excise taxes which Congress had the power to levy is so completely established as to require only statement ...

[We] hence come, first, to ascertain how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider motive or purpose, we shall then approach the propositions relied on by the light of the correct rule on the subject of purpose or motive.

Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government upon which our system is founded, and would be a mere act of judicial usurpation. ...

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted ... The often quoted statement of Chief Justice Marshall in *McCulloch v. Maryland* that the power to tax is the power to destroy affords no support whatever to the proposition that, where there is a lawful power to impose a tax, its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out by Mr. Chief Justice Marshall in ... *Gibbons v. Ogden* ...

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that, on their face, they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or

restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise ...

2. The proposition that, where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases, (*Spencer v. Merchant*) that

"The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

3. Whilst undoubtedly both the Fifth and Tenth Amendments qualify, insofar as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress ...

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties ...

4. Lastly, we come to consider the argument that, even though, as a general rule, a tax of the nature of the one in question would be within the power of Congress, in this case, the tax should be held not to be within such power because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void because they violate those fundamental rights which it is the duty of every free government to safeguard and which, therefore, should be held to be embraced by implied though nonetheless potential guaranties, or, in any event, to be within the protection of the due process clause of the Fifth Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede ... that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled ... It has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and therefore no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress ...

Affirmed.

Excerpted by Ethan Derstine

Bailey v. Drexel Furniture Co.

259 U.S. 20 (1922)

> Decision: Affirmed
> Vote: 8-1
> Majority: Taft, joined by McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis
> Dissenting: Clarke

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western District of North Carolina. On September 20, 1921, it received a notice from Bailey, United States Collector of Internal Revenue for the District, that it had been assessed $6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under fourteen years of age, thus incurring the tax of ten percent on its net profits for that year. The Company paid the tax under protest, and after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the Company against the Collector for the full amount with interest ...

The Child Labor Tax Law ... is attacked on the ground that it is a regulation of the employment of child labor in the States — an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amend-

ment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by § 8, Article I, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act ...

The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject ...

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.

The case before us cannot be distinguished from that of *Hammer v. Dagenhart* (1918) ...

The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress' regulation of state concerns, the Court said this was not, in fact, regulation of interstate commerce, but rather that of State concerns, and was invalid. So here, the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.

This case requires, as did the *Dagenhart* case, the application of the principle announced by Chief Justice Marshall in *McCulloch v. Maryland* (1819), in a much quoted passage:

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect or tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law ...

McCray v. United States (1904). That, like the *Veazie Bank* case [1869], was the increase of an excise tax upon a subject properly taxable in which the taxpayers claimed that the tax had become invalid because the increase was excessive. It was a tax on oleomargarine, a substitute for butter. The tax on the white oleomargarine was one-quarter of a cent a pound, and on the yellow oleomargarine was first two cents and was then by the act in question increased to ten cents per pound. This court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or limited by the Courts because the latter might deem the incidence of the tax oppressive, or even destructive. It was the same principle as that applied in the *Veazie Bank* case. This was that Congress, in selecting its subjects for taxation, might impose the burden where and as it would, and that a motive disclosed in its selection to discourage sale or manufacture of an article by a higher tax than on some other did not invalidate the tax. In neither of these cases did the law objected to show on its face, as does the law before, us the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.

The court said that the act could not be declared invalid just because another motive than taxation, not shown on the face of the act, might have contributed to its passage. This case does not militate against the conclusion we have reached in respect of the law now before us. The court there made manifest its view that the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax, and not solely to the achievement of some other purpose plainly within state power. For the reason given, we must hold the Child Labor Tax Law invalid, and the judgment of the District Court is

Affirmed.

MR. JUSTICE CLARKE dissents.

Excerpted by Ethan Derstine

United States v. Carlton

512 U.S. 26 (1994)

> Decision: Reversed
> Vote: 9-0
> Writing for Court: Blackmun, joined by Rehnquist, Stevens, Kennedy, Souter, and Ginsburg
> Concurrence: O'Connor
> Concurrence: Scalia, joined by Thomas

JUSTICE BLACKMUN delivered the opinion of the Court.

In 1987, Congress amended a provision of the federal estate tax statute by limiting the availability of a recently added deduction for the proceeds of sales of stock to employee stock-ownership plans (ESOP's). Congress provided that the amendment would apply retroactively, as if incorporated in the original deduction provision, which had been adopted in October 1986. The question presented by this case is whether the retroactive application of the amendment violates the Due Process Clause of the Fifth Amendment.

Respondent Jerry W. Carlton, the executor of the will of Willametta K. Day, deceased, sought to utilize the § 2057 deduction. Day died on September 29, 1985. Her estate tax return was due December 29, 1986 (after Carlton had obtained a 6-month filing extension). On December 10, 1986, Carlton used estate funds to purchase 1.5 million shares of MCI Communications Corporation for $11,206,000, at an average price of $7.47 per share. Two days later, Carlton sold the MCI stock to the MCI ESOP for $10,575,000, at an average price of $7.05 per share. The total sale price thus was $631,000 less than the purchase price. When Carlton filed the estate tax return on December 29, 1986, he claimed a deduction under § 2057 of $5,287,000, for half the proceeds of the sale of the stock to the MCI ESOP. The deduction reduced the estate tax by $2,501,161. The parties have stipulated that Carlton engaged in the MCI stock transactions specifically to take advantage of the § 2057 deduction.

On January 5, 1987, the Internal Revenue Service (IRS) announced that, "[p]ending the enactment of clarifying legislation," it would treat the § 2057 deduction as available only to estates of decedents who owned the securities in question immediately before death.

The IRS disallowed the deduction claimed by Carlton under § 2057 on the ground that the MCI stock had not been owned by his decedent "immediately before death." Carlton paid the asserted estate tax deficiency, plus interest, filed a claim for refund, and instituted a refund action in the United States District Court for the Central District of California. He conceded that the estate did not qualify for the deduction under the 1987 amendment to § 2057. He argued, however, that retroactive application of the 1987 amendment to the estate's 1986 transactions violated the Due Process Clause of the Fifth Amendment. The District Court rejected his argument and entered summary judgment in favor of the United States.

This Court repeatedly has upheld retroactive tax legislation against a due process challenge ...

The due process standard to be applied to tax statutes with retroactive effect ... is the same as that generally applicable to retroactive economic legislation:

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. ...

"To be sure, ... retroactive legislation does have to meet a burden not faced by legislation that has only future effects. ... 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former'. ... But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." [*Pension Benefit Guaranty Corporation v. R.A. Gray & Co*] (1984) ...

There is little doubt that the 1987 amendment to § 2057 was adopted as a curative measure. As enacted in October 1986, § 2057 contained no requirement that the decedent have owned the stock in question to qualify for the ESOP proceeds deduction. As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an ESOP, thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation.

It seems clear that Congress did not contemplate such broad applicability of the deduction when it originally adopted § 2057. That provision was intended to create an "incentive for stockholders to sell their companies to their employees who helped them build the company rather than liquidate, sell to outsiders or have the corporation redeem their shares on behalf of existing shareholders." Joint Committee on Taxation, Tax Reform Proposals: Tax Treatment of Employee Stock Ownership Plans (ESOPs), 99th Cong., 2d Sess., 37 (Joint Comm. Print 1985) ...

We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress 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. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable.

Second, Congress acted promptly and established only a modest period of retroactivity ...

Respondent Carlton argues that the 1987 amendment violates due process because he specifically and detrimentally relied on the preamendment version of § 2057 in engaging in the MCI stock transactions in December 1986. Although Carlton's reliance is uncontested-and the reading of the original statute on which he relied appears to have been correct-his reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code. Justice Stone explained in *Welch v. Henry* ... :

"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 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. ... "

Moreover, the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.

Similarly, we do not consider respondent Carlton's lack of notice regarding the 1987 amendment to be dispositive ...

In focusing exclusively on the taxpayer's notice and reliance, the Court of Appeals held the congressional enactment to an unduly strict standard. Because we conclude that retroactive application of the 1987 amendment to § 2057 is rationally related to a legitimate legislative purpose, we conclude that the amendment as applied to Carlton's 1986 transactions is consistent with the Due Process Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

If I thought that "substantive due process" were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation. Although there is not much precision in the concept" 'harsh and oppressive,'" which is what the Court has adopted as its test of substantive due process unconstitutionality in the field of retroactive tax legislation ... surely it would cover a retroactive amendment that cost a taxpayer who relied on the original statute's clear meaning over $600,000 ...

The Court attempts to minimize the amendment's harshness by characterizing it as "a curative measure," quoting some post-legislation legislative history (another oxymoron) to show that, despite the uncontested plain meaning of the statute, Congress never meant it to apply to stock that was not owned by the decedent at the time of death ... I am not sure that whether Congress has treated a citizen oppressively should turn upon whether the oppression was, after all, only Congress' "curing" of its own mistake. Even if it should, however, what was done to respondent here went beyond a "cure." The retroactivity not only hit him with the tax that Congress "meant" to impose originally, but it caused his expenditures incurred in invited reliance upon the earlier law to become worthless. That could have been avoided, of course, by providing a tax credit for such expenditures. Retroactively disallowing the tax benefit that the earlier law offered, without compensating those who incurred expenses in accepting that offer, seems to me harsh and oppressive by any normal measure ...

The Court also attempts to soften the impact of the amendment by noting that it involved only "a modest period of retroactivity" ... But in the case of a tax-incentive provision, as opposed to a tax on a continuous activity (like the earning of income), the critical event is the taxpayer's reliance on the incentive, and the key timing issue is whether the change occurs after the reliance; that it occurs immediately after rather than long after renders it no less harsh.

The reasoning the Court applies to uphold the statute in this case guarantees that *all* retroactive tax laws will henceforth be valid. To pass constitutional muster the retroactive aspects of the statute need only be "rationally related to a legitimate legislative purpose." *Ante,* at 35. Revenue raising is certainly a legitimate legislative purpose, see U. S. Const., Art. I, § 8,

cl. 1, and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal. I welcome this recognition that the Due Process Clause does not prevent retroactive taxes, since I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process ...

I cannot avoid observing, however, two stark discrepancies between today's due process reasoning and the due process reasoning the Court applies to its identification of new so-
called fundamental rights, such as the right to structure family living arrangements ... and the right to an abortion ... First and most obviously, where respondent's claimed right to hold onto his property is at issue, the Court upholds the tax amendment because it rationally furthers a legitimate interest; whereas when other claimed rights that the Court deems fundamental are at issue, the Court strikes down laws that concededly promote legitimate interests ... Secondly, when it is pointed out that the Court's retroactive-tax ruling today is inconsistent with earlier decisions ... the Court dismisses those cases as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" ... But economic legislation was not the only legislation subjected to "exacting review" in those bad old days, and one wonders what principled reason justifies "discarding" that bad old approach only as to that category ...

The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analysis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.

Excerpted by Ethan Derstine

Defining the Taxing and Spending Power

United States v. Butler

297 U.S. 1 (1936)

> Decision: Affirmed
> Vote: 6-3
> Majority: Roberts, joined by Butler, Sutherland, Van Devanter, Hughes, McReynolds
> Dissent: Stone, joined by Brandeis and Cardozo

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case, we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, conflict with the Federal Constitution.

Title I of the statute is captioned "Agricultural Adjustment." ...

Section 8 provides, amongst other things, that, "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"To provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. ... "

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933, and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under § 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid, and ordered them paid. Upon appeal, the Circuit Court of Appeals reversed the order ...

The Government asserts that, even if the respondents may question the propriety of the appropriation embodied in the statute, their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question ...

The question is not what power the Federal Government ought to have, but what powers, in fact, have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments — the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted ...

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce ... among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation — the first — confers upon the Congress power

"to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. ... "

It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that, if it were adopted,

"it is obvious that, under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers ... "

The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination, and finally that the appropriation under attack was, in fact, for the general welfare of the United States ...

We are not now required to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states, or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden ...

Said the court, in McCulloch v. Maryland:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible ...

The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not, in fact, voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful ... It is clear that the Department of Agriculture has properly described the plan as one to keep a noncooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory ...

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction ...

The judgment is

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic government.
2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved ...

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production, and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare, rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture ...

The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

... The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition ... that it be used for the intended purpose. Similarly, it would seem to be compliance with the Constitution, not

violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid, since both are in furtherance of the national purpose for which the money is appropriated ...

Congress, through the Interstate Commerce Commission, has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports ... The only conclusion to be drawn is that results become lawful when they are incidents of those powers, but unlawful when incident to the similarly granted power to tax and spend.

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power, and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed, or even planted at all ...

Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer, at his own option, promises to fulfill the condition ...

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent — expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of

"an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.

Excerpted by Ethan Derstine

Steward Machine Co. v. Davis

301 U.S. 548 (1937)

> Decision: Affirmed
> Vote: 5-4
> Majority: Cardozo, joined by Brandeis, Stone, Roberts and Hughes
> Concur/Dissenting: McReynolds
> Concur/Dissent: Sutherland, joined by Van Devanter
> Dissent: Butler

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment ($46.14) [about $1,000 in 2023 dollars], asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. The decision is in accord with judgments of the Supreme Judicial Court of Massachusetts ... the Supreme Court of California ... and the Supreme Court of Alabama ... It is in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented ... An important question of constitutional law being involved, we granted certiorari.

The Social Security Act ... is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary. The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. § 901. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. § 907(a) ...

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States, as excises are required to be; that its exceptions are so many and arbitrary

as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states, and that the states, in submitting to it, have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender ...

The subject-matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. 1, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty ... Whether the tax is to be classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" or a "duty". A capitation or other "direct" tax it certainly is not ... We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation ...

Third: The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally ... Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. *Sonzinsky v. United States* (1937) This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent. credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. *Cincinnati Soap Co. v. United States*, *supra*. There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement, there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. *West Coast Hotel Co. v. Parrish* (1937). The relevant statistics are gathered in the brief of counsel for the government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare ... The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train ...

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end ...

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress ... For all that appears, she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. 'Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed.' Sonzinsky v. United States, supra. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation ... Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

Fourth: The statute does not call for a surrender by the states of powers essential to their quasi sovereign existence ...

The judgment is

Affirmed.

Separate opinion of MR. JUSTICE McREYNOLDS.

That portion of the Social Security legislation here under consideration, I think, exceeds the power granted to Congress. It unduly interferes with the orderly government of the State by her own people and otherwise offends the Federal Constitution.

In *Texas v. White*, (1869), a cause of momentous importance, this Court, through Chief Justice Chase, declared —

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. ... Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained really free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government

through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory, and no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure that fact ...

No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States a Federal Union as contemplated by the Constitution becomes impossible. ...

Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the State would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril.

Excerpted by Ethan Derstine

Fullilove v. Klutznick

448 U.S. 448 (1980)

> Decision: Affirmed
> Vote: 6-3
> Opinion of the Court: Burger, joined by White and Powell
> Concur: Powell
> Concur: Marshall, joined by Brennan and Blackmun
> Dissent: Stevens; Stewart, joined by Rehnquist

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE POWELL joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups ...

Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement, and that the MBE provision, on its face, violated the Equal Protection Clause of the Fourteenth Amendment, [and] the equal protection component of the Due Process Clause of the Fifth Amendment ...

On December 19, 1977, the District Court issued a memorandum opinion upholding the validity of the MBE program and denying the injunctive relief sought ...

The United States Court of Appeals for the Second Circuit affirmed ...

When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, (1927). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress ...

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U.S. Const., Art. I, 8, cl. 1. This Court has recognized that the power to "provide for the ... general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers ... Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy ...

The MBE program is structured within this familiar legislative pattern ...

Here we need not explore the outermost limitations on the objectives attainable through such an application of the Spending Power. The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

We turn first to the Commerce Power. U.S. Const., Art. I, § 8, cl. 3. Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects ... The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus, Congress could take necessary and proper action to remedy the situation ...

It is not necessary that these prime contractors be shown responsible for any violation of antidiscrimination laws ...

Our cases ... express no doubt of the congressional authority to prohibit practices "challenged as perpetuating the effects of [not unlawful] discrimination occurring prior to the effective date of the Act." *Franks v. Bowman Transportation Co.*, (1976) ... Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that, in this respect, the objectives of the MBE provision are within the scope of the Spending Power ...

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that, in this respect, the objectives of the MBE provision are within the scope of the Spending Power.

Excerpted by Ethan Derstine

NFIB v. Sebelius

567 U.S. 519 (2012)

> Decision: Affirmed in part and reversed in part
> Vote: 5-4
> Majority: Roberts (Parts I, II, III-C), joined by Ginsburg, Breyer, Sotomayor, Kagan
> Plurality: Roberts (Part IV), joined by Breyer, Kagan
> Concur: Roberts (Parts III-A, III-B, III-D)
> Concur/Dissent: Ginsburg, joined by Sotomayor, Breyer, Kagan (Parts I, II, III, IV)
> Dissent: Scalia, Kennedy, Thomas, and Alito
> Dissent: Thomas

Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice Breyer and Justice Kagan join, and an opinion with respect to Parts III–A, III–B, and III–D.

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold ...

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care ... This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion. ...

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). That payment, which the Act describes as a "penalty," is calculated as a percentage of household income ...

The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product ...

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax ...

We have ... held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power. And in *New York v. United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. We thus ask whether the shared responsibility payment falls within Congress's taxing power ...

The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not "frame" it as such. *Post,* at 17. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing

threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment ...

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it.

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness ...

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U. S., at 188.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the dis-abled. 42 U. S. C. §1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage ...

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line ...

The Spending Clause grants Congress the power "to pay the Debts and provide for the ... general Welfare of the United States." U. S. Const., Art. I, §8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." College Savings Bank, 527 U. S., at 686 ... The conditions imposed by Congress ensure that the funds are used by the States to "provide for the ... general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized ... Spending Clause legislation as 'much in the nature of a contract.' " *Barnes v. Gorman*, (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst*, supra, at 17. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system ...

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes ... It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis*, (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure

turns into compulsion," ibid., the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York* ... That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York* ... Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine* ...

In rejecting the argument that the federal law was a "weapon[ ] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." Id ... Indeed, the State itself did "not offer a suggestion that in passing the unemployment law she was affected by duress." Id ...

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts v. Mellon*, (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York*, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree ...

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.' " Id. By "financial inducement" the Court meant the threat of losing five per-

cent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds ...

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head ...

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that ...

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding ...

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

It is so ordered.

Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting.

As far as §5000A is concerned ... we must, if "fairly possible," *Crowell v. Benson*, (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than un- constitutional (ut res magis valeat quam pereat). But we cannot rewrite the statute to be what it is not ...

Our cases establish a clear line between a tax and a penalty: " '[A] tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act.' " *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, (1996) ... In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—never—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that any exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute calls it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in 26 U. S. C. §5000A, entitled "Requirement to maintain minimum essential coverage." (Emphasis added.) It commands that every "applicable individual shall ... ensure that the individual ... is covered under minimum essential coverage." Ibid. (emphasis added). And the immediately following provision states that, "[i]f ... an applicable individual ... fails to meet the requirement of subsection (a) ... there is hereby imposed ... a penalty." §5000A(b) (emphasis added) ...

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." *United States v. Munoz-Flores*, (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty ... Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry ...

We now consider respondents' second challenge to the constitutionality of the ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termination of all the State's Medicaid funding ...

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that ... the Act really does not give them any choice at all ...

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits ... For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into ... Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts v. United States*, (1978), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole*, supra ... Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine* ...

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship ... And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " Ibid. (emphasis added). If a federal spending program coerces participation the States have not "exercise[d] their choice"—let alone made an "informed choice." Id., at 17, 25.

Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis* ... "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern

according to Congress' instructions." *New York* ... Congress may not "simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id ... Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory ...

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule ...

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court ...

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

Commerce excerpted by Kimberly Clairmont. Taxing and Spending excerpted by Ethan Derstine

Taxing and Spending for the General Welfare

Helvering v. Davis

301 U.S. 619 (1937)

> Decision: Reversed
> Vote: 7-2
> Majority: Cardozo, joined by Hughes, Brandeis, Stone, Sutherland, Van Devanter, and Roberts
> Dissent: McReynolds, joined by Butler

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Social Security Act ... is challenged once again ...

Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX (though with different exemptions). It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for the levy of the taxes imposed by Title VIII ...

This suit is brought by a shareholder of the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, to restrain the corporation from making the payments and deductions called for by the act, which is stated to be void under the Constitution of the United States ... The expected consequences are indicated substantially as follows: the deductions from the wages of the employees will produce unrest among them, and will be followed, it is predicted, by demands that wages be increased. If the exactions shall ultimately be held void, the company will have parted with moneys which, as a practical matter, it will be impossible to recover ... The prediction is made also that serious consequences will ensue if there is a submission to the excise. The corporation and its shareholders will suffer irreparable loss, and many thousands of dollars will be subtracted from the value of the shares. The prayer is for an injunction and for a declaration that the act is void ...

A petition for certiorari followed ... We were asked to determine: (1) "whether the tax imposed upon employers by § 804 of the Social Security Act is within the power of Congress under the Constitution," and (2) "whether the validity of the tax imposed upon employees by § 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution ... "

The purge of nationwide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided ... Spreading from State to State, unemployment is an ill not particular, but general, which may be checked, if Congress so determines, by the resources of the Nation ... But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the

disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house, as well as from the haunting fear that such a lot awaits them when journey's end is near.

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act ...

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom. Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings ... The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield ...

Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught ...

The tax is not invalid as a result of its exemptions ...

The decree of the Court of Appeals should be reversed, and that of the District Court affirmed.

Reversed.

Excerpted by Ethan Derstine

Flemming v. Nestor

363 U.S. 603 (1960)

> Decision: Reversed
> Vote: 5-4
> Majority: Harlan, joined by Frankfurter, Clark, Whittaker, and Stewart
> Dissent: Black
> Dissent: Douglas
> Dissent: Brennan, joined by Warren, and Douglas

MR. JUSTICE HARLAN delivered the opinion of the Court.

The challenged section [of the Social Security Act] provides for the termination of ... insurance benefits payable to, or in certain cases in respect of, an alien individual who, after September 1, 1954 (the date of enactment of the section), is deported under § 241(a) of the Immigration and Nationality Act ...

Appellee, an alien, immigrated to this country from Bulgaria in 1913, and became eligible for old-age benefits in November, 1955. In July, 1956, he was deported pursuant to § 241(a)(6)(C)(i) of the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939. [A]ppellee's benefits were terminated soon thereafter, and notice of the termination was given to his wife, who had remained in this country. Upon his failure to obtain administrative reversal of the decision, appellee commenced this action in the District Court ... [T]he District Court ruled for appellee, holding § 202(n) unconstitutional under the Due Process Clause of the Fifth Amendment in that it deprived appellee of an accrued property right ...

We think that the District Court erred in holding that § 202(n) deprived appellee of an "accrued property right." Appellee's right to Social Security benefits cannot properly be considered to have been of that order ...

Payments under the Act are based upon the wage earner's record of earnings in employment or self-employment covered by the Act, and take the form of old-age insurance and disability insurance benefits inuring to the wage earner (known as the "primary beneficiary"), and of benefits, including survivor benefits, payable to named dependents ("secondary beneficiaries") of a wage-earner ... Of special importance in this case is the fact that eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes, but rather on the earnings record of the primary beneficiary.

The program is financed through a payroll tax levied on employees in covered employment, and on their employers ...

The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the *general welfare,'" Helvering v. Davis* ...

The "right" to Social Security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering*. But ... treatment of the manifold specific problems presented by the Social Security program demands more than a generalization. That program was designed to function into the indefinite future, and its specific provisions rest on predications as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands ... Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act ...

This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause ...

Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. Such is not the case here. The fact of a beneficiary's residence abroad — in the case of a deportee, a presumably permanent residence — can be of obvious relevance to the question of eligibility. One benefit which may be thought to accrue to the economy from the Social Security system is the increased over-all national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payments. This advantage would be lost as to payments made to one residing abroad. For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply ...

We need go no further to find support for our conclusion that this provision of the Act cannot be condemned as so lacking in rational justification as to offend due process ...

Judicial inquiries into Congressional motives are, at best, a hazardous matter, and when that inquiry seeks to go behind objective manifestations, it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it ...

[W]e cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute.

Reversed.

Excerpted by Alexandria Metzdorf

Sabri v. United States

541 U.S. 600 (2004)

> Decision: Affirmed
> Vote: 9-0
> Majority: Souter, joined by Rehnquist, Stevens, O'Connor, Ginsburg, Breyer, and Kennedy and Scalia (all but Part III)
> Concur: Kennedy, joined by Scalia
> Concur: Thomas

Justice Souter delivered the opinion of the Court.

The question is whether 18 U. S. C. §666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution. We hold that it is.

Petitioner Basim Omar Sabri is a real estate developer who proposed to build a hotel and retail structure in the city of Minneapolis. Sabri lacked confidence, however, in his ability to adapt to the lawful administration of licensing and zoning laws, and offered three separate bribes to a city councilman, Brian Herron ...

Count 1 of the indictment charged Sabri with offering a $5,000 kickback for obtaining various regulatory approvals, and according to Count 2, Sabri offered Herron a $10,000 bribe to set up and attend a meeting with owners of land near the site Sabri had in mind, at which Herron would threaten to use the city's eminent domain authority to seize their property if they were troublesome to Sabri. Count 3 alleged that Sabri offered Herron a commission of 10% on some $800,000 in community economic development grants that Sabri sought from the city, the MCDA, and other sources.

The charges were brought under 18 U. S. C. §666(a)(2), which imposes federal criminal penalties on anyone who

"corruptly gives ... anything of value to any person, with intent to influence or reward an agent of [the] government, or any agency thereof, in connection with any business, transaction, or series of transactions ... involving anything of value of $5,000 or more ... "

Before trial, Sabri moved to dismiss the indictment on the ground that §666(a)(2) is unconstitutional on its face for failure to require proof of a connection between the federal funds and the alleged bribe, as an element of liability ...

We granted certiorari ... to resolve a split among the Courts of Appeals over the need to require connection between forbidden conduct and federal funds ...

Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, §8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, §8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars ... Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars.

It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by §666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant ... But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there ... It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here, and on a bribe that goes well beyond liquor and cigars ...

No piling is needed here to show that Congress was within its prerogative to protect spending objects from the menace of local administrators on the take. The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place, and Sabri would be hard pressed to claim ... that §666(a)(2) "has nothing to do with" the congressional spending power ...

We remand for proceedings consistent with this opinion. The judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

Excerpted by Alexandria Metzdorf

Restriction of State Revenue Power

Michelin Tire Corp v. Wages

423 U.S. 276 (1976)

> Vote: 8-0
> Majority: Brennan, joined by Burger, Stewart, Marshall, Blackmun, Powell, and Rehnquist
> Concur: White
> Not participating: Stevens

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, the Tax Commissioner and Tax Assessors of Gwinnett County, Ga. assessed *ad valorem* property taxes against tires and tubes imported by petitioner from France and Nova Scotia that were included on the assessment dates in an inventory maintained at its wholesale distribution warehouse in the county. Petitioner brought this action for declaratory and injunctive relief in the Superior Court of Gwinnett County, alleging that, with the exception of certain passenger tubes that had been removed from the original shipping cartons, the *ad valorem* property taxes assessed against its inventory of imported tires and tubes were prohibited by Art. I, § 10, cl. 2, of the Constitution, which provides in pertinent part:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. ... "

Petitioner, a New York corporation qualified to do business in Georgia, operates as an importer and wholesale distributor in the United States of automobile and truck tires and tubes manufactured in France and Nova Scotia by Michelin Tires, Ltd ...

The imported tires, each of which has its own serial number, are packed in bulk into the trailers and vans, without otherwise being packaged or bundled. They lose their identity as a unit, however, when unloaded from the trailers and vans at the distribution warehouse. When unloaded, they are sorted by size and style, without segregation by place of manufacture, stacked on wooden pallets each bearing four stacks of five tires of the same size and style, and stored in pallet stacks of three pallets each. This is the only processing required or performed to ready the tires for sale and delivery to the franchised dealers ...

Both Georgia courts addressed the question whether, without regard to whether the imported tires had lost their character as imports, Georgia's nondiscriminatory *ad valorem* tax fell within the constitutional prohibition against the laying by States of "any Imposts or Duties on Imports. ... " The Superior Court expressed strong doubts that the *ad valorem* tax fell within the prohibition, but concluded that it was bound by this Court's decisions to the contrary ...

Our independent study persuades us that a nondiscriminatory *ad valorem* property tax is not the type of state exaction which the Framers of the Constitution ... had in mind as being an "impost" or "duty ... "

The Framers of the Constitution ... sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government, and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically ...

It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation ...

Finally, nondiscriminatory *ad valorem* property taxes do not interfere with the free flow of imported goods among the States ... Indeed, importers of goods destined for inland States can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland States. Petitioner, for example, operates other distribution centers from wholesale warehouses in inland States. Actually, a quarter of the tires distributed from petitioner's Georgia warehouse are imported interstate directly from Canada. To be sure, allowance of nondiscriminatory *ad valorem* property taxation may increase the cost of goods purchased by "inland" consumers. But, as already noted, such taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the service used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods ...

Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution. The judgment of the Supreme Court of Georgia is accordingly

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Excerpted by Alexandria Metzdorf

Complete Auto Transit v. Brady

430 U.S. 274 (1977)

> Decision: Affirmed
> Vote: 9-0
> Majority: Blackmun, joined by Burger, Brennan, Stewart, White, Marshall, Powell, Rehnquist, and Stevens

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

... The issue in this case is whether Mississippi runs afoul of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, when it applies the tax it imposes on "the privilege of ... doing business" within the State to appellant's activity in interstate commerce ...

The taxes in question are sales taxes assessed by the Mississippi State Tax Commission against the appellant, Complete Auto Transit, Inc ... The assessments were made pursuant to the following Mississippi statutes ...

"Upon every person operating ... any ... transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business ... "

Any person liable for the tax is required to add it to the gross sales price and, "insofar as practicable," to collect it at the time the sales price is collected.

Appellant is a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. General Motors assembles outside Mississippi vehicles that are destined for dealers within the State. The vehicles are then shipped by rail to Jackson, Miss., where, usually within 48 hours, they are loaded onto appellant's trucks and transported by appellant to the Mississippi dealers ...

[T]he Mississippi Tax Commission informed appellant that it was being assessed taxes and interest totaling $122,160.59 for the sales of transportation services during the three-year period from August 1, 1968, through July 31, 1971. Remittance within 10 days was requested ... Appellant paid the assessments under protest and, in April, 1973, pursuant to § 10121.1 ... instituted the present refund action ...

Appellant claimed that its transportation was but one part of an interstate movement, and that the taxes assessed and paid were unconstitutional as applied to operations in interstate commerce ...

Appellant's attack is based solely on decisions of this Court holding that a tax on the "privilege" of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. *Spector v. O'Connor,* (1951) ... This rule

looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation ...

Over the years, the Court has applied this practical analysis in approving many types of tax that avoided running afoul of the prohibition against taxing the "privilege of doing business," but, in each instance, it has refused to overrule the prohibition. Under the present state of the law, the *Spector* rule, as it has come to be known, has no relationship to economic realities ...

In this case, of course, we are confronted with a situation like that presented in *Spector.* The tax is labeled a privilege tax "for the privilege of ... doing business" in Mississippi ... and the activity taxed is, or has been assumed to be, interstate commerce. We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned. The view of the Commerce Clause that gave rise to the rule of *Spector* perhaps was not without some substance. Nonetheless, the possibility of defending it in the abstract does not alter the fact that the Court has rejected the proposition that interstate commerce is immune from state taxation ...

Not only has the philosophy underlying the rule been rejected, but the rule itself has been stripped of any practical significance. If Mississippi had called its tax one on "net income" or on the "going concern value" of appellant's business, the *Spector* rule could not invalidate it. There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned. Accordingly, we now reject the rule of *Spector Motor Service, Inc. v. O'Connor* that a state tax on the "privilege of doing business" is *per se* unconstitutional when it is applied to interstate commerce, and that case is overruled.

There being no objection to Mississippi's tax on appellant except that it was imposed on nothing other than the "privilege of doing business" that is interstate, the judgment of the Supreme Court of Mississippi is affirmed.

It is so ordered.

Excerpted by Alexandria Metzdorf

Oregon Waste Systems v. Dept of Environmental Quality of Oregon

511 U.S. 93 (1994)

> Decision: Reversed and remanded
> Vote: 7-2
> Majority: Thomas, joined by Stevens, O'Connor, Scalia, Kennedy, Souter, and Ginsburg
> Dissent: Rehnquist, joined by Blackmun

Justice Thomas delivered the opinion of the Court ...

Today, we must decide whether Oregon's purportedly cost-based surcharge on the in-state disposal of solid waste generated in other States violates the Commerce Clause.

Like other States, Oregon comprehensively regulates the disposal of solid wastes within its borders. Respondent ... oversees the State's regulatory scheme by developing and executing plans for the management, reduction, and recycling of solid wastes. To fund these and related activities, Oregon levies a wide range of fees on landfill operators. In 1989, the Oregon Legislature imposed an additional fee, called a "surcharge," on "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site ... " At the conclusion of the rulemaking process, the Commission set the surcharge on out-of-state waste at $2.25 per ton. In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon. The in-state fee, capped by statute at $0.85 per ton (originally $0.50 per ton), is considerably lower than the fee imposed on waste from other States ... Subsequently, the legislature conditionally extended the $0.85 per ton fee to out-of-state waste, in addition to the $2.25 per ton surcharge, § 459A.110(6), with the proviso that if the surcharge survived judicial challenge, the $0.85 per ton fee would again be limited to in-state waste ...

Petitioners challenged the administrative rule establishing the out-of-state surcharge and its enabling statutes under both state law and the Commerce Clause of the United States Constitution ...

We granted certiorari ... because the decision below conflicted with a recent decision of the United States Court of Appeals for the Seventh Circuit ...

The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce ...

[W]e have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce ... " As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually per se invalid ...

Oregon's $2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the $0.85 per ton charge imposed on solid in-state waste. The statutory determinant for which fee applies to any particular shipment of solid waste to an Oregon landfill is whether or not the waste was "generated out-of-state ... "

[T]he surcharge must be invalidated unless respondents can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, (1988) ... Our cases require that justifications for discriminatory restrictions on commerce pass the "strictest scrutiny ... "

Respondents' principal defense of the higher surcharge on out-of-state waste is that it is a "compensatory tax" necessary to make shippers of such waste pay their "fair share" of the costs imposed on Oregon by the disposal of their waste in the State. In *Chemical Waste* v. *Hunt* (1992), we noted the possibility that such an argument might justify a discriminatory surcharge or tax on out-of-state waste. In making that observation, we implicitly recognized the settled principle that interstate commerce may be made to " 'pay its way.' " *Complete Auto Transit, Inc. v. Brady*, (1977) ...

To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, "identif[y] ... the [intrastate tax] burden for which the State is attempting to compensate." Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed— the amount of the tax on intrastate commerce ... Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other ...

Although it is often no mean feat to determine whether a challenged tax is a compensatory tax, we have little difficulty concluding that the Oregon surcharge is not such a tax. Oregon does not impose a specific charge of at least $2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory. In fact, the only analogous charge on the disposal of Oregon waste is $0.85 per ton, approximately one-third of the amount imposed on waste from other States ... Respondents' failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim.

Respondents argue that, despite the absence of a specific $2.25 per ton charge on in-state waste, intrastate commerce does pay its share of the costs underlying the surcharge through general taxation. Whether or not that is true is difficult to determine, as "[general] tax payments are received for the general purposes of the [government], and are, upon proper receipt, lost in the general revenues." *Flast v. Cohen*, (1968) (Harlan, J., dissenting). Even assuming, however, that various other means of general taxation, such as income taxes, could serve as an identifiable intrastate burden roughly equivalent to the out-of-state surcharge, respondents' compensatory tax argument fails because the in-state and out-of-state levies are not imposed on substantially equivalent events ...

Indeed, the very fact that in-state shippers of out-of-state waste, such as Oregon Waste, are charged the out-of-state surcharge even though they pay Oregon income taxes refutes respondents' argument that the respective taxable events are substantially equivalent. We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are "entirely different kind[s] of tax[es] ... "

[B]ecause all citizens of Oregon benefit from the proper in-state disposal of waste from Oregon, respondents claim it is only proper for Oregon to require them to bear more of the costs of disposing of such waste in the State through a higher

general tax burden. At the same time, however, Oregon citizens should not be required to bear the costs of disposing of out-of-state waste, respondents claim. The necessary result of that limited cost shifting is to require shippers of out-of-state waste to bear the full costs of in-state disposal, but to permit shippers of Oregon waste to bear less than the full cost.

We fail to perceive any distinction between respondents' contention and a claim that the State has an interest in reducing the costs of handling in-state waste ... To give controlling effect to respondents' characterization of Oregon's tax scheme as seemingly benign cost spreading would require us to overlook the fact that the scheme necessarily incorporates a protectionist objective as well ...

Respondents counter that if Oregon is engaged in any form of protectionism, it is "resource protectionism," not economic protectionism. It is true that by discouraging the flow of out-of-state waste into Oregon landfills, the higher surcharge on waste from other States conserves more space in those landfills for waste generated in Oregon. Recharacterizing the surcharge as resource protectionism hardly advances respondents' cause, however. Even assuming that landfill space is a "natural resource," "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders ... "

We recognize that the States have broad discretion to configure their systems of taxation as they deem appropriate ... All we intimate here is that their discretion in this regard, as in all others, is bounded by any relevant limitations of the Federal Constitution, in these cases the negative Commerce Clause. Because respondents have offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge is facially invalid under the negative Commerce Clause. Accordingly, the judgment of the Oregon Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice Rehnquist, with whom Justice Blackmun joins, dissenting.

Landfill space evaporates as solid waste accumulates. State and local governments expend financial and political capital to develop trash control systems that are efficient, lawful, and protective of the environment. The State of Oregon responsibly attempted to address its solid waste disposal problem through enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste ... The regulatory scheme included a fee charged on out-of-state solid waste. The Oregon Legislature directed the Environmental Quality Commission to determine the appropriate surcharge "based on the costs ... of disposing of solid waste generated out-of-state ... " The surcharge works out to an increase of about $0.14 per week for the typical out-of-state solid waste producer. This seems a small price to pay for the right to deposit your "garbage, rubbish, refuse ... ; sewage sludge, septic tank and cesspool pumpings or other sludge; ... manure, ... dead animals, [and] infectious waste" on your neighbors ...

Once again, however, as in *Philadelphia* and *Chemical Waste Management*, the Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States in addressing the vexing national problem of solid waste disposal ...

Under current projections, Americans will produce 222 million tons of garbage in the year 2000. Generating solid waste has never been a problem. Finding environmentally safe disposal sites has. By 1991, it was estimated that 45 percent of all solid waste landfills in the Nation had reached capacity. Nevertheless, the Court stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these ...

[T]he Court notes that it has "little difficulty," concluding that the Oregon surcharge does not operate as a compensatory tax, designed to offset the loss of available landfill space in the State caused by the influx of out-of-state waste. The Court reaches this nonchalant conclusion because the State has failed "to identify a specific charge on *intrastate* commerce equal to or exceeding the surcharge." (emphasis added). The Court's myopic focus on "differential fees" ignores the fact that in-state producers of solid waste support the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste ...

The availability of safe landfill disposal sites in Oregon did not occur by chance. Through its regulatory scheme, the State of Oregon inspects landfill sites, monitors waste streams, promotes recycling, and imposes an $0.85 per ton disposal fee on in-state waste ... all in an effort to curb the threat that its residents will harm the environment and create health and safety problems through excessive and unmonitored solid waste disposal. Depletion of a clean and safe environment will follow if Oregon must accept out-of-state waste at its landfills without a sharing of the disposal costs. The Commerce Clause does not require a State to abide this outcome ...

Far from neutralizing the economic situation for Oregon producers and out-of-state producers, the Court's analysis turns the Commerce Clause on its head. Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites ... Petitioners do not buy garbage to put in their landfills; solid waste producers pay petitioners to take their waste ... Thus, the fees do not alter the price of a product that is competing with other products for common purchasers. If anything, striking down the fees works to the disadvantage of Oregon businesses. They alone will have to pay the "nondisposal" fees associated with solid waste: landfill siting, landfill cleanup, insurance to cover environmental accidents, and transportation improvement costs associated with out-of-state waste being shipped into the State ...

The Court asserts that the State has not offered "any safety or health reason[s]" for discouraging the flow of solid waste into Oregon. I disagree. The availability of environmentally sound landfill space and the proper disposal of solid waste strike me as justifiable "safety or health" rationales for the fee ...

The Court begrudgingly concedes that interstate commerce may be made to "pay its way," (internal quotation marks omitted), yet finds Oregon's nominal surcharge to exact more than a " 'just share' " from interstate commerce ... It escapes me how an additional $0.14 per week cost for the average solid waste producer constitutes anything but the type of "incidental effects on interstate commerce" endorsed by the majority ...

The State of Oregon is not prohibiting the export of solid waste from neighboring States; it is only asking that those neighbors pay their fair share for the use of Oregon landfill sites. I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that

solid waste landfills present. The Court, deciding otherwise, further limits the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society.

For the foregoing reasons, I respectfully dissent.

Excerpted by Alexandria Metzdorf

South Dakota v. Wayfair

585 U.S. ___ (2018)

> Decision: Vacated and remanded
> Vote: 5-4
> Majority: Kennedy, joined by Thomas, Ginsburg, Alito, and Gorsuch
> Concur: Thomas
> Concur: Gorsuch
> Dissent: Roberts, joined by Breyer, Sotomayor, and Kagan

Justice Kennedy delivered the opinion of the Court.

When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires the Court to determine when an out-of-state seller can be required to collect and remit that tax. All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment, and this turns on a proper interpretation of the Commerce Clause, U. S. Const., Art. I, §8, cl. 3.

In two earlier cases the Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's State, following an order from a catalog, did not satisfy the physical presence requirement. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, (1967); *Quill Corp.* v. *North Dakota*, (1992). The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by those cases.

Like most States, South Dakota ... taxes the retail sales of goods and services in the State ... Sellers are generally required to collect and remit this tax to the Department of Revenue ...

Under this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota instead must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. "[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious." *National Geographic Soc.* v. *California Bd. of Equalization*, (1977). And consumer compliance rates are notoriously low ... It is estimated that *Bellas Hess* and *Quill* cause the States

to lose between $8 and $33 billion every year ... In South Dakota alone, the Department of Revenue estimates revenue loss at $48 to $58 million annually. Particularly because South Dakota has no state income tax, it must put substantial reliance on its sales and use taxes for the revenue necessary to fund essential services. Those taxes account for over 60 percent of its general fund ...

The legislature found that the inability to collect sales tax from remote sellers was "seriously eroding the sales tax base" and "causing revenue losses and imminent harm ... through the loss of critical funding for state and local services ... "

To that end, the Act requires out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state." §1. The Act applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. The Act also forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established.

Respondents Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax ...

South Dakota filed a declaratory judgment action against respondents in state court, seeking a declaration that the requirements of the Act are valid and applicable to respondents ... Respondents moved for summary judgment, arguing that the Act is unconstitutional ... South Dakota conceded that the Act cannot survive under *Bellas Hess* and *Quill* but asserted the importance, indeed the necessity, of asking this Court to review those earlier decisions in light of current economic realities ...

The South Dakota Supreme Court ... stated: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." This Court granted certiorari ...

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." Art. I, §8, cl. 3 ... Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, (1945). But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce ... "

The central dispute is whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the State ...

When considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes ...

The *Quill* majority expressed concern that without the physical presence rule "a state tax might unduly burden interstate commerce" by subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions. *Id.*, at 313, n. 6. But the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State. For example, a business with one salesperson in each State must collect sales taxes in every jurisdiction in which goods are delivered; but a business with 500 salespersons in one central location and a website accessible in every State need not collect sales taxes on otherwise identical nationwide sales.

The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. But it is "not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden." *Complete Auto* ...

Quill puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burdens of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own ... In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.

Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State ...

The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before—"regardless of how close or far the nearest storefront." *Direct Marketing Assn.* v. *Brohl*, (2015) (Kennedy, J., concurring). Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term." A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State ...

In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that " '[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.' " What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers'

furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers ... and help create the "climate of consumer confidence" that facilitates sales. According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill*—even one warehouse or one salesperson—an increased share of the taxes ...

For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill* ... and *National Bellas Hess* ... should be, and now are, overruled.

In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State ...

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case ...

South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement ... It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State ...

The judgment of the Supreme Court of South Dakota is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice Roberts, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan join, dissenting.

In *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp.* v. *North Dakota*, (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante,* at 18. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into

a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago.

This Court "does not overturn its precedents lightly." *Michigan* v. *Bay Mills Indian Community*, (2014) ... The bar is even higher in fields in which Congress "exercises primary authority" and can, if it wishes, override this Court's decisions with contrary legislation. *Bay Mills* ...

We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context ... But because Congress "has plenary power to regulate commerce among the States," *Quill*, it may at any time replace such judicial rules with legislation of its own ...

In *Quill*, this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." ... The Court thus left it to Congress "to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id* ...

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decisionmaking ...

An erroneous decision from this Court may well have been an unintended factor contributing to the growth of e-commerce. See, *e.g.,* W. Taylor, Who's Writing the Book on Web Business? Fast Company (Oct. 31, 1996), https: // www.fastcompany.com / 27309 / whos-writing-book-web-business. The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era. The Constitution gives Congress the power "[t]o regulate Commerce ... among the several States." Art. I, §8. I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.

I respectfully dissent.

Excerpted by Alexandria Metzdorf

Federalism

Case List

Defining Federalism

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Defining Federalism

McCulloch v. Maryland

17 U.S. 316 (1819)

> Decision: Reversed
> Vote: 6-0
> Majority: Marshall, joined by Washington, Johnson, Livingston, Todd, Duvall, and Story

MARSHALL, Ch. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government ...

The first question made in the cause is—has congress power to incorporate a bank? [See *McCulloch v. Maryland*, Legislative Powers chapter] ...

It being the opinion of the Court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2d. Whether the State of Maryland may, without violating the Constitution, tax that branch? ...

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws.

... [T]he counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution ... as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them ... These are, 1st. That a power to create

implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme ...

The power of Congress to create and, of course, to continue the bank was the subject of the preceding part of this opinion, and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the Constitution of the United States ...

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right, in the confidence that they will not abuse it ...

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution ...

If we apply the principle for which the state of Maryland contends, to the Constitution, generally, we shall find it capable of changing totally the character of that instrument ... The American people have declared their Constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States. If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States ...

[I]t is further adjudged and ordered, that the judgment of the said Baltimore county court be reversed and annulled, and that judgment be entered in the said Baltimore county court for the said James W. McCulloch.

[*Reversed.*]

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Dred Scott v. Sandford

60 U.S. 393 (1857)

> Decision: Reversed and vacated
> Vote: 7-2
> Majority: Taney, joined by Wayne, Catron, Daniel, Nelson, Grier, Campbell
> Concurrence: Wayne
> Concurrence: Catron
> Concurrence: Daniel
> Concurrence: Nelson, joined by Grier
> Concurrence: Grier
> Concurrence: Campbell
> Dissent: McLean
> Dissent: Curtis

Mr. Chief Justice TANEY delivered the opinion of the court.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom ...

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves ...

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves ...

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted ...

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts ...

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument ...

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States as to the rights of man and the rights of the people was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive: It begins by declaring that,

"[w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation ...

[T]here are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories ... And these two provisions show conclusively that neither the description of persons therein referred to nor their descendants were embraced in any of the other provisions of the Constitution, for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen ...

It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court the various laws, marking the condition of this race which were passed from time to time after the Revolution and before and since the adoption of the Constitution of the United States ... [I]n no part of the country except Maine did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows in a manner not to be mistaken the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards, throughout the thirteen States by which that instrument was framed, and it is hardly consistent ... to suppose that they regarded at that time as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized ... and upon whom they had impressed such deep and enduring marks of inferiority and degradation ... It cannot be supposed that they intended to secure to them rights and privileges and rank, in the new political body throughout the Union which every one of them denied within

the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State ...

What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And, upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous ...

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom ...

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

...

The powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved. And if the Constitution recognises

the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words — too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident ...

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States, and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri ...

[W]e are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant, and that the Circuit Court of the United States had no jurisdiction when, by the laws of the State, the plaintiff was a slave and not a citizen ...

Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Mr. Justice McLEAN dissenting.

[T]he plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this:

"That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country and sold as negro slaves."

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him ...

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that Federal jurisdiction "may be exercised between citizens of different States," and the same is provided in the act of 1789. The above argument is properly met by saying that the Constitution was intended to be a practical instrument, and where its language is too plain to be misunderstood, the argument ends ...

No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress. Congress has power "to establish a uniform rule of naturalization."

It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the acts of Congress on the subject of naturalization, and subversive of the Federal powers ...

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and, in this view, have recognised them as citizens, and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress ...

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That, as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That, as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States ...

I proceed briefly to examine the practical construction placed on the clause now in question so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated that, after the Government of the United States was organized under the Constitution, the temporary Government of the Territory northwest of the River Ohio could no longer exist save under the powers conferred on Congress by the Constitution ... And, accordingly, an act was passed on the 7th day of August, 1789, which recites:

"Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States ... "

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect ... "

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States, for it clearly shows that slavery was thereafter to be prohibited there, and it could be prohibited only by an exertion of the power of the United States under the Constitution, no other power being capable of operating within that territory after the Constitution took effect ...

[T]he Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, [the law stood ...]

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

...

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law ...

And not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status must be defined, protected, and enforced by such laws ...

Is it not ... rational to conclude that they who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws ... and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery?

...

Whatever individual claims may be founded on local circumstances or sectional differences of condition cannot, in my opinion, be recognised in this court without arrogating to the judicial branch of the Government powers not committed to it, and which, with all the unaffected respect I feel for it when acting in its proper sphere, I do not think it fitted to wield ...

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude and west of the river Mississippi, were constitutional and valid laws ...

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

Excerpted by Alexandria Metzdorf

National League of Cities v. Usery

426 U.S. 833 (1976)

> Decision: Reversed and remanded
> Vote: 5-4
> Majority: Rehnquist, joined by Burger, Stewart, Blackmun, and Powell
> Concurrence: Blackmun
> Dissent: Brennan, joined by White, Marshall
> Dissent: Stevens

Mr. Justice REHNQUIST delivered the opinion of the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act ... and required employers covered by the Act to pay their employees a minimum hourly wage ... and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week ... By this Act covered employers were required to keep certain records to aid in the enforcement of the Act ... and to comply with specified child labor standards ... This Court unanimously upheld the Act as a valid exercise of congressional authority under the commerce power in *United States v. Darby*, (1941) ...

[I]n 1966, with the amendment of the definition of employers under the Act, the exemption heretofore extended to the States and their political subdivisions was removed with respect to employees of state hospitals, institutions, and schools ... We nevertheless sustained the validity of the combined effect of these two amendments in *Maryland v. Wirtz*, (1968) ...

By its 1974 amendments, then, Congress has now entirely removed the exemption previously afforded States and their political subdivisions ... The Act thus imposes upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees engaged in interstate commerce.

Appellants [contend] that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution ...

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner ...

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers, who have long been covered by the Act and who must find ways to increase their gross income if they are to pay higher wages while maintaining current earnings. The difference, however, is that a State is not merely a factor

in the "shifting economic arrangements" of the private sector of the economy, *Kovacs v. Cooper*, (1949) (Frankfurt, J., concurring), but is itself a coordinate element in the system established by the Framers for governing our Federal Union ...

The requirement imposing premium rates upon any employment in excess of what Congress has decided is appropriate for a governmental employee's workweek, for example, appears likely to have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation ...

Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies ... If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "*separate and independent existence.'" Coyle [v. Oklahoma (1911)]* ... This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress ...

There are undoubtedly factual distinctions between the two situations, but in view of the conclusions expressed earlier in this opinion we do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative.

We are therefore persuaded that *Wirtz* must be overruled.

The judgment of the District Court is accordingly reversed, and the cases are remanded for further proceedings consistent with this opinion.

So ordered.

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Garcia v. SAMTA

469 U.S. 528 (1985)

> Decision: Reversed and remanded
> Vote: 5-4
> Majority: Blackmun, joined by Brennan, White, Marshall, Stevens
> Dissent: Powell, joined by Burger, Rehnquist, O'Connor
> Dissent: Rehnquist
> Dissent: O'Connor, joined by Rehnquist, Powell

Justice BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities v. Usery* (1976) ... Since [that litigation,] federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion ... Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled ...

[There are four] prerequisites for governmental immunity under *National League of Cities* ... First, it is said that the federal statute at issue must regulate "the 'States as States.' " Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.' " Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.' " Finally, the relation of state and federal interests must not be such that "the nature of the federal interest ... justifies state submission ... "

The controversy in the present cases has focused on the third ... requirement—that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." Just how troublesome the task has been is revealed by the results reached in other federal cases ... The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best ...

Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated ... A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable

as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of governmental tort liability in part because the notion of a "uniquely" governmental function is unmanageable ... Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. *Flint v. Stone Tracy Co.* (1911). The set of services that fits into this category, however, may well be negligible ... It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets ...

The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes ...

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles ...

The States unquestionably do "retai[n] a significant measure of sovereign authority." *EEOC v. Wyoming*, (1983) (POWELL, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government ...

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role ...

When we look for the States' "residuary and inviolable sovereignty ... " in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself ...

[A]gainst this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." *EEOC v. Wyoming* (1983).

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet ...

This analysis makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed ...

In sum, in *National League of Cities* the Court tried to repair what did not need repair.

National League of Cities v. Usery, (1976), is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, with whom Justice POWELL and Justice REHNQUIST join, dissenting.

The Court today surveys the battle scene of federalism and sounds a retreat ... I would prefer to hold the field and, at the very least, render a little aid to the wounded ...

The Court overrules *National League of Cities* ... on the grounds that it is not "faithful to the role of federalism in a democratic society." The essence of our federal system," the Court concludes, "is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose ... " *National League of Cities* is held to be inconsistent with this narrow view of federalism because it attempts to protect only those fundamental aspects of state sovereignty that are essential to the States' separate and independent existence, rather than protecting all state activities "equally."

In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution ... " The true "essence" of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme ...

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems ... Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. *FERC v. Mississippi*, (1982) (O'CONNOR, J., dissenting) ...

The operative language of these cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. *National League of Cities v. Usery* represented an attempt to define such limits. The Court today rejects *National League of Cities* and washes its hands of all efforts to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain " 'horrible possibilities that never happen in the real world ... ' " There is ample reason to believe to the contrary ...

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States ... As far as the Constitution is concerned, a State should not be equated with any private litigant. *Nevada v. Hall* (1979) (Blackmun, J., dissenting) ... Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible ... "

I respectfully dissent.

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Sovereign Immunity

Hans v. Louisiana

134 US 1 (1890)

> Decision: Affirmed
> Vote: 9-0
> Majority: Bradley, joined by Fuller, Miller, Field, Gray, Blatchford, Lamar, Brewer
> Concurrence: Harlan

This is an action brought in the circuit court of the United States, in December, 1884, against the state of Louisiana, by Hans, a citizen of that state, to recover the amount of certain coupons annexed to bonds of the state, issued under the provisions of an act of the legislature ...

Petitioner also avers that said provisions of said constitution are in contravention of said contract, and their adoption was an active violation ... of article 1, section 10, of the constitution of the United States ...

A citation being issued directed to the state, and served upon the governor ... the attorney general of the state filed an exception ... [saying] "that this court is without jurisdiction ... Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state; and its jurisdiction is respectfully declined."

"Wherefore respondent prays to be hence dismissed, with costs, and for general relief ... "

Mr. Justice Bradley, after stating the case as above, delivered the opinion of the Court.

The question is presented whether a state can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the constitution or laws of the United States.

The ground taken is that under the constitution ... a case is within the jurisdiction of the federal courts without regard to the character of the parties, if it arises under the constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said constitution or laws. The language relied on is that clause of the third article of the constitution, which declares that the judicial power of the United States shall extend to all cases in law and equity arising under this constitution ...

[T]he plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state. It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable ... that a state may be sued in the federal courts by its own citizens ... although not allowing itself to be sued in its own courts. If this is the necessary consequence of the

language of the constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that, under the language of the constitution and of the judiciary act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country. That decision was made in the case of *Chisholm v. Georgia* (1789) ... and created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states ... It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits ...

Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States ... Of other controversies between a state and another state or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction ...

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted ...

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted—an additional reason why the jurisdiction claimed for the circuit court does not exist is the language of the act of Congress by which its jurisdiction is conferred. The words are these:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits ... arising under the Constitution or laws of the United States, or treaties,"etc. "Concurrent with the courts of the several states." Does not this qualification show that congress, in legislating to carry the constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a state without its consent. Then how does the circuit court, having only concurrent jurisdiction, acquire any such power?

... With regard to the question then before the court, it may be observed that writs of error to judgments in favor of the crown, or of the state, had been known to the law from time immemorial, and had never been considered as exceptions to the rule that an action does not lie against the sovereign. To avoid misapprehension, it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued or comes itself into court, yet, where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. While the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void

and powerless to affect their enjoyment ... The legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause. The judgment of the circuit court is affirmed.

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Pennhurst State School and Hospital v. Halderman

465 U.S. 89 (1984)

> Decision: Reversed and remanded
> Vote: 5-4
> Majority: Powell, joined by Burger, White, Rehnquist, and O'Connor
> Dissent: Brennan
> Dissent: Stevens, joined by Brennan, Marshall, and Blackmun

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law ...

This litigation, here for the second time, concerns the conditions of care at petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded ...

After concluding that the large size of Pennhurst prevented it from providing the necessary habilitation in the least restrictive environment, the court ordered that "immediate steps be taken to remove the retarded residents from Pennhurst." Petitioners were ordered "to provide suitable community living arrangements" for the class members, and the court appointed a Special Master "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court." See *Pennhurst State School and Hospital v. Halderman*, (1981) ...

The Court of Appeals for the Third Circuit affirmed most of the District Court's judgment ... It agreed that respondents had a right to habilitation in the least restrictive environment, but it grounded this right solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act [herein the Act] ... The court did not consider

the constitutional issues or § 504 of the Rehabilitation Act, and while it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation ... the court did not decide whether that state right encompassed a right to treatment in the least restrictive setting ...

This Court reversed the judgment of the Court of Appeals, finding that [the Act] did not create any substantive rights ...

On remand, the Court of Appeals affirmed its prior judgment in its entirety ... It determined that, in a recent decision, the Supreme Court of Pennsylvania had "spoken definitively" in holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded ... It also rejected petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state law claim. The court noted that the Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims ... and concluded that the same result obtained with respect to a pendent state law claim. It reasoned that ... "there cannot be ... an Eleventh Amendment exception to that rule ... "

We granted certiorari ... and now reverse and remand ...

Petitioners ... challenge [that] the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law ...

[T]he Constitution provides that the federal judicial power extends, *inter alia,* to controversies "between a State and Citizens of another State ... "

A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court ... We have insisted, however, that the State's consent be unequivocally expressed ... Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued ...

This Court's decisions thus establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Employees v. Missouri Dept of Public Health and Welfare* (1973). There may be a question, however, whether a particular suit in fact is a suit against a State. It is clear, of course, that, in the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment ... This jurisdictional bar applies regardless of the nature of the relief sought ...

When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." *Ford v. Dept of Treasury of Indiana* (1945) ... "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon* (1963). And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State ... an unconstitutional enactment is "void," and therefore does not "impart to

[the officer] any immunity from responsibility to the supreme authority of the United States." [*Ex parte Young* (1908)]. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct ... " *Ibid* ...

With these principles in mind, we now turn to the question whether the claim that petitioners violated state law in carrying out their official duties at Pennhurst is one against the State, and therefore barred by the Eleventh Amendment. Respondents advance two principal arguments in support of the judgment below. First, they contend that, under the doctrine of *Edelman v. Jordan* [(1974)], the suit is not against the State because the courts below ordered only prospective injunctive relief. Second, they assert that the state law claim properly was decided under the doctrine of pendent jurisdiction. Respondents rely on decisions of this Court awarding relief against state officials on the basis of a pendent state law claim ...

We first address the contention that respondents' state law claim is not barred by the Eleventh Amendment because it seeks only prospective relief ... The Court of Appeals held that, if the judgment below rested on federal law, it could be entered against petitioner state officials under the doctrine established in *Edelman* and *Young* even though the prospective financial burden was substantial and ongoing. The court assumed, and respondents assert, that this reasoning applies as well when the official acts in violation of state law. This argument misconstrues the basis of the doctrine established in *Young* and *Edelman* ...

[T]he injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character ... " [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States ... "

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan* ... *Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young*, while at the same time preserving to an important degree the constitutional immunity of the States.

This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case, the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law ...

[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when — as here — the relief sought and ordered has an impact directly on the State itself. In reaching a contrary conclusion, the Court of Appeals relied principally on a separate line of cases dealing with pendent jurisdiction. The crucial point for the Court of Appeals was that this Court has granted relief against state officials on the basis of a pendent state law claim ...

This Court long has held generally that, when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction ... The Court also has held that a federal court may resolve a case solely on the basis of a pendent state law claim ... and that, in fact, the court usually should do so in order to avoid federal constitutional questions ... But pendent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.

As the Court of Appeals noted ... relief was granted against state officials on the basis of state law claims that were pendent to federal constitutional claims. In none of these cases, however, did the Court so much as mention the Eleventh Amendment in connection with the state law claim. Rather, the Court appears to have assumed that, once jurisdiction was established over the federal law claim, the doctrine of pendent jurisdiction would establish power to hear the state law claims as well ...

[T]he implicit view of these cases seems to have been that, once jurisdiction is established on the basis of a federal question, no further Eleventh Amendment inquiry is necessary with respect to other claims raised in the case. This is an erroneous view, and contrary to the principles established in our Eleventh Amendment decisions. "The Eleventh Amendment is an explicit limitation of the judicial power of the United States." *Missouri v. Fiske* (1933). It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 U.S.C. § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution ... The Amendment thus is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts ... The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims. The history of the adoption and development of the Amendment ... confirms that it is an independent limitation on all exercises of Art. III power ...

[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state law claims brought into federal court under pendent jurisdiction ...

The Court of Appeals upheld the judgment of the District Court solely on the basis of Pennsylvania's MH/MR Act. We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of this state law. The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. On remand, the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases. The court also may consider whether relief may be granted to respondents under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6011, 6063 (1976 ed. and Supp. V). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf

Alden v. Maine

527 U.S. 706 (1999)

> Decision: Affirmed
> Vote: 5-4
> Majority: Kennedy, joined by Scalia, Thomas, Rehnquist, and O'Connor
> Dissent: Souter, joined by Stevens, Ginsburg, and Breyer

Justice Kennedy delivered the opinion of the Court.

In 1992, petitioners, a group of probation officers, filed suit against their employer, the State of Maine, in the United States District Court for the District of Maine. The officers alleged the State had violated the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA) ... While the suit was pending, this Court decided *Seminole Tribe of Fla. v. Florida*, (1996), which made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts. Upon consideration of Seminole Tribe, the District Court dismissed petitioners' action, and the Court of Appeals affirmed ...

We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit ...

We have ... sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ...

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida* ... Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance ... The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design ... Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document ...

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status ...

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.' " *Printz v. US* (1997) ...

The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts ...

Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified ...

Although the state conventions which addressed the issue of sovereign immunity in their formal ratification documents sought to clarify the point by constitutional amendment, they made clear that they, like Hamilton, Madison, and Marshall, understood the Constitution as drafted to preserve the States' immunity from private suits ...

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit; they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, (1985) ...

The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in Chisholm was contrary to the well-understood meaning of the Constitution," *Seminole Tribe* ... As a consequence, we have looked to "history and experience, and the established order of things," rather than "[a]dhering to the mere letter" of the Eleventh Amendment, in determining the scope of the States' constitutional immunity from suit ...

Following this approach, the Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment ...

These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself ... The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design ...

In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts ...

"[T]here is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' " (quoting The Federalist No. 81) ... This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution. In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design.

Petitioners contend the text of the Constitution and our recent sovereign immunity decisions establish that the States were required to relinquish this portion of their sovereignty. We turn first to these sources.

Article I, §8, grants, Congress broad power to enact legislation in several enumerated areas of national concern. The Supremacy Clause, furthermore, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is contended that, by virtue of these provisions, where Congress enacts legislation subjecting the States to suit, the legislation by necessity overrides the sovereign immunity of the States.

As is evident from its text, however, the Supremacy Clause enshrines as "the supreme Law of the Land" only those Federal Acts that accord with the constitutional design ...

The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power ... We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers. Although some of our decisions had endorsed this contention ... they have since been overruled ...

In light of the ratification debates and the history of the Eleventh Amendment, there is no reason to believe the Founders intended the Constitution to preserve a more restricted immunity in the United States. On the contrary, Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties ... suggests the States' sovereign immunity was understood to extend beyond state-law causes of action.

[T]he Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity ... It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution ...

Our final consideration is whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution. We look both to the essential principles of federalism and to the special role of the state courts in the constitutional design.

Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation ...

Petitioners contend that immunity from suit in federal court suffices to preserve the dignity of the States. Private suits against nonconsenting States, however, present "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *In re Ayers* (1887) ... Not only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.

In some ways, of course, a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself ... A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals ... Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege ...

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process ... Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen ...

A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts ... If Congress could displace a State's allocation of governmental

power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very Constitution from which its existence derives ...

In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States ...

Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States ... That we have, during the first 210 years of our constitutional history, found it unnecessary to decide the question presented here suggests a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law.

The sole remaining question is whether Maine has waived its immunity ... The State, we conclude, has not consented to suit ...

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second. The judgment of the Supreme Judicial Court of Maine is

Affirmed.

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Constraints on Congressional Power

New York v. United States

505 U.S. 144 (1992)

> Decision: Affirmed in part and reversed in part
> Vote: 6-3
> Majority: O'Connor, joined by Rehnquist, Scalia, Kennedy, Thomas, as well as White, Blackmun, and Stevens (parts III-A and III-B only)
> Concur/dissent: White, joined by Blackmun and Stevens
> Concur/dissent: Stevens

Justice O'CONNOR delivered the opinion of the Court.

These cases implicate one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In these cases, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ... The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

We live in a world full of low level radioactive waste ... The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year ...

As a result, since 1979 only three disposal sites— those in Nevada, Washington, and South Carolina—have been in operation. Waste generated in the rest of the country must be shipped to one of these three sites for disposal. ...

In 1979, both the Washington and Nevada sites were forced to shut down temporarily, leaving South Carolina to shoulder the responsibility of storing low level radioactive waste produced in every part of the country. The Governor of South Carolina, understandably perturbed, ordered a 50% reduction in the quantity of waste accepted at the Barnwell site. The Governors of Washington and Nevada announced plans to shut their sites permanently ...

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the Low-Level Radioactive Waste Policy Act ... Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders ... " The 1980 Act authorized States to enter into regional compacts

that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States ... The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities; not surprisingly, these were the compacts formed around South Carolina, Nevada, and Washington, the three sited States. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste ... The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985 ...

In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate ... [T]he three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact ... After the 7-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region.

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

Monetary incentives. One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy ... The Secretary then makes payments from this account to each State that has complied with a series of deadlines ... Each State that has not met the 1993 deadline must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received.

Access incentives. The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter ... Finally, States that have not filed complete applications by January 1, 1992, for a license to operate a disposal facility, or States belonging to compacts that have not filed such applications, may be charged triple surcharges.

The take title provision. The third type of incentive is the most severe. The Act provides:

"If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment ... "

New York, a State whose residents generate a relatively large share of the Nation's low level radioactive waste, did not join a regional compact. Instead, the State complied with the Act's requirements by enacting legislation providing for the siting and financing of a disposal facility in New York. The State has identified five potential sites, three in Allegany County and two in Cortland County. Residents of the two counties oppose the State's choice of location ...

[Petitioners] sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution ... Petitioners have abandoned their due process and Eleventh Amendment claims on their way up the appellate ladder; as the cases stand before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause ...

[T]he Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

These questions can be viewed in either of two ways ... In a case ... involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress ...

The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power ...

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. Among the provisions of the Constitution that have been particularly important in this regard, three concern us here.

First, the Constitution allocates to Congress the power "[t]o regulate Commerce ... among the several States ... " Interstate commerce was an established feature of life in the late 18th century ... The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power ...

Second, the Constitution authorizes Congress "to pay the Debts and provide for the ... general Welfare of the United States ... " While the spending power is "subject to several general restrictions articulated in our cases," *South Dakota v. Dole* (1987), these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget ...

Finally, the Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding ... " We have observed that the Supremacy Clause gives the Federal Government "a decided advantage in th[e] delicate balance" the Constitution strikes between state and federal power. *Gregory v. Ashcroft* (1991).

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not ... [W]e must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause ... Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field ...

[T]he question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress "could not directly tax or legislate upon individuals; it had no explicit `legislative' or `governmental' power to make binding `law' enforceable as such ... "

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist." The Federalist No. 15 ...

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States ...

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts ... The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices ...

... [B]y any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply ... Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision ...

As petitioners see it, the Act imposes a requirement directly upon the States that they regulate in the field of radioactive waste disposal in order to meet Congress' mandate that "[e]ach State shall be responsible for providing ... for the disposal of ... low-level radioactive waste." Petitioners understand this provision as a direct command from Congress, enforceable independent of the three sets of incentives provided by the Act. Respondents, on the other hand, read this provision together with the incentives ...

The Act could plausibly be understood either as a mandate to regulate or as a series of incentives. Under petitioners' view ... the Act would clearly "commandee[r] the legislative processes of the States ... " *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) ... We must reject this interpretation of the provision for two reasons. First, such an outcome would, to say the least, "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft* ... Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress ... " *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building* & *Construction Trades Council,* (1988). This rule of statutory construction pushes us away from petitioners' understanding of § 2021c (a)(1)(A) of the Act, under which it compels the States to regulate according to Congress' instructions.

We therefore decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act. Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce ...

The second step ... is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power.

The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority [here] ...

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign ...

The take title provision is of a different character ... In this provision, Congress has crossed the line distinguishing encouragement from coercion.

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress ... On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages ... Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two ... A choice between two unconstitutionally coercive regulatory techniques is no choice at all ...

Respondents emphasize the latitude given to the States to implement Congress' plan. This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution ...

The purpose of the Act is not defeated by the invalidation of the take title provision, so we may leave the remainder of the Act in force ...

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

Affirmed in part and reversed in part.

It is so ordered.

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Printz v. United States

521 U.S. 898 (1997)

> Decision: reversed
> Vote: 5-4
> Majority: Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas
> Concurrence: O'Connor
> Concurrence: Thomas
> Dissent: Stevens, joined by Souter, Ginsburg, and Breyer
> Dissent: Souter
> Dissent: Breyer, joined by Stevens

Justice SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

The Gun Control Act of 1968 (GCA), establishes a detailed federal scheme governing the distribution of firearms ...

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998 ...

[Under the Act] a dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, or if state law provides for an instant background check. In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs [Chief Law Enforcement Officers] are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law ... The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful ... If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination ... Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both."

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place ... A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional ... We granted certiorari.

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme ... While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful ... they are empowered to grant, in effect, waivers of the federally prescribed 5–day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court ...

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," Brief for the United States ...

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship ... [and] to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State ...

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power ... It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce ...

[W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power ...

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption ... [T]he day before its proposal of the Bill of Rights ... the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures ...

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of The Federalist ... "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, The Federalist No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter The Federalist), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," id., No. 45, at 292 (J. Madison). But none of these statements necessarily implies-what is the critical point here-that Congress could impose these responsibilities *without the consent of the States* ...

It is most implausible that the person who labored for that example of state executive officers' assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws. If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere ...

To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to the Act of August 3, 1882 ... which enlisted state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a

"convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State ... officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added.)

...

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco v. Mississippi,* (1934), a principle that controls the present cases ...

It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft* (1991). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison) ... Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict ... [T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people ...

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft* (1991) ...

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," personally and through officers whom he appoints ... The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control ... The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known ... That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws ...

The Government contends that ... the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs. It is permissible, the Government asserts, for Congress to command state or local officials to assist in the implementation of federal law so long as "Congress itself devises a clear legislative

solution that regulates private conduct" and requires state or local officers to provide only "limited, non-policymaking help in enforcing that law." "[T]he constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities." Brief for the United States.

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes ... This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so ... We are doubtful that the new line the Government proposes would be any more distinct. Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check? ... It is quite impossible, in short, to draw the Government's proposed line at "no policymaking," and we would have to fall back upon a line of "not too much policymaking." How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields ... by "reduc[ing] [them] to puppets of a ventriloquist Congress," *Brown v. EPA* (1977). It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority ...

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects ... Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected ...

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York v. US* (1992)*:* "The Federal Government may not compel the States to enact or administer a federal regulatory program." The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule ...

There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, and to wait five business days before consummating the sale. These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the Court.

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice Stevens, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting.

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in *New York* v. *United States,* (1992). Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether the Congress could require state agents to collect federal taxes. Or the question whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," *ante,* at 4, that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. And Congress' view of the matter is quite different from that implied by the Court today.

The Brady Act was passed in response to what Congress described as an "epidemic of gun violence." H. R. Rep. No. 103-344, p. 8 (1993) ...

The text of the Constitution provides a sufficient basis for a correct disposition of this case.

Article I, §8, grants the Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by Justice Thomas in his concurring opinion in *United States* v. *Lopez,* (1995), there can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment ...

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I ...

Indeed, the historical materials strongly suggest that the Founders intended to enhance the capacity of the federal government by empowering it–as a part of the new authority to make demands directly on individual citizens–to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws." The Federalist No. 27 ...

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies ... Congress could impose these responsibilities without the consent of the States." *Ante,* at 10-11 (emphasis omitted). No fair reading of these materials can justify such an interpretation ...

This point is made especially clear in Hamilton's statement that "the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and *will be rendered auxiliary to the enforcement of its laws*." *Ibid.* (second emphasis added). It is hard to imagine a more unequivocal statement that state judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers ...

Bereft of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in the early years of the Republic ...

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. The majority's description of these early statutes is both incomplete and at times misleading ... The Court assumes that the imposition of such essentially executive duties on state judges and their clerks sheds no light on the question whether executive officials might have an immunity from federal obligations ...

We are far truer to the historical record by applying a functional approach in assessing the role played by these early state officials. The use of state judges and their clerks to perform executive functions was, in historical context, hardly unusual ...

... the Court's ruling is strikingly lacking in affirmative support. Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it.

The Court's "structural" arguments are not sufficient to rebut that presumption. The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations ...

Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the states ...

Nor is there force to the assumption undergirding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse ...

Hence, the Court's textual argument is quite misguided. The majority focuses on the Clause's specific attention to the point that "Judges in every State shall bebound." *Ibid.* That language commands state judges to "apply federal law" in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore. Our opinions in *Testa,* and earlier the *Second Employers' Liability Cases,* rested generally on the language of the Supremacy Clause, without any specific focus on the reference to judges ...

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the CrimeControl Center of the Department of Justice than to an offensive federal command to a sovereign state. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

Accordingly, I respectfully dissent.

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Nevada State HR v. Hibbs

538 U.S. 721 (2003)

> Decision: Affirmed
> Vote: 5-4
> Majority: Rehnquist, joined by O'Connor, Souter, Ginsburg, and Breyer
> Concurrence: Souter, joined by Ginsburg and Breyer
> Concurrence: Stevens
> Dissent: Scalia
> Dissent: Kennedy, joined by Scalia and Thomas

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," should that employer "interfere with, restrain, or deny the exercise of" FMLA rights. We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act ...

Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated ...

We granted certiorari to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court for violation of [the Act] ...

For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States ...

Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment ... The clarity of Congress' intent here is not fairly debatable. The Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction ... " We held in *Kimel* [*v. Florida Bd. Of Regents* (2000)] that, by using identical language in the Age Discrimination in Employment Act of 1967 (ADEA) ... Congress satisfied the clear statement rule of *Dellmuth* [*v. Muth* (1989)]. This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision ...

Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power "to enforce" the substantive guarantees of §1-among them, equal protection of the laws-by enacting "appropriate legislation." Congress may, in the exercise of its §5 power, do more than simply proscribe conduct that we have held unconstitutional. " 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Kimel* ...

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.[1] We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. *Craig v. Boren*, (1976). For a gender-based classification to withstand such scrutiny, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives ... " We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

The history of the many state laws limiting women's employment opportunities is chronicled in–and, until relatively recently, was sanctioned by–this Court's own opinions ... Until our decision in *Reed* v. *Reed,* (1971), "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' "-such as the above beliefs-"could be conceived for the discrimination." *U.S. v. Virginia* (1996) ...

Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964 ... and we sustained this abrogation in *Fitzpatrick, [v. Bitzer (1976)].* But state gender discrimination did not cease. "[I]t can hardly be doubted that ... women still face pervasive, although at times more subtle, discrimination ... in the job market." *Frontiero* v. *Richardson,* (1973). According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. [*U.S. v] Virginia* [(1996)]. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic §5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. S. Rep. No. 103—3, pp. 14—15 (1993) ...

Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways ...

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1. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." In response to this finding, Congress sought "to accomplish the [Act's other] purposes ... in a manner that ... minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available ... *on a gender-neutral basis[,]* and to promote the goal of equal employment opportunity *for women and men. ... "* (emphasis added) ...

In spite of all of the above evidence, Justice Kennedy argues in dissent that Congress' passage of the FMLA was unnecessary because "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits," *post*, at 7, and points to Nevada's leave policies in particular, *post*, at 13. However, it was only "[s]ince Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S. Rep. No. 103—3, at 20 ... (1991) ...

In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 legislation. ...

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation ... "

Unlike the statutes at issue in ... *Kimel* ... which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the fault line between work and family-precisely where sex-based overgeneralization has been and remains strongest and affects only one aspect of the employment relationship.

We also find significant the many other limitations that Congress placed on the scope of this measure ... The FMLA requires only unpaid leave ... and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months. Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers ... Congress chose "a middle ground, a period long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses ...

For the above reasons, we conclude that [the Act] is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior."

The judgment of the Court of Appeals is therefore

Affirmed.

Excerpted by Alexandria Metzdorf

Murphy v. NCAA

584 U.S. ___ (2018)

> Decision: Reversed
> Vote: 6-3
> Majority: Alito, joined by Roberts, Kennedy, Thomas, Kagan, Gorsuch, and Breyer (all but Part VI-B)
> Concurrence: Thomas
> Concur/dissent: Breyer
> Dissent: Ginsburg, joined by Sotomayor

Justice Alito delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to "authorize" sports gambling schemes ... We must decide whether this provision is compatible with the system of "dual sovereignty" embodied in the Constitution.

Americans have never been of one mind about gambling, and attitudes have swung back and forth. By the end of the 19th century, gambling was largely banned throughout the country, but beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened ...

By the 1960s, Atlantic City, "once the most fashionable resort of the Atlantic Coast," had fallen on hard times, and casino gambling came to be seen as a way to revitalize the city. In 1974, a referendum on statewide legalization failed, but two years later, voters approved a narrower measure allowing casino gambling in Atlantic City alone. At that time, Nevada was the only other State with legal casinos, and thus for a while the Atlantic City casinos had an east coast monopoly. "With 60 million people living within a one-tank car trip away," Atlantic City became "the most popular tourist destination in the United States." But that favorable situation eventually came to an end.

With the enactment of the Indian Gaming Regulatory Act in 1988, casinos opened on Indian land throughout the country. Some were located within driving distance of Atlantic City, and nearby States (and many others) legalized casino gambling. But Nevada remained the only state venue for legal sports gambling in casinos, and sports gambling is immensely popular ...

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling, and this sparked federal efforts to stem the tide. Opponents of sports gambling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA) ...

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on" competitive sporting events. §3702(1). In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes –

but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime ... Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations.

Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's effective date.

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. [I]n 2012 the legislature enacted a law [legalizing sports betting] ...

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. In response, the State argued, among other things, that PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban.

In making this argument, the State relied primarily on two cases, *New York* v. *United States*, (1992), and *Printz* v. *United States*, (1997), in which we struck down federal laws based on what has been dubbed the "anticommandeering" principle ...

New Jersey argued that PASPA is similarly flawed because it regulates a State's exercise

of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling ... The plaintiffs countered that PASPA is critically different from the commandeering cases because it does not command the States to take any affirmative act. Without an affirmative federal command to *do* something, the plaintiffs insisted, there can be no claim of commandeering.

Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. One of the accepted meanings of the term "authorize," they point out, is "permit ... " They therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization.

Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. Brief for Respondents 39. To authorize, they maintain, means " '[t]o empower; to give a right or authority to act; to endow with authority ... ' " And this, they say, is precisely what the 2014 Act does: It empowers a defined group of entities, and it endows them with the authority to conduct sports gambling operations.

Respondents do not take the position that PASPA bans all modifications of old laws against sports gambling ... but just how far they think a modification could go is not clear. They write that a State "can also repeal or enhance [laws prohibiting sports gambling] without running afoul of PASPA" but that it "cannot 'partially repeal' a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the state ... "

In our view, petitioners' interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. This is clear when the state-law landscape at the time of PASPA's enactment is taken into account. At that time, all forms of sports gambling were illegal in the great majority of States, and in that con-

text, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only "permits" sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' definition).

The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted ...

The respondents and United States argue that even if there is some doubt about the correctness of their interpretation of the anti-authorization provision, that interpretation should be adopted in order to avoid any anticommandeering problem that would arise if the provision were construed to require States to maintain their laws prohibiting sports gambling. They invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. See *Jennings* v. *Rodriguez*, (2018). The plausibility of the alternative interpretations is debatable, but even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle, as we now explain.

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States ... Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty." *Gregory* v. *Ashcroft*, (1991).

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority ...

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine ...

We therefore turn to the question whether, as petitioners maintain, our decision regarding PASPA's prohibition of the authorization and licensing of sports gambling operations dooms the remainder of the Act. In order for other PASPA provisions to fall, it must be "evident that

[Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Alaska Airlines, Inc.* v. *Brock,* (1987) ... We will consider each of the provisions at issue separately.

Under 28 U. S. C. §3702(1), States are prohibited from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes. If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state "operat[ion]" is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted ... If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. State-run lotteries, which sold tickets costing only a few dollars, were thought more benign than other forms of gambling, and that is why they had been adopted in many States ... To the Congress that adopted PASPA, legalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards ...

We reach the same conclusion with respect to the provisions prohibiting state "sponsor[ship]" and "promot[ion]." The line between authorization, licensing, and operation, on the one hand, and sponsorship or promotion, on the other, is too uncertain. It is unlikely that Congress would have wanted to prohibit such an ill-defined category of state conduct ...

[W]e hold that no provision of PASPA is severable from the provision directly at issue in these cases ...

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens ... The Constitution gives Congress no such power.

The judgment of the Third Circuit is reversed.

It is so ordered.

Excerpted by Alexandria Metzdorf

Federal Preemption of State Laws

Missouri v. Holland

252 U.S. 416 (1920)

> Decision: Affirmed
> Vote: 7-2
> Majority: Holmes, joined by White, McKenna, Day, McReynolds, Brandeis, and Clarke
> Dissent: Van Devanter, Pitney [without opinion]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act ... The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged *quasi* sovereign rights of a State ...

The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture ... [T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States ...

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power, but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national wellbeing that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found ... The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that, as between a State and its inhabitants, the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put

the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone, and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State, and, in a week, a thousand miles away. If we are to be accurate, we cannot put the case of the State upon higher ground than that the treaty deals with creatures that, for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the State would be free to regulate this subject itself ...

Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' *Baldwin v. Franks* [(1887)]. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, [(1807)], with regard to statutes of limitation, and even earlier, as to confiscation ... It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, [(1817)] ... Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here, a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Decree affirmed.

Excerpted by Alexandria Metzdorf

Crosby v. NFTC

530 U.S. 363 (2000)

> Decision: Affirmed
> Vote: Unanimous
> Majority: Souter, joined by Rehnquist, Stevens, O'Connor, Kennedy, Ginsburg, and Breyer
> Concurrence: Scalia, joined by Thomas

JUSTICE SOUTER delivered the opinion of the Court.

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is ...

The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma ...

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma ...

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts restricted purchase list in 1998 ... Three withdrew from Burma after the passage of the state Act, and one member had its bid for a procurement contract increased by 10 percent under the provision of the state law ...

In April 1998, the Council filed suit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the petitioner state officials charged with administering and enforcing the state Act (whom we will refer to simply as the State). The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act. After detailed stipulations, briefing, and argument, the District Court permanently enjoined enforcement of the state Act, holding that it "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs ... "

The United States Court of Appeals for the First Circuit affirmed on three independent grounds ... It found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig* v. *Miller* (1968) ... violated the dormant Foreign Commerce Clause ... and was preempted by the congressional Burma Act ...

We granted certiorari to resolve these important questions ... and now affirm.

A fundamental principle of the Constitution is that Congress has the power to preempt state law ... Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. *US v. Locke* (2000) ... And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute ... *Hines v. Davidowitz* (1941) ...

[T]he categories of preemption are not "rigidly distinct." *English* v. *General Elec. Co.,* (1990). Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, "field pre-emption may be understood as a species of conflict pre-emption ... " and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:

"For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the

act cannot otherwise be accomplished-if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect-the state law must yield to the regulation of Congress within the sphere of its delegated power."

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act. We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma ...

First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions ... It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. And, most significantly, Congress empowered the President "to waive, temporarily or permanently, any sanction [under the federal Act] ... if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States."

Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue ... or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause ...

Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate ... and perpetual, there being no termination provision ... This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence ...

The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions ... The fact of a common end hardly neutralizes conflicting means ... and the fact that some companies may be able to comply with both sets

of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ ... Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force ...

[T]he Executive has consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress ...

This evidence ... is more than sufficient to show that the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy ...

[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, *Hines*. The State's inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous. Since we never ruled on whether state and local sanctions against South Africa in the 1980's were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter.

Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

Excerpted by Alexandria Metzdorf

Arizona v. United States

567 U.S. 387 (2012)

> Decision: Remanded, reversed in part and affirmed in part
> Vote: 8-0
> Majority: Kennedy, joined by Roberts, Ginsburg, Breyer, and Sotomayor
> Concur/dissent: Scalia
> Concur/dissent: Thomas
> Concur/dissent: Alito
> Not participating: Kagan

Justice Kennedy delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the state senate. Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States ... " The law's provisions establish an official state policy of "attrition through enforcement." The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law ...

Two [of the provisions] create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State ... Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe ... has committed any public offense that makes the person removable from the United States." Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government ...

This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status.

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens ... This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization ... "

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States ... This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines* v. *Davidowitz* (1941) ...

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials ...

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities ...

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect ... From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under this principle, Congress has the power to preempt state law ... There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision ...

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, (1947).

Second, state laws are preempted when they conflict with federal law ... This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* ...

In effect, §3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate ...

The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration. The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a " 'harmonious whole.' " Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." *Wisconsin Dept. of Industry* v. *Gould Inc.*, (1986) ...

Arizona contends that §3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Con-

gress adopted ... Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

These specific conflicts between state and federal law simply underscore the reason for field preemption. As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." Section 3 is preempted by federal law.

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona ... The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control ...

Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens ... " The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers ... It also requires every employer to verify the employment authorization status of prospective employees ... These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions ...

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable ... " IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives ...

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*. Under §5(C) ... Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although §5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose ... Section 5(C) is preempted by federal law.

Section 6 of S.B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe ... [the person] has committed any public offense that makes [him] removable from the United States." The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government ... Officers covered by these agreements are subject to the Attorney General's direction and supervision. There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable ...

Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, §6 creates an obstacle to the full purposes and objectives of Congress. Section 6 is preempted by federal law.

Section 2(B) of S. B. 1070 requires state officers to make a "reasonable attempt ... to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records ...

The United States argues that making status verification mandatory interferes with the federal immigration scheme ...

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations ...

The nature and timing of this case counsel caution in evaluating the validity of §2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law ... This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect ...

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

The United States has established that §§3, 5(C), and 6 of S. B. 1070 are preempted. It was improper, however, to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.

The judgment of the Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Alexandria Metzdorf

The Contracts Clause

Case List

Early Interpretations of the Contract Clause

Fletcher v. Peck (1810)
Sturges v. Crowninshield (1819)
Trustees of Dartmouth College v. Woodward (1819)

The Taney Court through the New Deal

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge (1837)
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Government Interference in Private Contracts

Allied Steel Co. v. Spannaus (1978)
Exxon Corp v. Eagerton (1983)
Energy Reserves Group v. Kansas Power and Light (1983)
Keystone Bituminous Coal Association v. DeBenedictis (1987)

Modern Applications

Sveen v. Melin (2018)

Early Interpretations of the Contract Clause

Fletcher v. Peck

10 U.S. 87 (1810)

> Decision: Affirmed
> Vote: 6-0
> Majority: Marshall, joined by Cushing, Chase, Washington, Livingston
> Concur: Johnson

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of that State ...

The only question, then, presented by this demurrer, for the consideration of the Court is this: did the then Constitution of the State of Georgia prohibit the Legislature to dispose of the lands which were the subject of this contract in the manner stipulated by the contract?

The question whether a law is void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its act to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case, the court can perceive no such opposition. In the Constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the Act of 1795. The court cannot say that, in passing that Act, the Legislature has transcended its powers and violated the Constitution ...

The third count recites the undue means practised on certain members of the Legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent Legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired and rendered null and void ...

The principle asserted is that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle so far as it respects general legislation cannot be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?

To the Legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties ...

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term "contract" without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction the Constitution, grants are comprehended under the term "contracts," is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment, and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State ...

It is, then, the unanimous opinion of the Court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

Excerpted by Stella Kemp, Ethan Derstine, and Rorie Solberg

Sturges v. Crowninshield

17 U.S. 4 (1819)

> Decision: Reversed
> Vote: 6-0
> Majority: Marshall, joined by Johnson, Duvall, Todd, Livingston, Washington, and Story

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This case is adjourned from the Court of the United States for the First Circuit and the District of Massachusetts on several points on which the judges of that court were divided ...

The first is whether, since the adoption of the Constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States? This question depends on the

following clause in the 8th section of the first article of the Constitution of the United States. "The Congress shall have power," &c., to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." ...

In considering this question, it must be recollected that previous to the formation of the new Constitution, we were divided into independent states, united for some purposes but in most respects sovereign ...

These powers proceed not from the people of America, but from the people of the several states, and remain, after the adoption of the Constitution, what they were before except so far as they may be abridged by that instrument ... The principle laid down by the counsel for the plaintiff in this respect is undoubtedly correct. Whenever the terms in which a power is granted to Congress or the nature of the power require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it. Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States of this description?

Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is perhaps incompatible with state legislation on that part of the subject to which the acts of Congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say with positive precision what belongs exclusively to the one and not to the other class of laws.

When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the Legislature of the Union possesses the power of enacting bankrupt laws and those of the states the power of enacting insolvent laws ...

If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states, but it removes a disability to its exercise which was created by the act of Congress. [I]t is sufficient to say that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law provided it contain no principle which violates the 10th section of the first article of the Constitution of the United States. This opinion renders it totally unnecessary to consider the question whether the law of New York is or is not a bankrupt law.

In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use — what is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible or less liable to misconstruction than those who are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that money on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it ...

The argument drawn from the omission in the Constitution to prohibit the states from passing insolvent laws admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the Constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. [T]he convention did not intend to prohibit the passage of all insolvent laws ...

The argument which has been pressed most earnestly at the bar is that although all legislative acts which discharge the obligation of a contract without performance are within the very words of the Constitution, yet an insolvent act containing this principle is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times that the mind of the convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation and yet hold his property, not to this, which is beneficial in its operation ...

It seems scarcely possible to suppose that the framers of the Constitution, if intending to prohibit only laws authorizing the payment of debts by installment, would have expressed that intention by saying "no state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair and we think the necessary construction of the sentence requires that we should give these words their full and obvious meaning ... The attention of the convention ... was particularly directed to ... acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle that contracts should be inviolable. The Constitution therefore declares that no state shall pass "any law impairing the obligation of contracts."

...

It is the opinion of the Court that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the Constitution of the United States, and that the plea is no bar to the action. ...

Excerpted by Stella Kemp

Trustees of Dartmouth College v. Woodward

17 U.S. 518 (1819)

> Decision: Reversed
> Vote: 4-1
> Majority: Marshall, joined by Johnson and Livingston
> Concur: Washington, joined by Livingston
> Concur: Story, joined by Livingston
> Dissent: Duvall
> Not participating: Todd

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the State court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled ...

The Superior Court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is do the acts to which the verdict refers violate the Constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised — an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution. But the American people have said in the Constitution of the United States that "no State shall pass any bill of attainder, *ex post facto law,* or law impairing the obligation of contracts." In the same instrument, they have also said, "that the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the Trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the Legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816 ... Among other alterations in the charter, this act increases the number of Trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a Board of Overseers with

power to inspect and control the most important acts of the Trustees. This Board consists of twenty-five persons ... The majority of the Trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found. The points for consideration are, 1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds? ...

1. On the first point, it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State, for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. [A]s the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself, and that, since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description, to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted ...

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or

if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred ... It becomes then the duty of the Court, most seriously to examine this charter and to ascertain its true character ...

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its Trustees or Governors were originally named by the founder and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government, but a charity school or a seminary of education incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation ...

Can this be such a contract as the Constitution intended to withdraw from the power of State legislation?

This is plainly a contract to which the donors, the Trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in Trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception taking this case out of the prohibition contained in the Constitution ...

The opinion of the Court, after mature deliberation, is that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this Court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the Legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken, it appears that the whole power of governing the College, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the Trustees. On the part of the Crown, it was expressly stipulated that this corporation thus constituted should continue forever, and that the number of Trustees should forever consist of twelve, and no more. By this contract, the Crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the State. But the Constitution of the United States has imposed this additional limitation –that the legislature of a State shall pass no act "impairing the obligation of contracts."

On the effect of this law, two opinions cannot be entertained. Between acting directly and acting through the agency of Trustees and Overseers, no essential difference is perceived. The whole power of governing the College is transferred from Trustees, appointed according to the will of the founder, expressed in the charter, to the Executive of New Hampshire ...

Upon the whole, I am of opinion that the above acts of New Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently that the judgment of the State Court ought to be reserved.

[*Judgment affirmed.*]

Mr. Justice STORY [concurring].

In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation, and I am therefore bound to declare that the acts of the Legislature of New Hampshire now in question do impair the obligations of that charter, and are consequently unconstitutional and void ...

Under these impressions, I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the Legislature whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do, but to pronounce the law as we find it, and, having done this, our justification must be left to the impartial judgment of our country ...

Excerpted by Stella Kemp

The Taney Court through the New Deal

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge
36 U.S. 420 (1837)

> Decision: 5-2
> Vote: Affirmed
> Opinion: Taney, joined by McLean, Baldwin, Wayne, and Barbour
> Concur: McLean, joined by Barbour, Baldwin and Wayne
> Dissent: Story, joined by Thompson

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge (1837)

TANEY, Ch. J., delivered the opinion of the court.

The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may, no doubt, be seriously affected in their pecuniary interests, by any decision which the court may pronounce; and the questions which have been raised as to the power of the several states, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible, that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests, with the utmost caution; guarding, so far as they have the power to do so, the rights of property, and at the same time, carefully abstaining from any encroachment on the rights reserved to the states ...

In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles river, and the public advantages that would result from a bridge; and praying to be incorporated, for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March 1785, passed an act incorporating a company, by the name of 'The Proprietors of the Charles River Bridge,' for the purposes mentioned in the petition ...

The bridge was accordingly built, and was opened for passengers on the 17th of June 1786. In 1792, the charter was extended to seventy years from the opening of the bridge; and at the expiration of that time, it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of 'The Proprietors of the Warren Bridge,' for the purpose of erecting another bridge over Charles river ...

The Warren bridge, by the terms of its charter, was to be surrendered to the state, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built, and the bill was filed, after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a ground for relief that the act for the erection of the Warren Bridge impaired the obligation of the contract between the State of Massachusetts and the proprietors of the Charles River Bridge, and was therefore repugnant to the Constitution of the United States ...

The plaintiffs in error insist, mainly, upon two grounds: ... 2d. That independently of the ferry-right, the acts of the legislature of Massachusetts, of 1785 and 1792, by their true construction, necessarily implied, that the legislature would not authorize another bridge, and especially, a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the 'Proprietors of the Charles River Bridge' should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state; and that the law authorizing the erection of the Warren bridge in 1828, impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us (being a writ of error to a state court), the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle, that the law divests vested rights. It is well settled ... that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. [I]n the late case of *Watson and others* v. *Mercer*, decided in 1834: 'As to the first point (say the court), it is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact, that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws, generally, but only *ex post facto* laws.' ...

In other words, they must show, that the state had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case ...

The legislature, in granting the charter, show, by the language of the law, that they acted on the principles assumed by the petitioners. The preamble recites, that the bridge 'will be of great public utility;' and that is the only reason they assign, for passing the law which incorporates this company. The validity of the character is not made to depend on the consent of the college, nor of any assignment or surrender on their part ...

[I]t is not pretended, that the erection of the Warren bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show, that the legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated, that contract, by the erection of the Warren bridge.

The inquiry, then, is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none; no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? ...

The Charles River bridge was completed in 1786; the time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren bridge, the proprietors of Charles River bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges and franchises of the company, must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785 ...

It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question, involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it. Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record, to bring out the great question in contest; and it is the interest of all parties concerned, that the real controversy should be settled, without further delay: and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding, in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

Excerpted by Stella Kemp

Allgeyer v. Louisiana

165 U.S. 578 (1898)

> Decision: Reversed
> Vote: 9-0
> Opinion: Peckham, joined by Fuller, Field, Harlan, Gray, Brewer, Brown, Shiras, and White

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the Court.

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with, the prohibition may be absolute ...

A conditional prohibition in regard to foreign insurance companies doing business within the State of Louisiana is to be found in article 236 of the Constitution of that state, which reads as follows:

"No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

In *Louisiana v. Williams,* (1894), the Supreme Court of that state held that an open policy of marine insurance, similar in all respects to the one herein described and made by a foreign insurance company not doing business within the state and having no agent therein, must be considered as made at the domicile of the company issuing the open policy, and that where in such case the insurance company had no agent in Louisiana, it could not be considered as doing an insurance business within the state ...

The general contract contained in the open policy, as well as the special insurance upon each shipment of goods of which notice is given to the insurance company, being contracts made in New York and valid there, the State of Louisiana claims notwithstanding such facts that the defendants have violated the act of 1894 by doing an act in that state to effect for themselves insurance on their property then in that state in a marine insurance company which had not complied in all respects with the laws of that state, and that such violation consisted in the act of mailing a letter or sending a telegram to the insurance company in New York describing the cotton upon which the defendants desired the insurance under the open marine policy to attach ...

It is said by the supreme court that the validity of such a statute has been decided in principle in this Court in the case of *Hooper v. California,* (1895) ...

We think the distinction between that case and the one at bar is plain and material ... In the case before us, the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that state was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made ...

We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana ... It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent ...

Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case, the company did no business within the state, and the contracts were not therein made ...

As so construed, we think the statute is a violation of the Fourteenth Amendment of the federal Constitution in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The "liberty" men-

tioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to [be] free in the enjoyment of all his faculties, to be free to use them in all lawful ways ... and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned ...

When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act — one which the defendants were at liberty to perform and which the state legislature had no right to prevent at least with reference to the federal Constitution ...

The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose ...

In such a case as the facts here present, the policy of the state in forbidding insurance companies which had not complied with the laws of the state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the state and with reference to a company which is not doing business within its limits.

For these reasons, we think the statute in question, No. 66 of the Laws of Louisiana of 1894, was a violation of the federal Constitution, and afforded no justification for the judgment awarded by that court against the plaintiffs in error. That judgment must therefore be

Reversed, and the case remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with his opinion.

Excerpted by Stella Kemp

Coppage v. Kansas

236 U.S. 1 (1915)

> Decision: Reversed
> Vote: 6-3
> Opinion: Pitney, joined by White, McKenna, Van Devanter, Lamar, and McReynolds
> Dissent: Holmes
> Dissent: Day, joined by Hughes

MR. JUSTICE PITNEY delivered the opinion of the Court.

In a local court in one of the counties of Kansas, plaintiff in error was found guilty and adjudged to pay a fine, with imprisonment as the alternative, upon an information charging him with a violation of an act of the legislature of that state ... §§ 4674 and 4675. ... The act reads as follows:

"An Act to Provide a Penalty for Coercing or Influencing or Making Demands upon or Requirements of Employees, Servants, Laborers, and Persons Seeking Employment." ...

"SECTION 1. That it shall be unlawful for any individual ... or employee of any company or corporation to coerce ... any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association as a condition of such person or persons securing employment or continuing in the employment of such ... corporation."

"SEC 2. Any ... employee of any company or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars or imprisoned in the county jail not less than thirty days."

The judgment was affirmed by the supreme court of the state, two justices dissenting, and the case is brought here upon the ground that the statute, as construed and applied in this case, is in conflict with that provision of the Fourteenth Amendment of the Constitution of the United States which declares that no state shall deprive any person of liberty or property without due process of law.

The facts, as recited in the opinion of the supreme court, are as follows: about July 1, 1911, one Hedges was employed as a switchman by the St. Louis & San Francisco Railway Company, and was a member of a labor organization called the Switchmen's Union of North America. Plaintiff in error was employed by the railway company as superintendent, and as such he requested Hedges to sign an agreement, which he presented to him in writing at the same time informing him that, if he did not sign it he could not remain in the employ of the company. The following is a copy of the paper thus presented:

"Fort Scott, Kansas, _____, 1911"

"Mr. T. B. Coppage, Superintendent Frisco Lines, Fort Scott:"

"We, the undersigned, have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company."

"(Signed) _____"

Hedges refused to sign this, and refused to withdraw from the labor organization. Thereupon plaintiff in error, as such superintendent, discharged him from the service of the company ...

The evidence shows that it would have been to the advantage of Hedges, from a pecuniary point of view and otherwise, to have been permitted to retain his membership in the union and at the same time to remain in the employ of the railway company ...

We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense, punishable with fine or imprisonment, for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

In *Adair v. United States* (1898), this Court had to deal with a question not distinguishable in principle from the one now presented ...

Unless it is to be overruled, this decision is controlling upon the present controversy, for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the Fifth Amendment, it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the Fourteenth Amendment, and hence, if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment, or discriminating against him because of his membership in a labor organization, it is unconstitutional for a state to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed ...

In the present case, the Kansas Supreme Court sought to distinguish the *Adair* decision upon this ground. The distinction, if any there be, has not previously been recognized as substantial, so far as we have been able to find. The opinion in the *Adair* case, while carefully restricting the decision to the precise matter involved ... as the first in order of a number of decisions supporting the conclusion of the court, a case (*People v. Marcus,* (1905)) in which the statute denounced as unconstitutional was in substance the counterpart of the one with which we are now dealing ...

Approaching the matter from a somewhat different standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue? ...

Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property

— partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property ...

The right is ... essential ... for the vast majority of persons have no other honest way to begin to acquire property save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the state ...

To avoid possible misunderstanding, we should here emphasize what has been said before — that, so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case ...

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune, and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none, for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange ...

The police power is broad and not easily defined, but it cannot be given the wide scope that is here asserted for it without in effect nullifying the constitutional guaranty ...

... in our opinion, the Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power, for such restriction is the very thing that is inhibited by the Amendment ...

A like result was reached in *State ex Rel. Smith v. Daniels* (1912), with respect to an act that, like the Kansas statute, forbade an employer to require an employee or person seeking employment, as a condition of such employment, to make an agreement that the employee would not become or remain a member or a labor organization. This was held invalid upon the authority of the *Adair* case.

Upon both principle and authority, therefore, we are constrained to hold that the Kansas Act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the "due process" clause of the Fourteenth Amendment, and therefore void.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Excerpted by Stella Kemp

Home Building & Loan Association v. Blaisdell

290 U.S. 398 (1934)

> Decision: Affirmed
> Vote: 5-4
> Majority: Hughes, joined by Brandeis, Stone, Roberts, and Cardozo
> Dissent: Sutherland, joined by Van Devanter, McReynolds, and Butler

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant contests the validity of ... the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause (Art. I, § 10) and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution.

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended ...

The Act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date ...

We are here concerned with the provisions of Part One, § 4, authorizing the District Court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," subject to the above described limitation ...

Prior to the expiration of the extended period of redemption, the court may revise or alter the terms of the extension as changed circumstances may require. Part One, § 5.

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that, by reason of their default, the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3,700.98; that appellant was the holder of the sheriff's certificate of sale; that, because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that, unless the period of redemption were extended, the property would be irretrievably lost, and that the reasonable value of the property greatly exceeded the amount due on the mortgage ...

The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract clause of the Federal Constitution, within the police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist ...

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. ...

The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions ...

The obligation of a contract is "the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*. ...

The legislature cannot "bargain away the public health or the public morals." Thus, the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state constitution which put an end to a lottery theretofore authorized by the legislature. *Stone v. Mississippi* ...

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts ...

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals ... " [*Manigault v. Springs* (1905)] ...

The question is not whether the legislative action affects contracts incidentally, or directly, or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. ...

The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. ...

The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts, and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases.

Applying the criteria established by our decisions we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. ... The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, the economic emergency which threatened "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.
2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals, but for the protection of a basic interest of society.
3. In view of the nature of the contracts in question — mortgages of unquestionable validity — the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.
4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. ... Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency.
5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute, as here applied, does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned ...

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

Excerpted by Stella Kemp

Government Interference in Private Contracts

Allied Steel Co. v. Spannaus

438 U.S. 234 (1978)

> Decision: Reversed
> Vote: 5-3
> Majority: Stewart, joined by Burger, Powell, Rehnquist, and Stevens
> Dissent: Brennan, joined by White, and Marshall

Justice Blackmun took no part in consideration or decision of the case.

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the application of Minnesota's Private Pension Benefits Protection Act to the appellant violates the Contract Clause of the United States Constitution ...

In 1974, appellant Allied Structural Steel Co. (company), a corporation with its principal place of business in Illinois, maintained an office in Minnesota with 30 employees. Under the company's general pension plan, adopted in 1963 and qualified as a single-employer plan under § 401 of the Internal Revenue Code ... salaried employees were covered as follows: at age 65, an employee was entitled to retire and receive a monthly pension generally computed by multiplying 1% of his average monthly earnings by the total number of his years of employment with the company. Thus, an employee aged 65 or more could retire without satisfying any particular length-of-service requirement, but the size of his pension would reflect the length of his service with the company. ...

In sum, an employee who did not die, did not quit, and was not discharged before meeting one of the requirements of the plan would receive a fixed pension at age 65 if the company remained in business and elected to continue the pension plan in essentially its existing form.

On April 9, 1974, Minnesota enacted the law here in question, the Private Pension Benefits Protection Act ... Under the Act, a private employer of 100 employees or more — at least one of whom was a Minnesota resident — who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years. The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age. A separate provision specified that periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion.

During the summer of 1974, the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the

Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State. At least nine of the discharged employees did not have any vested pension rights under the company's plan, but had worked for the company for 10 years or more, and thus qualified as pension obligees of the company under the law that Minnesota had enacted a few months earlier ...

The company brought suit in a Federal District Court asking for injunctive and declaratory relief. It claimed that the Act unconstitutionally impaired its contractual obligations to its employees under its pension agreement. The three-judge court upheld the constitutional validity of the Act as applied to the company ... and an appeal was brought to this Court ... We noted probable jurisdiction ...

In *Home Building & Loan Assn. v. Blaisdell,* the Court upheld against a Contract Clause attack a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, despite the Contract Clause, the States retain residual authority to enact laws "to safeguard the vital interests of [their] people ... "

The most recent Contract Clause case in this Court was *United States Trust Co. v. New Jersey,* (1977). In that case, the Court again recognized that, although the absolute language of the Clause must leave room for "the *essential attributes of sovereign power,' ... necessarily reserved by the States to safeguard the welfare of their citizens," that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems,* "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable ...

In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship ...

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan ... The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement ...

Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices. The company was thus forced to make all the retroactive changes in its contractual obligations at one time ...

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or

grace periods ... Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," *United States Trust Co.,* simply cannot stand in this case ...

This Minnesota law simply does not possess the attributes of those state laws that, in the past, have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem ... It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. ... It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships — irrevocably and retroactively ... And its narrow aim was leveled not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had, in the past, been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees ...

It is not necessary to hold that the Minnesota law impaired the obligation of the company's employment contracts "without moderation or reason or in a spirit of oppression." But we do hold that, if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case.

The judgment of the District Court is reversed.

It is so ordered.

Excerpted by Stella Kemp

Exxon Corp v. Eagerton

462 U.S. 176 (1983)

> Decision: Affirmed in part, reversed in part, and remanded.
> Vote: 9-0
> Opinion: Marshall, joined by Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens and O'Connor

JUSTICE MARSHALL delivered the opinion of the Court.

These cases concern an Alabama statute which increased the severance tax on oil and gas extracted from Alabama wells, exempted royalty owners from the tax increase, and prohibited producers from passing on the increase to their purchasers. Appellants challenge the pass-through prohibition and the royalty owner exemption under the Supremacy Clause, the Contract Clause, and the Equal Protection Clause ...

Appellants in both [cases] have working interests in producing oil and gas wells located in Alabama. They drill and operate the wells and are responsible for selling the oil and gas extracted. Appellants are obligated to pay the landowners a percentage of the sale proceeds as royalties, the percentage depending upon the provisions of the applicable lease ... After paying the 2% increase in the severance tax under protest, appellants and eight other oil and gas producers filed suit in the Circuit Court of Montgomery County, Ala., seeking a declaratory judgment that Act 79-434 was unconstitutional and a refund of the taxes paid under protest. The Circuit Court ruled in favor of appellants, concluding that both the royalty owner exemption and the pass-through prohibition violate the Equal Protection Clause and the Contract Clause, and that the pass-through prohibition is also preempted by the Natural Gas Policy Act of 1978 (NGPA) ...

We turn next to appellants' contention that the royalty owner exemption and the pass-through prohibition impaired the obligations of contracts in violation of the Contract Clause.

Appellants' Contract Clause challenge to the royalty owner exemption fails for the simple reason that there is nothing to suggest that that exemption nullified any contractual obligations of which appellants were the beneficiaries. The relevant provision of Act 79-434 states that "[a]ny person who is a royalty owner shall be exempt from the payment of any increase in taxes levied and shall not be liable therefor." On its face, this portion of the Act provides only that the legal incidence of the tax increase does not fall on royalty owners, i.e., the State cannot look to them for payment of the additional taxes. In contrast to the pass-through prohibition, the royalty owner exemption nowhere states that producers may not shift the burden of the tax increase in whole or in part to royalty owners. Nor is there anything in the opinion below to suggest that the Supreme Court of Alabama interpreted the exemption to have this effect. We will not strain to reach a constitutional question by speculating that the Alabama courts might in the future interpret the royalty owner exemption to forbid enforcement of a contractual arrangement to shift the burden of the tax increase ...

Unlike the royalty owner exemption, the pass-through prohibition did restrict contractual obligations of which appellants were the beneficiaries. Appellants were parties to sale contracts that permitted them to include in their prices any increase in the severance taxes that they were required to pay on the oil or gas being sold. The contracts were entered into before the pass-through prohibition was enacted, and their terms extended through the period during which the prohibition was in effect. By barring appellants from passing the tax increase through to their purchasers, the pass-through prohibition nullified pro tanto the purchasers' contractual obligations to reimburse appellants for any severance taxes.

While the pass-through prohibition thus affects contractual obligations of which appellants were the beneficiaries, it does not follow that the prohibition constituted a "Law impairing the Obligations of Contracts" within the meaning of the Contract Clause.

Producers Transportation Co. v. Railroad Comm'n of California, (1920), is particularly instructive for present purposes. In that case, the Court upheld an order issued by a state commission under a newly enacted statute empowering the commission to set the rates that could be charged by individuals or corporations offering to transport oil by pipeline. The Court rejected the contention of a pipeline owner that the statute could not override preexisting contracts ...

There is no material difference between *Producers Transportation Co.* and the cases before us. If a party that has entered into a contract to transport oil is not immune from subsequently enacted state regulation of the rates that may be charged for such transportation, parties that have entered into contracts to sell oil and gas likewise are not immune from state regulation of the prices that may be charged for those commodities. And if the Contract Clause does not prevent a

State from dictating the price that sellers may charge their customers, plainly it does not prevent a State from requiring that sellers absorb a tax increase themselves, rather than pass it through to their customers. If one form of state regulation is permissible under the Contract Clause notwithstanding its incidental effect on preexisting contracts, the other form of regulation must be permissible as well ...

For the foregoing reasons, we conclude that the application of the pass-through prohibition to sales of gas in interstate commerce was preempted by federal law, but we uphold both the pass-through prohibition and the royalty owner exemption against appellants' challenges under the Contract Clause and the Equal Protection Clause. Since the severability of the pass-through prohibition from the remainder of the 1979 amendments is a matter of state law, we remand to the Supreme Court of Alabama for that court to determine whether the partial invalidity of the pass-through prohibition entitles appellants to a refund of some or all of the taxes paid under protest. Accordingly, the judgment of the Supreme Court of Alabama is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Stella Kemp

Energy Reserves Group v. Kansas Power and Light

459 U.S. 400 (1983)

> Decision: Affirmed
> Vote: 9-0
> Majority: Blackmun, joined by Brennan, White, Marshall, Stevens and O'Connor and in all but Part II-C of which Burger, Powell, and Rehnquist joined.
> Concur: Powell, joined by Burger and Rehnquist

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the regulation by the State of Kansas of the price of natural gas sold at wellhead in the intrastate market. It presents a federal Contract Clause issue and a statutory issue.

On September 27, 1975, The Kansas Power & Light Company (KPL), a public utility and appellee here, entered into two intrastate natural gas supply contracts with Clinton Oil Company, the predecessor-in-interest of appellant Energy Reserves Group, Inc. (ERG). Under the first contract, KPL agrees to purchase gas directly at the wellhead on the Spivey-Grabs Field in Kingman and Harper Counties in southern Kansas. The second contract obligates KPL to purchase from the same field residue gas, that is, gas remaining after certain recovery and processing steps are completed. The original contract price was $1.50 per thousand cubic feet (Mcf) of gas. The contracts continue in effect for the life of the field or for the life of the processing plants associated with the field ...

Each contract contains two clauses known generically as indefinite price escalators. The first is a governmental price escalator clause; this provides that, if a governmental authority fixes a price for any natural gas that is higher than the price specified in the contract, the contract price shall be increased to that level. The second is a price redetermination clause; this gives ERG the option to have the contract price redetermined no more than once every two years. The new price is then set by averaging the prices being paid under three other gas contracts chosen by the parties ...

Each contract states that the purpose of the price escalator clauses is "solely" to compensate ERG for "anticipated" increases in its operating costs and in the value of its gas ... Each contract also provides: "Neither party shall be held in default for failure to perform hereunder if such failure is due to compliance with," ... any "relevant present and future state and federal laws."

In 1977, ERG invoked the price redetermination clause, and the parties agreed on a price of $1.77 per Mcf, effective November 27 of that year. The Commission approved the pass-through of this increase to consumers. KPL paid the new price through 1978 ...

On December 1, 1978, the Natural Gas Policy Act of 1978 (Act) ... designed in principal part to encourage increased natural gas production, became effective. The Act replaced the federal price controls that had been established under the Natural Gas Act ... with price ceilings that rise monthly based on "an inflation adjustment factor" and other considerations ...

In direct response to the Act, the Kansas Legislature promptly imposed price controls on the intrastate gas market ... Section 55-1404 prohibits consideration either of ceiling prices set by federal authorities or of prices paid in Kansas under other contracts in the application of governmental price escalator clauses and price redetermination clauses. Section 55-1405 of the Kansas Act, however, permits indefinite price escalator clauses to operate after March 1, 1979, to raise the price of old intrastate gas up to the federal Act's § 109 ceiling price. Section § 55-1406 exempts new gas and gas from stripper wells ...

On the parties' cross-motions for summary judgment, the state trial court held that the Act's imposition of price ceilings on intrastate gas did not trigger the governmental escalator clause. It also found that the Kansas Act did not violate the Contract Clause, reasoning that Kansas has a legitimate interest in addressing and controlling the serious economic dislocations that the sudden increase in gas prices would cause, and that the Kansas Act reasonably furthered that interest ... The Supreme Court of Kansas, by unanimous vote, affirmed ...

The constitutional issue is whether the Kansas Act impairs ERG's contracts with KPL in violation of the Contract Clause ...

Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people." *Home Bldg. & Loan Assn. v. Blaisdell,* (1934) ...

The very existence of the governmental price escalator clause and the price redetermination clause indicates that the contracts were structured against the background of regulated gas prices. If deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act's adoption of the § 109 ceiling ...

To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes.

The State also has a legitimate interest in correcting the imbalance between the interstate and intrastate markets by permitting intrastate prices to rise only to the § 109 level ...

To analyze properly the Kansas Act's effect, however, we must consider the entire state and federal gas price regulatory structure. Only natural gas subject to indefinite price escalator clauses poses the danger of rapidly increasing prices in Kansas. Gas under contracts with fixed escalator clauses and interstate gas purchased by the utilities subject to § 109 would not escalate as would intrastate gas subject to indefinite price escalator clauses. The Kansas Act simply brings the latter category into line with old interstate gas prices by limiting the operation of the indefinite price escalator clauses. Finally, the Act is a temporary measure that expires when federal price regulation of certain categories of gas terminates.

The Kansas statute completes the regulation of the gas market by imposing gradual escalation mechanisms on the intrastate market, consistent with the new national policy toward gas regulation.

We thus resolve the constitutional issue against ERG ...

The regulation of energy production and use is a matter of national concern. Congress set out on a new path with the Natural Gas Policy Act of 1978. In pursuing this path, Congress explicitly envisioned that the States would regulate intrastate markets in accordance with the overall national policy. The Kansas Natural Gas Price Protection Act is one State's effort to balance the need to provide incentives for the production of gas against the need to protect consumers from hardships brought on by deregulation of a traditionally regulated commodity. We see no constitutional or statutory infirmity in Kansas' attempt. The judgment of the Supreme Court of Kansas is therefore

Affirmed.

Excerpted by Stella Kemp

Keystone Bituminous Coal Association v. DeBenedictis

480 U.S. 470 (1987)

> Decision: Affirmed
> Vote: 5-4
> Opinion: Stevens, joined by Brennan, White, Marshall, and Blackmun
> Dissent: Rehnquist, joined by Powell, O'Connor, and Scalia

JUSTICE STEVENS, delivered the opinion of the Court.

Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal. This lowering of the strata can have devastating effects ... In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades ...

Pennsylvania's Subsidence Act authorizes the Pennsylvania Department of Environmental Resources (DER) to implement and enforce a comprehensive program to prevent or minimize subsidence and to regulate its consequences. Section 4 of the Subsidence Act ... prohibits mining that causes subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries ... Section 6 of the Subsidence Act ... authorizes the DER to revoke a mining permit if the removal of coal causes damage to a structure or area protected by § 4 and the operator has not within six months either repaired the damage, satisfied any claim arising therefrom, or deposited a sum equal to the reasonable cost of repair with the DER as security.

In 1982, petitioners filed a civil rights action in the United States District Court for the Western District of Pennsylvania, seeking to enjoin officials of the DER from enforcing the Subsidence Act and its implementing regulations ...

The complaint alleges that Pennsylvania recognizes three separate estates in land: The mineral estate; the surface estate; and the "support estate ... " In the portions of the complaint that are relevant to us, petitioners alleged that both § 4 of the Subsidence Act, as implemented by the 50% rule and § 6 of the Subsidence Act, constitute a taking of their private property without compensation in violation of the Fifth and Fourteenth Amendments. They also alleged that § 6 impairs their contractual agreements in violation of Article I, § 10, of the Constitution ...

In rejecting petitioners' Contracts Clause claim, the District Court noted that there was no contention that the Subsidence Act or the DER regulations had impaired any contract to which the Commonwealth was a party. Since only private contractual obligations had been impaired, the court considered it appropriate to defer to the legislature's determinations concerning the public purposes served by the legislation. The court found that the adjustment of the rights of the contracting parties was tailored to those "significant and legitimate" public purposes ... At the parties' request, the District Court certified the facial challenge for appeal.

The Court of Appeals affirmed, agreeing that *Pennsylvania Coal* does not control, because the Subsidence Act is a legitimate means of "protect[ing] the environment of the Commonwealth, its economic future, and its wellbeing." ... In rejecting the argument that the support estate had been entirely destroyed, the Court of Appeals did not rely on the fact that the support estate itself constitutes a bundle of many rights, but rather considered the support estate as just one segment of a larger bundle of rights that invariably includes either the surface estate or the mineral estate ...

The court held that the impairment of private agreements effectuated by the Subsidence Act was justified by the legislative finding "that subsidence damage devastated many surface structures, and thus endangered the health, safety, and economic welfare of the Commonwealth and its people." We granted certiorari ...

In addition to their challenge under the Takings Clause, petitioners assert that § 6 of the Subsidence Act violates the Contracts Clause by not allowing them to hold the surface owners to their contractual waiver of liability for surface damage. Here too, we agree with the Court of Appeals and the District Court that the Commonwealth's strong public interests in the legislation are more than adequate to justify the impact of the statute on

petitioners' contractual agreements ...

Prior to the ratification of the Fourteenth Amendment, it was Article I, § 10, that provided the primary constitutional check on state legislative power. The first sentence of that section provides:

"No State shall enter into any Treaty ... coin Money ... pass any ... ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

U.S. Const., Art. I, § 10 ...

Unlike other provisions in the section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. The context in which the Contracts Clause is found, the historical setting in which it was adopted, and our cases construing the Clause, indicate that its primary focus was upon legislation that was designed to repudiate or adjust preexisting debtor-creditor relationships that obligors were unable to satisfy.

In assessing the validity of petitioners' Contracts Clause claim in this case, we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment. Petitioners claim that they obtained damages waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removes the surface owners' contractual obligations to waive damages. We agree that the statute operates as "a substantial impairment of a contractual relationship," and therefore proceed to the asserted justifications for the impairment ...

The record indicates that, since 1966, petitioners have conducted mining operations under approximately 14,000 structures protected by the Subsidence Act ... In any event, it is petitioners' position that, because they contracted with some previous owners of property generations ago, they have a constitutionally protected legal right to conduct their mining operations in a way that would make a shambles of all those buildings and cemeteries ...

By requiring the coal companies either to repair the damage or to give the surface owner funds to repair the damage, the Commonwealth accomplishes both deterrence and restoration of the environment to its previous condition. We refuse to second-guess the Commonwealth's determinations that these are the most appropriate ways of dealing with the problem. We conclude, therefore, that the impairment of petitioners' right to enforce the damages waivers is amply justified by the public purposes served by the Subsidence Act.

The judgment of the Court of Appeals is

Affirmed.

Excerpted by Stella Kemp

Modern Applications

Sveen v. Melin

584 U.S. ___ (2018)

> Decision: Reversed
> Vote: 8-1
> Majority: Kagan, joined by Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito and Sotomayor
> Dissent: Gorsuch

Justice Kagan delivered the opinion of the Court.

A Minnesota law provides that "the dissolution or annulment of a marriage revokes any revocable[ ] beneficiary designation[ ] made by an individual to the individual's former spouse." That statute establishes a default rule for use when Minnesotans divorce. If one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result. But if he does not, the policyholder may rename the ex-spouse as beneficiary.

We consider here whether applying Minnesota's automatic-revocation rule to a beneficiary designation made before the statute's enactment violates the Contracts Clause of the Constitution ...

In Minnesota, as across the nation, divorce courts have always had "broad discretion in dividing property upon dissolution of a marriage." *Maurer* v. *Maurer*, (Minn. 2001) ... In exercising that power, a court could revoke a beneficiary designation to a soon-to-be ex-spouse; or conversely, a court could mandate that the old designation remain ... Either way, the court, rather than the insured, would decide whether the ex-spouse would stay the beneficiary.

In contrast to the old law, Minnesota's new revocation-on-divorce statute starts from another baseline: the cancellation, rather than continuation, of a beneficiary designation. Enacted in 2002 to track the Code, the law provides that "the dissolution or annulment of a marriage revokes any revocable[ ] disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument." Minn. Stat. §524.2–804, subd. 1. The term "governing instrument" is defined to include an "insurance or annuity policy," along with a will and other will substitutes. §524.1–201 ...

In 1997, Sveen and Melin wed. The next year, Sveen purchased a life insurance policy. He named Melin as the primary beneficiary, while designating his two children from a prior marriage, Ashley and Antone Sveen, as the contingent beneficiaries. The Sveen-Melin marriage ended in 2007. The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations. In 2011, he passed away.

In this action, petitioners the Sveen children and respondent Melin make competing claims to the insurance proceeds ... Melin notes in reply that the Minnesota law did not yet exist when her former husband bought his insurance policy and

named her as the primary beneficiary. And she argues that applying the later-enacted law to the policy would violate the Constitution's Contracts Clause, which prohibits any state "Law impairing the Obligation of Contracts." Art. I, §10, cl. 1.

The District Court rejected Melin's argument and awarded the insurance money to the Sveens. But the Court of Appeals for the Eighth Circuit reversed. It held that a "revocation-upon-divorce statute like [Minnesota's] violates the Contract Clause when applied retroactively."

We granted certiorari ... to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a pre-existing agreement's beneficiary designation ...

... the Minnesota statute furthers the policyholder's intent in many cases—indeed, the drafters reasonably thought in the typical one ... Although there are exceptions, most divorcees do not aspire to enrich their former partners. (And that is true even when an ex-spouse has custody of shared children, given the many ways to provide them with independent support.) The Minnesota statute (like the model code it tracked) applies that understanding to beneficiary designations in life insurance policies and other will substitutes ...

The law puts in place a presumption about what an insured wants after divorcing. But if the presumption is wrong, the insured may overthrow it. And he may do so by the simple act of sending a change-of-beneficiary form to his insurer ... The statute thus reduces to a paperwork requirement (and a fairly painless one, at that): File a form and the statutory default rule gives way to the original beneficiary designation.

In cases going back to the 1800s, this Court has held that laws imposing such minimal paperwork burdens do not violate the Contracts Clause. One set of decisions addresses so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices. In *Jackson* v. *Lamphire*, (1830), for example, the Court rejected a Contracts Clause challenge to a New York law granting title in property to a later rather than earlier purchaser whenever the earlier had failed to record his deed. It made no difference, the Court held, whether the unrecorded deed was "dated before or after the passage" of the statute; in neither event did the law's modest recording condition "impair[ ] the obligation of contracts."

Likewise, in *Vance* v. *Vance*, (1883), the Court upheld a statute rendering unrecorded mortgages unenforceable against third parties—even when the mortgages predated the law ...

And more recently, in *Texaco, Inc.* v. *Short*, (1982), the Court held that a statute terminating pre-existing mineral interests unless the owner filed a "statement of claim" in a county office did not "unconstitutionally impair" a contract ...

[A]s we have shown, that law overrides a beneficiary designation only when the insured fails to send in a form to his insurer ...

But we see no meaningful distinction among all these laws. The old statutes also "act[ed] on the contract" in a significant way. They added a paperwork obligation nowhere found in the original agreement—"record the deed," say, or "notify the landowner." And they informed a contracting party that unless he complied, he could not gain the benefits of his bargain. Or viewed conversely, the Minnesota statute also "impose[s] a consequence" for not satisfying a burden outside the contract. For as we have shown, that law overrides a beneficiary designation only when the insured fails to send in a

form to his insurer. Of course, the statutes (both old and new) vary in their specific mechanisms. But they all make contract benefits contingent on some simple filing—or more positively spun, enable a party to safeguard those benefits by taking an action. And that feature is what the Court, again and again, has found dispositive.

First, not all the old statutes, as a formal matter, confined the consequence of noncompliance to the remedial sphere … And second, even when the consequence formally related to enforcement—for example, precluding an earlier purchaser from contesting a later one's title—the laws in fact wiped out substantive rights. Failure to record or notify, as noted earlier, would mean that the contracting party lost what (according to his agreement) was his land or mortgage or mineral interest … Once again: Just like Minnesota's statute, the laws discussed above hinged core contractual benefits on compliance with noncontractual paperwork burdens. When all is said and done, that likeness controls.

For those reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Stella Kemp

The Takings Clause

Case List

Defining a Taking

United States v. Causby (1946)
Armstrong v. United States (1960)
Penn Central Transportation Co. v. City of New York (1978)
First English Evangelical Lutheran Church v. Los Angeles County (1987)
Nollan v. California Coastal Commission (1987)
Lucas v. South Carolina Coastal Council (1992)
Horne v. Department of Agriculture (2015)

Defining Public Use and Its Limits

Pennsylvania Coal Co. v. Mahon (1922)
Berman v. Parker (1954)
Agins v. City of Tiburon (1980)
Hawaii Housing Authority v. Midkiff (1984)
Kelo v. City of New London (2005)

War and Takings

United States v. Caltex Inc. (1952)

Defining a Taking

United States v. Causby

328 U.S. 256 (1946)

> Decision: Reversed
> Vote: 5-2
> Majority: Douglas, joined by Reed, Frankfurter, Murphy, and Rutledge
> Dissent: Black, joined by Burton

Justice Jackson took no part in the consideration or decision of the case.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking, and entered judgment for the respondent. ...

Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina ... The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the national emergency, whichever is the earlier. ...

Various aircraft of the United States use this airport bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The north-west-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was $2,000 [this is $38,000 in 2023 dollars] ...

Under those statutes [Air Commerce Act 1926 & Civil Aeronautics Act 1938] the United States has 'complete and exclusive national sovereignty in the air space' over this country. They grant any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable air space of the United States.' And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' And it is provided that 'such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation.' Id. It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *cujus est solum ejus est usque and coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

But that general principle does not control the present case. For the United States conceded on oral argument that, if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller,* (1939). Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as the existing use ... If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it ...

Here, enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value. ...

We have said that the airspace is a public highway. Yet it is obvious that, if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as they can occupy or use in connection with the land. *See Hinman v. Pacific Air Transport,* (1936). The fact that he does not occupy it in a physical sense — by the erection of buildings and the like — is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that, if the United States erected an

elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land ... We think that the landowner, as an incident to his ownership, has a claim to it, and that invasions of it are in the same category as invasions of the surface.

In this case ... the damages were not merely consequential. They were the product of a direct invasion of respondents' domain. As stated in *United States v. Cress,* (1917), " ... it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property, and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land ...

The judgment is reversed, and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

MR. JUSTICE BLACK, dissenting:

... Since the effect of the Court's decision is to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since, in my view, the Constitution does not contain such barriers, I dissent ...

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a "taking." Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property. But the allegation of noise and glare resulting in damages constitutes at best, an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, or were the result of negligence. ... The concept of taking property, as used in the Constitution, has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. ...

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below ... I think that the Constitution entrusts Congress with full power to con-

trol all navigable airspace. Congress has already acted under that power. ... "Navigable air-space" was defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. § 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. ...

... Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and national problems. In my opinion, this case should be reversed on the ground that there has been no "taking" in the Constitutional sense.

Excerpted by Ethan Derstine

Armstrong v. United States

364 U.S. 40 (1960)

> Decision: Reversed and remanded
> Vote: 6-3
> Majority: Black, joined by Whittaker, Douglas, Brennan, and Warren
> Concurrence: Stewart
> Dissent: Harlan, joined by Frankfurter and Clark

MR. JUSTICE BLACK delivered the opinion of the Court.

In this action petitioners assert materialmen's liens under state law for materials furnished to a prime contractor building boats for the United States, and seek just compensation under the Fifth Amendment for the value of their liens on accumulated materials and uncompleted work which have been conveyed to the United States.

The United States entered into a contract with the Rice Shipbuilding Corporation for the construction of 11 navy personnel boats. The contract provided that, in the event of default by Rice, the Government could terminate the contract and require Rice to transfer title and deliver to the Government all completed and uncompleted work, together with all manufacturing materials acquired by Rice for building the boats ... Upon Rice's default, the Government exercised its option as to 10 of the boat hulls still under construction; Rice executed an itemized "Instrument of Transfer of Title" conveying to the United States the hulls and all manufacturing materials then on hand; and the Government removed all of these properties to out-of-state naval ship-yards for use in the completion of the boats. When the transfer occurred, petitioners had not been paid for their materials, and they have not been paid since. Petitioners therefore contended that they had liens under Maine law ...

Claiming valid liens on the hulls and manufacturing materials at the time they were transferred by Rice to the United States, petitioners asserted that the Government's action destroyed their liens by making them unenforceable and that this constituted a taking of their property without just compensation, in violation of the Fifth Amendment. The Court

of Claims, relying on *United States v. Ansonia Brass & Copper Co.,* (1910), held that petitioners never acquired valid liens on the hulls or the materials transferred to the Government, and that therefore there had been no taking of any property owned by them ...

The Court of Claims reached its conclusion from the correct premise that laborers and materialmen can acquire no liens on a "public work." ... It reasoned that, because the contract between Rice and the United States contemplated that title to the vessels would eventually vest in the Government, the Government had "inchoate title" to the materials supplied by petitioners, rendering such materials "public works" immune from the outset to petitioners' liens. We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it ...

The terms of the contract between Rice and the United States show conclusively that Rice, not the United States, had title to the property when petitioners furnished their materials ... That title was to remain in Rice during performance of the work, and ... private liens could attach to the property while Rice owned it ...

The final question is whether the Government's action constituted a "taking" of petitioners' property interests within the meaning of the Fifth Amendment. Before the United States compelled Rice to transfer the hulls and all materials held for future use in building the boats, petitioners had valid liens under Maine law against both the hulls and whatever unused materials which petitioners had furnished. Before transfer, these lines were enforceable by attachment against both the hulls and all materials. After transfer to the United States, the liens were still valid, *United States v. Alabama,* (1941), but they could not be enforced, because of the sovereign immunity of the Government and its property from suit. The result of this was a destruction of all petitioners' property rights under their liens, although, as we have pointed out, the liens were valid and had compensable value. Petitioners contend that destruction of their liens under the circumstances here is a "taking." The United States denies this, largely on the premise that inability of petitioners to enforce their liens because of immunity of the Government and its property from suit cannot amount to a "taking."

We hold that there was a taking of these liens for which just compensation is due under the Fifth Amendment. It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. *Omnia Commercial Co. v. United States,* (1923). This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential," and therefore not compensable ...

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking," and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government, for its own advantage, destroyed the value of the liens, something ... which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them, and, in the circumstances of this case, did thereby take the property value of those liens within the meaning of the Fifth Amendment ... [The government] was the direct, positive beneficiary.

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. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. *Cf. Thibodo v. United States,* (1955).

The judgment is reversed, and the cause is remanded to the Court of Claims for further proceedings to determine the value of the property taken.

Reversed and remanded.

Excerpted by Ethan Derstine

Penn Central Transportation Co. v. City of New York

438 U.S. 104 (1978)

> Decision: Affirmed
> Vote: 6-3
> Majority: Brennan, joined by Stewart, White, Marshall, Blackmun, and Powell
> Dissent: Rehnquist, joined by Burger and Stevens

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks — in addition to those imposed by applicable zoning ordinances — without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments ...

New York City, ... acting pursuant to a New York State enabling Act, adopted its Landmarks Preservation Law in 1965 ...

The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad-based 11-member agency assisted by a technical staff ... The Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring ... due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property ...

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features" ...

Second, the owner may apply to the Commission for a certificate of "appropriateness." ... The final procedure — seeking a certificate of appropriateness on the ground of "insufficient return," *see* § 207.0 — provides special mechanisms ... to ensure that designation does not cause economic hardship ...

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the "city tax block" it occupies a "landmark site." ...

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP) ... Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter ...

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal ... The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals ...

Appellants filed suit in New York Supreme Court [In New York State, the trial courts are called Supreme Courts] ... claiming, *inter alia,* that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment ...

The [New York Supreme Court] Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property ...

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which, of course, is made applicable to the States through the Fourteenth Amendment, *see Chicago, B. & Q. R. Co. v. Chicago,* (1807), and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

[Appellants] first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby, supra.* They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights ...

The submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable ...

Secondly, appellants ... argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in

property value, standing alone, can establish a "taking," ... Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic district legislation ... but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it ...

We now must consider whether the interference with appellant's property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co. v. Mahon,* (1922) ...

The New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits, but contemplates, that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those preexisting air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable ... [albeit they] may well not have constituted "just compensation" if a "taking" had occurred ... On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property.

Affirmed.

Excerpted by Ethan Derstine

First English Evangelical Lutheran Church v. Los Angeles County
482 U.S. 304 (1987)

> Decision: Reversed and Remanded
> Vote: 6-3
> Majority: Rehnquist, joined by Brennan, White, Marshall, Powell, and Scalia
> Dissent: Stevens joined in part by Blackmun and O'Connor (parts I, III)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property.

In 1957, appellant First English Evangelical Lutheran Church purchased a 21-acre parcel of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. The Middle Fork is the natural drainage channel for a watershed area owned by the National Forest Service. Twelve of the acres owned by the church are flat land, and contained a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek. The church operated on the site a campground, known as "Lutherglen," as a retreat center and a recreational area for handicapped children.

In July, 1977, a forest fire denuded the hills upstream from Lutherglen, destroying approximately 3,860 acres of the watershed area and creating a serious flood hazard. Such flooding occurred on February 9 and 10, 1978, when a storm dropped 11 inches of rain in the watershed. The runoff from the storm overflowed the banks of the Mill Creek, flooding Lutherglen and destroying its buildings.

In response to the flooding of the canyon, appellee County of Los Angeles adopted Interim Ordinance No. 11,855 in January, 1979. The ordinance provided that

"[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon. ... "

The California Court of Appeal has thus held that, regardless of the correctness of appellant's claim that the challenged ordinance denies it "all use of Lutherglen," appellant may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it. The constitutional question pretermitted in our earlier cases is therefore squarely presented here ... We now turn to the question whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings.

... "Temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

... The valuation of property which has been taken must be calculated as of the time of the taking, and ... depreciation in value of the property by reason of preliminary activity is not chargeable to the government ... It would require a considerable extension [of precedent] ... to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.

Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, "permit a court, at the behest of a private person, to require the ... Government to exercise the power of eminent domain. ... " We merely hold that, where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeal is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, joined in part by JUSTICE BLACKMUN and JUSTICE O'CONNOR, dissenting.

This Court clearly has the authority to decide this case by ruling that the complaint did not allege a taking under the Federal Constitution, and therefore to avoid the novel constitutional issue that it addresses ...

"Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Keystone Bituminous Coal Assn. v. DeBenedictis,* (1987) ... Thus, in order to protect the health and safety of the community, government ... surely may restrict access to hazardous areas — for example ... land in the path of a potentially life-threatening flood. When a governmental entity imposes these types of health and safety regulations, it may not be "burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

In this case, the legitimacy of the county's interest in the enactment of Ordinance No. 11,855 is apparent from the face of the ordinance, and has never been challenged ...

Thus, although the Court uses the allegations of this complaint as a springboard for its discussion of a discrete legal issue, it does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the county's effort to preserve life and property could ever constitute a taking. As far as the United States Constitution is concerned, the claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits.

...

There may be some situations in which even the temporary existence of a regulation has such severe consequences that invalidation or repeal will not mitigate the damage enough to remove the "taking" label. This hypothetical situation is what the Court calls a "temporary taking." But, contrary to the Court's implications, the fact that a regulation would constitute a taking if allowed to remain in effect permanently is by no means dispositive of the question whether the effect that the regulation has already had on the property is so severe that a taking occurred during the period before the regulation was invalidated.

A temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid. At least with respect to physical takings, the Court has so held ...

But our cases also make it clear that regulatory takings and physical takings are very different in this, as well as other, respects. While virtually all physical invasions are deemed takings, *see, e.g., Loretto, supra; United States v. Causby,* (1946), a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value ... This diminution of value inquiry is unique to regulatory takings. Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings. Some dividing line must be established between everyday regulatory inconveniences and those so severe that they constitute takings. ...

Until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause ...

In my opinion, the question whether a "temporary taking" has occurred should not be answered by simply looking at the reason a temporary interference with an owner's use of his property is terminated. Litigation challenging the validity of a land use restriction gives rise to a delay that is just as "normal" as an administrative procedure seeking a variance or an approval of a controversial plan. Just because a plaintiff can prove that a land use restriction would constitute a taking if allowed to remain in effect permanently does not mean that he or she can also prove that its temporary application rose to the level of a constitutional taking.

I respectfully dissent.

Excerpted by Ethan Derstine

Nollan v. California Coastal Commission

483 U.S. 825 (1987)

> Vote: 5-4, reversed
> Majority: Scalia, joined by Rehnquist, White, Powell and O'Conner
> Dissent: Brennan, joined by Marshall
> Dissent: Blackmun
> Dissent: Stevens, joined by Blackmun

JUSTICE SCALIA delivered the opinion of the Court.

The Nollans own a beachfront lot in Ventura County, California ...

The Nollans originally leased their property with an option to buy ...

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so ... they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property ... The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement ...

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest, but "a mere restriction on its use" is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them ...

The Commission argues that a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house — for example, a height limitation, a width restriction, or a ban on fences — so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional ... [T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights,

that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power, rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition ... The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but "an out-and-out plan of extortion." *J. E. D. Associates, Inc. v. Atkinson,* (1981) ...

The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach ...

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes ...

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective ...

The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," *see* U.S.Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public ... The burden produced by the diminution in visual access — the impression that the beach is not open to the public — is thus directly alleviated by the provision for public access over the dry sand ...

The deed restriction on which permit approval was conditioned would directly address ... [the] threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of that right ...

The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development ...

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any preexisting property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge ...

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access ...

State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.

I dissent.

Excerpted by Ethan Derstine

Lucas v. South Carolina Coastal Council

505 U.S. 1003 (1992)

Decision: Reversed
Vote: 6-2
Majority: Scalia, joined by Rehnquist, White, O'Connor and Thomas
Concurrence: Kennedy (in judgment)
Dissent: Blackmun
Dissent: Stevens
Statement: Souter

JUSTICE SCALIA delivered the opinion of the Court.

In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless ... " This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation."

...

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon,* (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property ... Justice Holmes recognized in *Mahon,* however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits ...

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment ... We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property ...

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land ... As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land ...* "

The *functional* basis for permitting the government, by regulation, to affect property values without compensation-that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *[Mahon].,* at 413-does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses ...

It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate-a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power ... We made this very point in *Penn Central Transportation Co.,* where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness" ...

Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield ...

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"-which require compensation-from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed ...

South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

The judgment is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Excerpted by Ethan Derstine

Horne v. Department of Agriculture

576 U.S. 350 (2015)

> Decision: Reversed
> Vote: 8-1
> Majority: Roberts, joined by Scalia, Kennedy, Thomas, Alito; Ginsburg, Breyer, and Kagan (Parts I and II only)
> Concurrence: Thomas
> Concur/Dissent: Breyer,, joined by Ginsburg and Kagan
> Dissent: Sotomayor

Chief Justice Roberts delivered the opinion of the Court.

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from imposing such a demand on the growers without just compensation. ...

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' *Arkansas Game & Fish Comm'n v. United States*, (2012), applies only to real property and not to personal property." The answer is no. ...

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home ...

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee ... The Committee's raisins must be physically segregated from free-tonnage raisins ... Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government ... The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of " them, *Loretto*, with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order ...

The second question presented asks "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion." The answer is no ...

The Government contends that because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place. The dissent agrees, arguing that this possible future revenue means there has been no taking under *Loretto*. ...

The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here. ...

The third question presented asks "Whether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking." The answer, at least in this case, is yes.

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." ...

"Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law ...

The Government and dissent rely heavily on *Ruckelshaus* v. *Monsanto Co.*, (1984). There we held that the Environmental Protection Agency could require companies manufacturing pesticides, fungicides, and rodenticides to disclose health, safety, and environmental information about their products as a condition to receiving a permit to sell those products ... [T]hose manufacturers were not subjected to a taking because they received a "valuable Government benefit" in exchange—a license to sell dangerous chemicals.

The taking here cannot reasonably be characterized as part of a similar voluntary exchange. In one of the years at issue here, the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the "benefit" of being allowed to sell the remaining 53 percent ... Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point ...

Raisins ... are private property—the fruit of the growers' labor ... Any physical taking of them for public use must be accompanied by just compensation.

The judgment of the United States Court of Appeals for the Ninth Circuit is *reversed*.

Justice Sotomayor, dissenting.

The Hornes claim, and the Court agrees, that the Raisin Marketing Order, (hereinafter Order), effects a *per se* taking under our decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, (1982). But *Loretto* sets a high bar for such

claims: It requires that each and every property right be destroyed by governmental action before that action can be said to have effected a *per se* taking. Because the Order does not deprive the Hornes of all of their property rights, it does not effect a *per se* taking ...

We have held that the government effects a *per se* taking when it requires a property owner to suffer a "permanent physical occupation" of his or her property. *Loretto*. In my view, however, *Loretto*—when properly understood—does not encompass the circumstances of this case because it only applies where all property rights have been destroyed by governmental action. Where some property right is retained by the owner, no *per se* taking under *Loretto* has occurred ...

What our jurisprudence ... makes plain is that a claim of a *Loretto* taking is a bold accusation that carries with it a heavy burden. To qualify as a *per se* taking under *Loretto*, the governmental action must be so completely destructive to the property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task. Simply put, the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking under *Loretto* ...

The Hornes do not use the raisins that are subject to the reserve requirement—which are, again, the only raisins that have allegedly been unlawfully taken—by eating them, feeding them to farm animals, or the like. They wish to use those reserve raisins by selling them, and they value those raisins only because they are a means of acquiring money. While the Order infringes upon the amount of that potential income, it does not inexorably eliminate it. Unlike the law in *Loretto*, see 458 U. S., at 436, the Order therefore cannot be said to have prevented the Hornes from making *any* use of the relevant property.

Because a straightforward application of our precedents reveals that the Hornes have not suffered a *per se* taking, I would affirm the judgment of the Ninth Circuit. The Court reaches a contrary conclusion only by expanding our *per se* takings doctrine in a manner that is as unwarranted as it is vague. I respectfully dissent.

Excerpted by Ethan Derstine

Defining Public Use and Its Limits

Pennsylvania Coal Co. v. Mahon

260 U.S. 393 (1922)

> Decision: Reversed
> Vote: 8-1
> Majority: Holmes, joined by Taft, McKenna, Day, Van Devanter, Pitney, McReynolds and Sutherland
> Dissent: Brandeis

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity [a legal process whereby a party to a contract brings an action asking for equitable relief] brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence [gradual caving in or sinking] of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but, in express terms, reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that, whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania ... commonly known there as the Kohler Act ...

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power ...

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.,* (1917). What

makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Th[u]s we think that we are warranted in assuming that the statute does ...

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go — and, if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston,* (1879). In general, it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R.R. Co.,* (1897). We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change ...

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS dissenting.

Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation, and the power to prohibit extends alike to the manner, the character, and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of

its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious — as it may because of further change in local or social conditions — the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public because, incidentally, some private persons may thereby receive gratuitously valuable special benefits ... But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means merely because it deprives the owner of the only use to which the property can then be profitably put ... Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense ... If, by mining anthracite coal, the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole ...

Excerpted by Ethan Derstine

Berman v. Parker

348 U.S. 26 (1954)

> Decision: Affirmed
> Vote: 9-0
> Majority: Douglas, joined by Warren, Black, Reed, Frankfurter, Jackson, Burton, Clark and Minton

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court which dismissed a complaint seeking to enjoin the condemnation of appellants' property under the District of Columbia Redevelopment Act of 1945 ... The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property. The District Court sustained the constitutionality of the Act.

By § 2 of the Act, Congress made a legislative determination that,

"owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose. "

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

...

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs ... This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one ...

Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it ... Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. 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. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

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 ... 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. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects ...

The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

The judgment of the District Court, as modified by this opinion, is

Affirmed.

Excerpted by Ethan Derstine

Agins v. City of Tiburon

447 U.S. 255 (1980)

> Decision: Affirmed
> Vote: 9-0
> Majority: Powell, joined by Burger, Brennan, Stewart, white, Marshall, Blackmun, Rehnquist and Stevens

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether municipal zoning ordinances took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land ... In response, the city adopted two ordinances that ... placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances ...

Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is, as yet, no concrete controversy regarding the application of the specific zoning provisions ... Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land ... The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken ... the question necessarily requires a weighing of private and public interests ...

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate ...

There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land ... nor extinguish a fundamental attribute of ownership ... The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments ...

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affirmed.

Excerpted by Ethan Derstine

Hawaii Housing Authority v. Midkiff

467 U.S. 229 (1984)

> Decision: Reversed
> Vote: 8-0
> Majority: O'Connor,, joined by Burger, Brennan, White, Blackmun, Powell, Rehnquist, and Stevens.
> Not participating: Marshall

JUSTICE O'CONNOR delivered the opinion of the Court.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State ...

In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners ... The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles. The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare. To redress these problems, the legislature decided to compel the large landowners to break up their estates ... The landowners claimed that the federal tax laws were the primary reason they previously had chosen to lease, and not sell, their lands. Therefore, to accommodate the needs of both lessors and lessees, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), which created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple ...

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States,* (1925), which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." ...

In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

...

On this basis, we have no trouble concluding that the Hawaii Act is constitutional ... Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers ... We cannot disapprove of Hawaii's exercise of this power ...

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 — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market ... is a rational exercise of the eminent domain power ...

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public.

"It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co. v. Los Angeles*, (1923). "[W]hat in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair." *Block v. Hirsh*, (1921). As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.

Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power ... Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government, and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals, but to attack certain perceived evils of concentrated property ownership in Hawaii — a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied. Accordingly, we reverse the judgment of the Court of Appeals, and remand these cases for further proceedings in conformity with this opinion.

It is so ordered.

Excerpted by Ethan Derstine

Kelo v. City of New London

545 U.S. 469 (2005)

> Decision: Affirmed
> Vote: 5-4
> Majority: Stevens, joined by Kennedy, Souter, Ginsburg and Breyer
> Concurrence: Kennedy
> Dissent: O'Connor, joined by Rehnquist, Scalia and Thomas
> Dissent: Thomas

Justice Stevens delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution ...

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment ...

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case ...

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field ...

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs ... For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference ... Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized ...

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

Justice O'Connor, with whom The Chief Justice, Justice Scalia, and Justice Thomas join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

"An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority ... . A few instances will suffice to explain what I mean ... . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded–*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public–in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent

ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property–and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut ...

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. To Pet. For Cert. 5 ...

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power ... Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment ...

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright* v. *United States*, (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown* v. *Legal Foundation of Wash.*, (2003) ...

The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security ...

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning ...

Our cases have generally identified three categories of takings that comply with the public use requirement ... First, the sovereign may transfer private property to public ownership–such as for a road, a hospital, or a military base ... Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available

for the public's use–such as with a railroad, a public utility, or a stadium ... [and] we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D. C ... In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees ...

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose ... Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff* ...

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public–such as increased tax revenue, more jobs, maybe even aesthetic pleasure ...

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory ...

Excerpted by Ethan Derstine

War and Takings

United States v. Caltex Inc.

344 U.S. 149 (1952)

> Decision: Reversed
> Vote: 7-2
> Majority: Vinson, joined by Reed, Frankfurter, Jackson, Clark, Minton and Burton
> Dissent: Douglas, joined by Black

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Each of the respondent oil companies owned terminal facilities in the Pandacan district of Manila at the time of the Japanese attack upon Pearl Harbor. These were used to receive, handle and store petroleum products from incoming ships and to release them for further distribution throughout the Philippine Islands. Wharves, rail and automotive equipment, pumps, pipelines, storage tanks, and warehouses were included in the property on hand at the outbreak of the war, as well as a normal supply of petroleum products ...

On December 12, 1941, the United States Army, through its Chief Quartermaster, stationed a control officer at the terminals. Operations continued at respondents' plants, but distribution of the petroleum products for civilian use was severely restricted. A major share of the existing supplies was requisitioned by the Army ...

The Chief Engineer on the staff of the Commanding General addressed to each of the oil companies letters stating that the Pandacan oil deposits "are requisitioned by the U.S. Army." The letters further stated: "Any action deemed necessary for the destruction of this property will be handled by the U.S. Army." ...

At 5:40 p.m., December 31, 1941, while Japanese troops were entering Manila, Army personnel completed a successful demolition. All unused petroleum products were destroyed, and the facilities were rendered useless to the enemy. The enemy was deprived of a valuable logistic weapon.

After the war, respondents demanded compensation for all of the property which had been used or destroyed by the Army. The Government paid for the petroleum stocks and transportation equipment which were either used or destroyed by the Army, but it refused to compensate respondents for the destruction of the Pandacan terminal facilities ...

In *United States v. Pacific R. Co.,* (1887), Justice Field, speaking for a unanimous Court, discussed the question at length. That case involved bridges which had been destroyed during the war between the states by a retreating Northern Army to impede the advance of the Confederate Army. Though the point was not directly involved, the Court raised the question of whether this act constituted a compensable taking by the United States, and answered it in the negative:

"The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general ... The safety of the state in such cases overrides all considerations of private loss."

It may be true that this language also went beyond the precise questions at issue. But the principles expressed were neither novel nor startling, for the common law had long recognized that, in times of imminent peril — such as when fire threatened a whole community — the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved ...

Had the Army hesitated, had the facilities only been destroyed after retreat, respondents would certainly have no claims to compensation. The Army did not hesitate. It is doubtful that any concern over the legal niceties of the situation entered into the decision to destroy the plants promptly, while there was yet time to destroy them thoroughly. Nor do we think it legally significant that the destruction was effected prior to withdrawal. The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy.

The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that, in wartime, many losses must be attributed solely to the fortunes of war, and not to the sovereign. No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts. But the general principles laid down in the *Pacific Railroad* case seem especially applicable here. Viewed realistically, then, the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy was no different than the destruction of the bridges in the *Pacific Railroad* case. Adhering to the principles of that case, we conclude that the court below erred in holding that respondents have a constitutional right to compensation on the claims presented to this Court.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I have no doubt that the military had authority to select this particular property for destruction. But, whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprived the enemy of a valuable logistic weapon.

It seems to me that the guiding principle should be this: whenever the government determines that one person's property — whatever it may be — is essential to the war effort, and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

Excerpted by Ethan Derstine

Substantive Due Process

Case List

Creating the Right

Loan Association v. Topeka (1874)
Holden v. Hardy (1898)

Expanding Due Process

Lochner v. New York (1905)
Muller v. Oregon (1908)
Adams v. Tanner (1917)
Bunting v. Oregon (1917)
Adkins v. Children's Hospital (1923)

Retracting the Doctrine

Home Loan Association v. Blaisdell (1934)
Nebbia v. New York (1934)
West Coast Hotel v. Parrish (1937)
Williamson v. Lee Optical Co. (1955)

Modern Application

State Farm Insurance v. Campbell (2003)

Creating the Right

Loan Association v. Topeka

87 U.S. 655 (1874)

> Decision: Affirmed
> Vote: 8-1
> Majority: Miller, joined by Swayne, Davis, Field, Strong, Bradley, Hunt, and Waite
> Dissent: Clifford

Mr. Justice MILLER delivered the opinion of the Court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29th, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain. ...

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts ... imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose.

It is therefore to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference ...

The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every state in the Union ... It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. ...

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose ... In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies ... valid on any other ground than that the purpose for which the taxes were levied was a public use ... The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain — the roads which they built being under their control, and not that of the state — were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the state, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals ... and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation. ...

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is therefore the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch* v. *The State of Maryland* (1819), that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact

that the existing tax of ten per cent imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised ...

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose*. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal ...

But in the case before us ... there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. ...

We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose.

The act of March 2d 1872, concerning internal improvements, can give no assistance to these bonds. If we could hold that the corporation for manufacturing wrought-iron bridges was within the meaning of the statute, which seems very difficult to do, it would still be liable to the objection that money raised to assist the company was not for a public purpose, as we have already demonstrated.

JUDGMENT AFFIRMED.

Excerpted by Walter DePuy

Holden v. Hardy

169 U.S. 366 (1898)

> Vote: 6-2
> Majority: Brown, joined by Harlan, Gray, Fuller, Shiras, White, and McKenna
> Dissent: Brewer and Peckham

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the Court.

This case involves the constitutionality of an act of the legislature of Utah ... entitled "An act regulating the hours of employment in underground mines and in smelters and ore reduction works ... " The following are the material provisions:

"SEC. 1. The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger. ...

"SEC. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of sections one and two of this act, shall be guilty of a misdemeanor."

The Supreme Court of Utah was of opinion that if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the constitution of the State, which declared that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines." ...

The validity of the statute in question is, however, challenged upon the ground of an alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the laborer of his property without due process of law, and denies to them the equal protection of the laws. As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together.

The Fourteenth Amendment, which was finally adopted July 28, 1868, largely expanded the power of the Federal courts and Congress, and for the first time authorized the former to declare invalid all laws and judicial decisions of the States abridging the rights of citizens or denying them the benefit of due process of law. ...

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees* v. *Hoboken Land Co.* (1856), as anywhere. He said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. ... To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? ... 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 proceeding 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." ...

The latest utterance of this court upon this subject is contained in the case of *Allgeyer* v. *Louisiana* (1897), in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. ...

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. ...

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

We concur in the following observations of the Supreme Court of Utah in this connection in its opinion in No. 2:

... Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government."

The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. ...

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has

been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them, that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. ...

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore,

Affirmed.

Excerpted by Walter DePuy

Expanding Due Process

Lochner v. New York

198 U.S. 45 (1905)

> Vote: 5-4
> Majority: Peckham, joined by Brewer, Brown, Fuller, and McKenna
> Dissent: Harlan, joined by White and Day
> Dissent: Holmes

Mr. Justice PECKHAM delivered the opinion of the Court.

The indictment, it will be seen, charges that the plaintiff in error violated ... the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case ... which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form ... The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employee may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer* v. *Louisiana* (1897). Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union ... Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its

police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail — the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden* v. *Hardy* (1898). A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency.

The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden* v. *Hardy* which covers the case now before us ...

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State, it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State?, and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State ... Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. ...

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature ...

It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? ... No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family ... It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts. ...

The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the

legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare. ...

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida County must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Reversed.

Excerpted by Walter DePuy

Muller v. Oregon

208 U.S. 412 (1908)

> Vote: 9-0
> Decision: Affirmed
> Majority: Brewer, joined by Day, Fuller, Harlan, Holmes, McKenna, Moody, Peckham, and White

Mr. Justice BREWER delivered the opinion of the Court.

On February 19, 1903, the legislature of the State of Oregon passed an act ... the first section of which is in these words:

"SEC. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

Section 3 made a violation of the provisions of the prior sections a misdemeanor, subject to a fine of not less than $10 nor more than $25. On September 18, 1905, an information was filed in the Circuit Court of the State for the county

of Multnomah, charging that the defendant "on the 4th day of September, A.D. 1905, in the county of Multnomah and State of Oregon, then and there being the owner of a laundry, known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female ... to work more than ten hours in said laundry on said 4th day of September, A.D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The Supreme Court of the State affirmed the conviction, *State* v. *Muller*, whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry. ...

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. ...

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they [women] stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner* v. *New York* (1905) that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor. ...

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract ...

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not,

by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the well-being of the race — justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all ...

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

For these reasons, and without questioning in any respect the decision in *Lochner* v. *New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is

Affirmed.

Excerpted by Walter DePuy

Adams v. Tanner

244 U.S. 590 (1917)

> Vote: 5-4
> Decision: Reversed
> Majority: McReynolds, joined by White, Day, Van devanter, and Pitney
> Dissent: Brandeis, joined by McKenna, Holmes and Clarke

Mr. Justice McReynolds delivered the opinion of the Court.

Initiative Measure Number 8 — popularly known as "The Employment Agency Law" — having been submitted to the people of Washington at the general election, received a majority vote and was thereafter declared a law, effective December 3, 1914, as provided by the state constitution. It follows:

"Be it enacted by the People of the State of Washington:

"Section 1. The welfare of the State of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The State of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment ... results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any employment agent ... to demand or receive ... from any person seeking employment ... any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days." ...

The bill alleges "that the employment business consists in securing places for persons desiring to work" and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation ...

We have held employment agencies are subject to police regulation and control. "The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them," *Brazee* v. *Michigan* (1916). But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. ...

A suggestion in behalf of the State that while a pursuit of this kind "may be beneficial to some particular individuals, or in specific cases, economically it is certainly non-useful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked ...

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." *Murphy* v. *California* (1912).

We are of opinion that Initiative Measure Number 8 as construed by the Supreme Court of Washington is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business. It may not therefore be enforced against them.

The judgment of the court below is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

Excerpted by Walter DePuy

Bunting v. Oregon

423 U.S. 426 (1917)

> Vote: 5-3
> Decision: Affirmed
> Majority: McKenna, joined by Holmes, Day, Pitney, and Clarke
> Dissent: White
> Dissent: Van Devanter
> Dissent: McReynolds
> Not Participating: Brandeis

Mr. Justice MCKENNA delivered the opinion of the Court.

Indictment charging a violation of a statute of the State of Oregon, § 2 of which provides as follows:

"No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however*, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage."

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lakeview Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the Fourteenth Amendment of the Constitution of the United States and the Constitution of Oregon.

The demurrer was overruled; and the defendant, after arraignment, plea of not guilty and trial, was found guilty. A motion in arrest of judgment was denied and he was fined $50 ...

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the State, as the Supreme Court of the State decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours of service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the State in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day; and § 2, as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word there can be no doubt of its purpose, and the Supreme Court of the

State has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties ... "

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories and manufacturing establishments to pay more for labor than the actual market value thereof." ... To this plaintiff in error adds that he was convicted, not for working an employee during a busy season for more than ten hours, but for not paying him more than the market value of his services.

There is a certain verbal plausibility in the contention that it was intended to permit 13 hours' work if there be 15 1/2 hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission ... We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodation — abuses prevented by the requirement of higher wages ...

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced to the wisdom of its exercise. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal. ...

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9 3/4; in Denmark, 9 3/4; in Norway, 10; Sweden, France, and Switzerland, 10 1/2; Germany, 10 1/4; Belgium, Italy, and Austria, 11; and in Russia, 12 hours ... "

Further discussion we deem unnecessary.

Judgment affirmed.

Excerpted by Walter DePuy

Adkins v. Children's Hospital

261 U.S. 525 (1923)

> Vote: 5-3
> Decision: Affirmed
> Majority: Sutherland, joined by McKenna, Van Devanter, McReynolds, and Butler
> Dissent: Taft, joined by Sanford
> Dissent: Holmes

Mr. Justice Brandeis took no part in the consideration or decision of the case.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia.

The act provides for a board of three members, to be constituted, as far as practicable, so as to be equally representative of employers, employees and the public. The board is authorized to have public hearings, at which persons interested in the matter being investigated may appear and testify, to administer oaths, issue subpoenas requiring the attendance of witnesses and production of books, etc., and to make rules and regulations for carrying the act into effect.

By § 8 the board is authorized —

"(1), To investigate and ascertain the wages of women and minors in the different occupations in which they are employed in the District of Columbia; (2), to examine ... any ... record of any employer of women or minors that in any way appertains to ... the question of wages of any such women or minors; and (3), to require from such employer full and true statements of the wages paid to all women and minors in his employment."

And by § 9, "to ascertain and declare, in the manner hereinafter provided, the following things: (a), Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals; and (b), standards of minimum wages for minors in any occupation within the District of Columbia, and what wages are unreasonably low for any such minor workers."

The act then provides (§ 10) that if the board, after investigation, is of opinion that any substantial number of women workers in any occupation are receiving wages inadequate ... a conference may be called to consider and inquire into and report on the subject investigated ...

The conference is required to make and transmit to the board a report including, among other things, "recommendations as to standards of minimum wages for women workers in the occupation under inquiry and as to what wages are inadequate to supply the necessary cost of living to women workers in such occupation and to maintain them in health and to protect their morals." ...

Finally ... it is declared that the purposes of the act are "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the Act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes." ...

We come then, at once, to the substantive question involved.

The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt ...

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment ...

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances ...

[The statute in question] is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women ... who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity — under penalties as to the employer — to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing. ...

The law ... ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss ... It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure ...

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do ... Certainly the employer by paying a fair equivalent for the service ren-

dered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it ... A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of those things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States. ...

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of contract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself: it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstances. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows from what has been said that the act in question passes the limit prescribed by the Constitution, and, accordingly, the decrees of the court below are

Affirmed.

Excerpted by Walter DePuy

Retracting the Doctrine

Home Loan Association v. Blaisdell

290 U.S. 398 (1934)

> Vote: 5-4
> Decision: Affirmed
> Majority: Hughes, joined by Brandeis, Stone, Roberts, and Cardozo
> Dissent: Sutherland, joined by Van Devanter, McReynolds, and Butler

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Appellant contests the validity of ... the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution ...

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. ... The Act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date ...

We are here concerned with the provisions of Part One, § 4, authorizing the District Court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," subject to the above described limitation ...

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3700.98; that appellant was the holder of the sheriff's certificate of sale; that because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that unless the period of redemption were extended the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage including all liens, costs and expenses. ...

The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant $40 a month through the extended period from May 2, 1933, that is, that in each of the months of August, September, and October, 1933, the payments should be $80, in two instalments, and thereafter $40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. ...

The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered ...

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson v. New* (1917) The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency ... But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. ... But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by the fact that the contract clause is associated in the same section with other and more specific prohibitions. Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature ...

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, "of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation." ...

Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford* (1932) Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which con-

tractual relations are worthwhile, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the State. And all contracts are subject to the right of eminent domain. The reservation of this necessary authority of the State is deemed to be a part of the contract ... the Court answered the forcible challenge of the State's power by the following statement of the controlling principle, — a statement reiterated by this Court speaking through Mr. Justice Brewer ... in *Long Island Water Supply Co.* v. *Brooklyn* (1897): "But into all contracts ... there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed ... to be known and recognized by all ... and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur." ...

The argument is pressed that ... the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is ... whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that ... the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects ... This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts ... that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes. ...

[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pres-

sure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. ...

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is *a constitution* we are expounding ... "

Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. ...

Applying the criteria established by our decisions we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. ...
2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.
3. In view of the nature of the contracts in question — mortgages of unquestionable validity — the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.
4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. ...
5. The legislation is temporary in operation. It is limited to the exigency which called it forth. ...

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause.

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one.

The judgment of the Supreme Court of Minnesota is affirmed.

Excerpted by Stella Kemp and Alexandria Metzdorf

Nebbia v. New York

244 U.S. 590 (1934)

> Vote: 5-4
> Decision: Affirmed
> Majority: Roberts, joined by Brandeis, Cardozo, Hughes, and Stone
> Dissent: McReynolds, joined by Van Devanter, Sutherland, and Butler

Mr. Justice ROBERTS delivered the opinion of the Court.

The Legislature of New York established, by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things, to "fix minimum and maximum ... retail prices to be charged by ... stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk ...

First. The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the quart and six cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded ...

Second. The more serious question is whether ... the enforcement of [the law] denied the appellant the due process secured to him by the Fourteenth Amendment ...

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation, which embraces every thing within the territory of a State ...

all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, ... are component parts of this mass." ... [*New York v. Miln* (1837)]

Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government ... These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts ...

Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property right ...

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.

The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest ... The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a

store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is *per se* unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility ... But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle ... The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago ...

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to

that effect renders a court *functus officio* ... And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power ...

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

Affirmed.

Excerpted by Walter DePuy

West Coast Hotel v. Parrish

300 U.S. 379 (1937)

> Vote: 5-4
> Decision: Affirmed
> Majority: Hughes, joined by McReynolds, Brandeis, Cardozo, Roberts, and Stone
> Dissent: Sutherland, joined by Butler, McReynolds, and Van Devanter

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors ... It provides:

"SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance. ...

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States ...

The appellant relies upon the decision of this Court in *Adkins* v. *Children's Hospital* (1923), which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel.

The recent case of *Morehead* v. *New York* (1936) came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and that for that and other reasons the New York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [Morehead] is distinguishable from that one [Adkins]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted ... Here the review granted was no broader than that sought by the petitioner ... He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar."

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration ...

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, Burlington & Quincy R. Co. v. McGuire (1911)*

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. ... In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden* v. *Hardy* (1898), where we pointed out the inequality in the footing of the parties. ...

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller* v. *Oregon* (1908) where the constitutional authority of the State to limit the working hours of women was sustained. ... We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing* v. *Kirkendall* (1912), in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees. ...

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the service that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." ...

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed ...

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose

during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be dearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." ...

Our conclusion is that the case of *Adkins* v. *Children's Hospital,* should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is

Affirmed.

Excerpted by Walter DePuy

Williamson v. Lee Optical Co.

348 U.S. 483 (1955)

> Vote: 8-0
> Decision: Affirmed in part and reversed in part.
> Majority: Douglas, joined by Black, Burton, Clark, Frankfurter, Minton, Reed, and Warren

Mr. Justice Harlan took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The effect of § 2 is to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. In practical effect, it means that no optician can fit old glasses into new frames or supply a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. The District Court conceded that it was in the competence of the police power of a State to regulate the examination of the eyes. But it rebelled at the notion that a State could require a prescription from an optometrist or ophthalmologist "to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer." It held that such a requirement was not "reasonably and rationally related to the health and welfare of the people." ... It was, accordingly, the opinion of the court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician's right to do business. ...

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription ... The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert ... But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. ... We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois* (1876), "For protection against abuses by legislatures the people must resort to the polls, not to the courts." ...

Affirmed in part and reversed in part.

Excerpted by Walter DePuy

Modern Application

State Farm Insurance v. Campbell

538 U.S. 408 (2003)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Kennedy, joined by Rehnquist, Stevens, O'Connor, Souter, and Breyer
> Dissent: Scalia
> Dissent: Thomas
> Dissent: Ginsburg

Justice KENNEDY delivered the opinion of the Court.

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.*, at 1142. To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $135,849 in excess liability. Its counsel made this clear to the Campbells: "'You may want to put for sale signs on your property to get things moving.'" *Ibid.* Nor was State Farm willing to post a *supersedeas* bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the

verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad-faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad-faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful-death and tort actions. State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. On remand State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict. ...

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages ... The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. Both parties appealed ...

We recognized in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.* (2001) that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." ... By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. ...

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. ... The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. ... The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ... To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property ...

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered ... Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice ... do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

In light of these concerns, in *Gore* [*BMW of North America Inc v. Gore* 1996], we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. ...

Under the principles outlined in *BMW of North America, Inc.* v. *Gore* (1996), this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award ...

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others ... the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives ...

A State cannot punish a defendant for conduct that may have been lawful where it occurred ... Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction ...

For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis ...

Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award ... We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process ... in upholding a punitive damages award, we concluded that an

award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety ... The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1 ...

In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered ...

The third guidepost in *Gore* is the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable cases." We note that, in the past, we have also looked to criminal penalties that could be imposed. The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. ...

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Walter DePuy

Contributors

Kimberly Clairmont is a double major studying political science with a concentration in law and politics as well as speech communication at Oregon State University. She is also an honors student, and her thesis, titled "The Women of the Court: Gender Shaping the U.S. Senate Confirmation Hearing Process", was defended in May of 2021. She graduates winter term of 2023. She also participated in the American Politics Research Group conducting original political science research under the mentorship of Professors Rorie Solberg and Christopher Stout. After graduation, Ms. Clairmont plans to attend law school in Oregon and hopes to practice criminal law as a prosecutor for the State of Oregon, perhaps in the Portland Metro area.

Ethan Derstine is a 2023 graduate of Oregon State University with a degree in political science. During his senior year, he was part of the American Politics Research Group, contributing to projects regarding the dissemination of court decisions to local law enforcement and prosecutors and the effect of identity on US House Representatives' tendency to speak out about hate crimes. He is currently evaluating career opportunities in the Portland (OR) area and would eventually like to attend law school.

Alexandria Metzdorf is a transgender alum of OSU with two BS degrees in economics and political science, and she plans to attend law school in 2024. She wants to help other trans people overcome unique challenges presented by the US legal system, breaking down barriers and shattering glass ceilings, with a particular focus on housing and discrimination. During COVID, she distributed $250,000 in funding to families in need of rent relief through the OERAP program in Oregon, and through her continued work at NeighborImpact has disbursed another $450,000 to over 200 households so far in 2023. In her spare time, Alexandria enjoys taking care of her extensive aroid collection, mixing her own tea blends, making hot sauce from home grown peppers, watching esoteric narrative and documentary films, and listening to vinyl records.

Stella Kemp is a 2023 graduate of Oregon State University and majored in Psychology.

Gabriel Thomison is a political science major with a law and politics option at Oregon State University, graduating in June of 2024. After graduation, Gabriel plans on attending the US Navy's Officer Candidate School. He hopes to either attend law school or pursue a master's degree in international affairs after military service.

Eduardo "Eddie" Vidal is a Political Science Major at Oregon State University with a focus in Law and Politics. During his studies at OSU, he was given the opportunity by his professor, Dr. Rorie Solberg, to contribute to this textbook. At the University of Oregon, Eddie has worked in an undergraduate research group on a project analyzing how American Politicians advertise to the Latin American Community through Spanish language press releases. He is planning to finish his degree in the Spring of 2024 and is currently applying for graduate studies for the Fall.

Walter DePuy is a valued contributor, and we appreciate their work throughout the publication of *Government Powers and Limitations*.

Justices Serving on the Court 1790 - 1834

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1790

Justices serving on the Court, 1790

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Rutledge	Washington	None	1790-1791
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1791 – 1792

Justices serving on the Court, 1791 – 1792

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Johnson	Washington	None	1791-1793
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1793 – 1795

Justices serving on the Court, 1793 – 1795

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1796 – 1797

Justices serving on the Court, 1796 – 1797

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1798 – 1799

Justices serving on the Court, 1798 – 1799

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1800 – 1803

Justices serving on the Court, 1800 – 1803

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Moore	Adams	Federalist	1800-1804
Chase	Washington	None	1796-1811

Marbury v. Madison (1803)

1804 – 1805

Justices serving on the Court, 1804 – 1805

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1806

Justices serving on the Court, 1806

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1807 – 1810

Justices serving on the Court, 1807 – 1810

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811
Todd	Jefferson	Dem-Rep	1807-1826

Fletcher v. Peck (1810)

1811

Justices serving on the Court, 1811

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826

1812 – 1822

Justices serving on the Court, 1812 – 1822

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

Martin v. Hunter's Lessee (1816)

McCulloch v. Maryland (1819)

Sturges v. Crowninshield (1819)

Trustees of Dartmouth College v. Woodward (1819)

1823 – 1825

Justices serving on the Court, 1823 – 1825

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

Gibbons v. Ogden (1824)

Eakin v. Raub (1825)

1826 – 1828

Justices serving on the Court, 1826 – 1828

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Trimble	Adams, J.Q.	Jacksonian	1826-1828
Story	Madison	Dem-Rep	1812-1845

1829

Justices serving on the Court, 1829

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1830 – 1834

Justices serving on the Court, 1830 – 1834

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

Justices Serving on the Court 1835 - 1889

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1835 – 1836

Justices serving on the Court, 1835 – 1836

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1837 – 1841

Justices serving on the Court, 1837 – 1841

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge (1837)

1842 – 1844

Justices serving on the Court, 1842 – 1844

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1845 – 1850

Justices serving on the Court, 1845 – 1850

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Woodbury	Polk	Democrat	1845-1851
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1851 – 1852

Justices serving on the Court, 1851 – 1852

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

Cooley v. Board of Wardens (1852)

1853 – 1857

Justices serving on the Court, 1853 – 1857

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

Dred Scott v. Sandford (1857)

1858 – 1861

Justices serving on the Court, 1858 – 1861

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

1862

Justices serving on the Court, 1862

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877

1863

Justices serving on the Court, 1863

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

Prize Cases (1863)

1864 – 1869

Justices serving on the Court, 1864 – 1869

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

Mississippi v. Johnson (1867)

Ex. parte McCardle (1869)

1870 – 1872

Justices serving on the Court, 1870 – 1872

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1873 – 1876

Justices serving on the Court, 1873 – 1876

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

Loan Association v. Topeka (1874)

1877 – 1880

Justices serving on the Court, 1877 – 1880

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1881

Justices serving on the Court, 1881

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1882 – 1887

Justices serving on the Court, 1882 – 1887

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Blatchford	Arthur	Republican	1882-1893
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1888 – 1889

Justices serving on the Court, 1888 – 1889

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

Chae Chan Ping v. United States (1889)

Justices Serving on the Court 1890 - 1937

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1890

Justices serving on the Court, 1890

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

In re Neagle (1890)

Hans v. Louisiana (1890)

1891

Justices serving on the Court, 1891

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1892

Justices serving on the Court, 1892

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1893 – 1895

Justices serving on the Court, 1893 – 1895

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Jackson	Harrison	Republican	1893-1895
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

United States v. E.C. Knight Co. (1895)

1896 – 1897

Justices serving on the Court, 1896 – 1897

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1898 – 1901

Justices serving on the Court, 1898 – 1901

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

Allgeyer v. Louisiana (1898)

Holden v. Hardy (1898)

1902

Justices serving on the Court, 1902

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

1903 – 1905

Justices serving on the Court, 1903 – 1905

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Champion v. Ames (1903)

McCray v. United States (1904)

Lochner v. New York (1905)

1906 – 1909

Justices serving on the Court, 1906 – 1909

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Moody	Roosevelt	Republican	1906-1910
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Muller v. Oregon (1908)

1910

Justices serving on the Court, 1910

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Lurton	Taft	Republican	1910-1914
Moody	Roosevelt	Republican	1906-1910
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1911

Justices serving on the Court, 1911

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1912 – 1913

Justices serving on the Court, 1912 – 1913

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1914 – 1915

Justices serving on the Court, 1914 – 1915

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Coppage v. Kansas (1915)

1916 – 1921

Justices serving on the Court, 1916 – 1921

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Clarke	Wilson	Democrat	1916-1922
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Adams v. Tanner (1917)

Bunting v. Oregon (1917)

Hammer v. Dagenhart (1918)

Missouri v. Holland (1920)

1922

Justices serving on the Court, 1922

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

Stafford v. Wallace (1922)

Bailey v. Drexel Furniture Co. (1922)

Pennsylvania Coal Co. v. Mahon (1922)

1923 – 1924

Justices serving on the Court, 1923 – 1924

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
McKenna	McKinley	Republican	1898-1925
Butler	Harding	Republican	1923-1939

Adkins v. Children's Hospital (1923)

1925 – 1929

Justices serving on the Court, 1925 – 1929

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

Ex Parte Grossman (1925)

Myers v. United States (1926)

McGrain v. Daughterty (1927)

1930 – 1931

Justices serving on the Court, 1930 – 1931

Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

1932 – 1937

Justices serving on the Court, 1932 – 1937

Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Black	Roosevelt	Democrat	1937-1971
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Cardozo	Hoover	Republican	1932-1938
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

Home Building & Loan Association v. Blaisdell (1934)

Home Loan Association v. Blaisdell (1934)

Nebbia v. New York (1934)

Humphrey's Executor v. United States (1935)

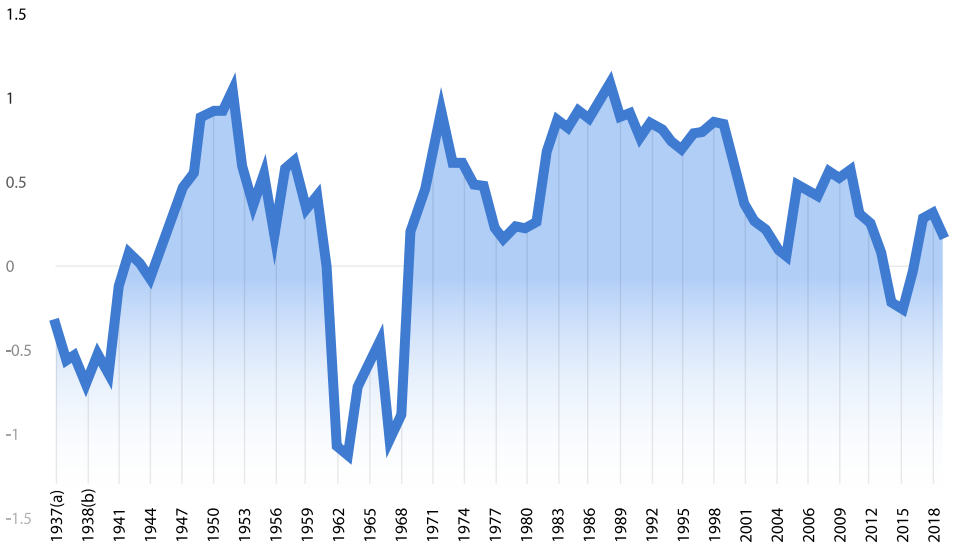
Schechter Poultry Corp. v. United States (1935)

United States v. Curtiss-Wright Export Corp (1936)

United States v. Butler (1936)

Median Justice Scores Per Year 1937 - 2018

The following figure provides the Martin Quinn scores for the median (aka middle aka swing) justice for the years available. Positive scores are considered conservative and negative scores liberal. The higher the score, the further along the justice is on the ideological continuum. For more information on these scores, navigate to https://mqscores.lsa.umich.edu/.

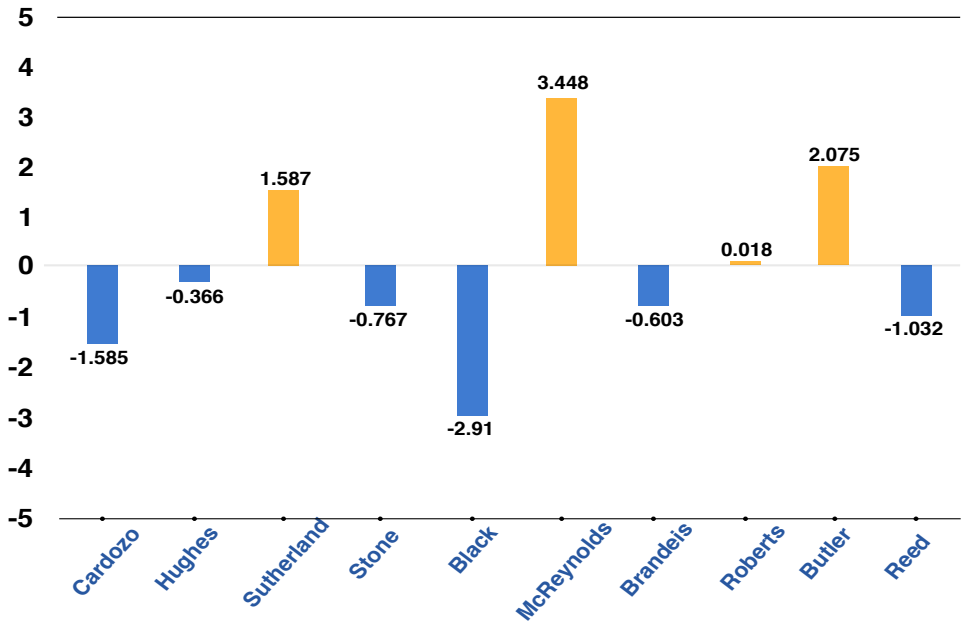


Median Justice Ideology scores per year, 1937 – 2018

Justices Serving on the Court 1937 - 1949

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1937



Justices serving on the Court and Martin Quinn Ideology scores, 1937

Justices serving on the Court, 1937

Justice	Mean	President	Party of President	Years Served
Cardozo	-1.585	Hoover	Republican	1932-1938
Hughes	-0.366	Hoover	Republican	1930-1941
Sutherland	1.587	Harding	Republican	1922-1938
Stone	-0.767	Coolidge	Republican	1925-1946
Black	-2.91	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.448	Wilson	Democrat	1914-1941
Brandeis	-0.603	Wilson	Democrat	1916-1939
Roberts	0.018	Hoover	Republican	1930-1945
Butler	2.075	Harding	Republican	1923-1939
Reed	-1.032	F.D. Roosevelt	Democrat	1938-1957

Chief Justice, 1937

Chief Justice	Median	Court Score
Hughes	-0.333	-0.01
Hughes	-0.559	-0.01

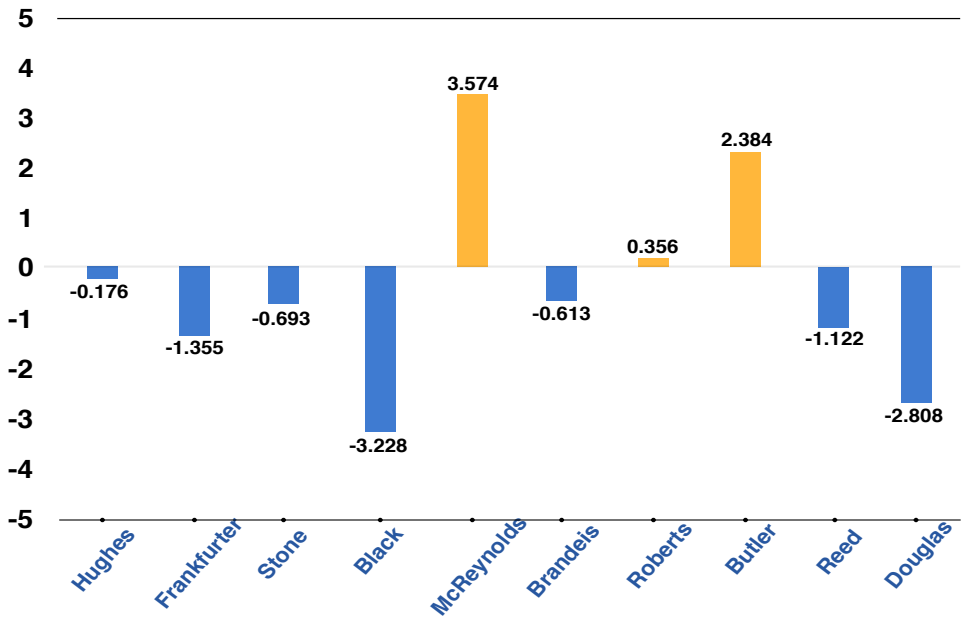
National Labor Relations Board v. Jones and Laughlin Steel Corp. (1937)

Steward Machine Co. v. Davis (1937)

Helvering v. Davis (1937)

West Coast Hotel v. Parrish (1937)

1938



Justices serving on the Court and Martin Quinn Ideology scores, 1938

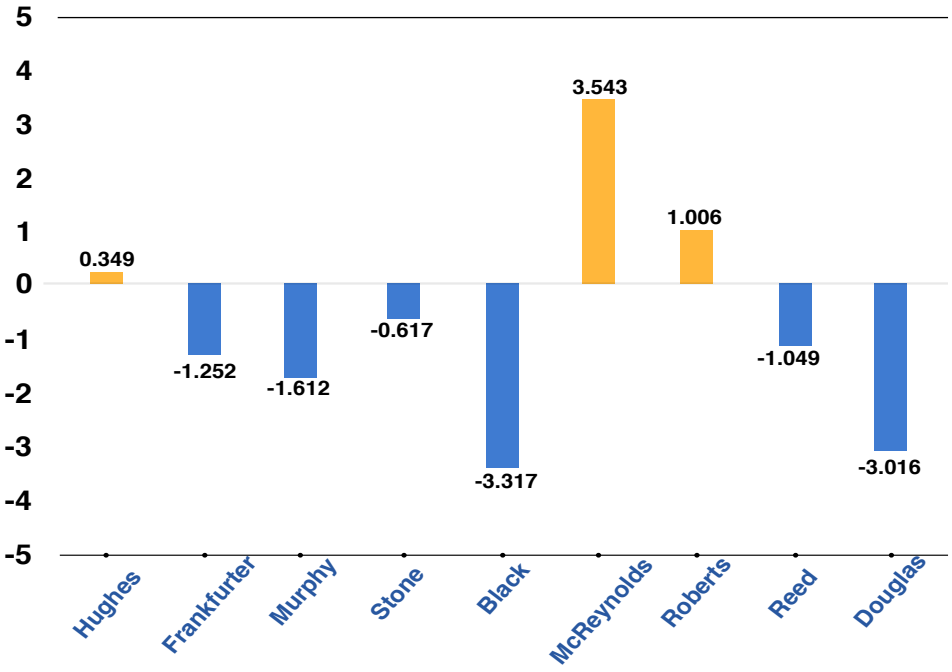
Justices serving on the Court, 1938

Justice	Mean	President	Party of President	Years Served
Hughes	-0.176	Hoover	Republican	1930-1941
Frankfurter	-1.355	F.D. Roosevelt	Democrat	1939-1962
Stone	-0.693	Coolidge	Republican	1925-1946
Black	-3.228	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.574	Wilson	Democrat	1914-1941
Brandeis	-0.613	Wilson	Democrat	1916-1939
Roberts	0.356	Hoover	Republican	1930-1945
Butler	2.384	Harding	Republican	1923-1939
Reed	-1.122	F.D. Roosevelt	Democrat	1938-1957
Douglas	-2.808	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1938

Chief Justice	Median	Court Score
Hughes	-0.526	-0.37
Hughes (2)	-0.681	-0.37

1939



Justices serving on the Court and Martin Quinn Ideology scores, 1939

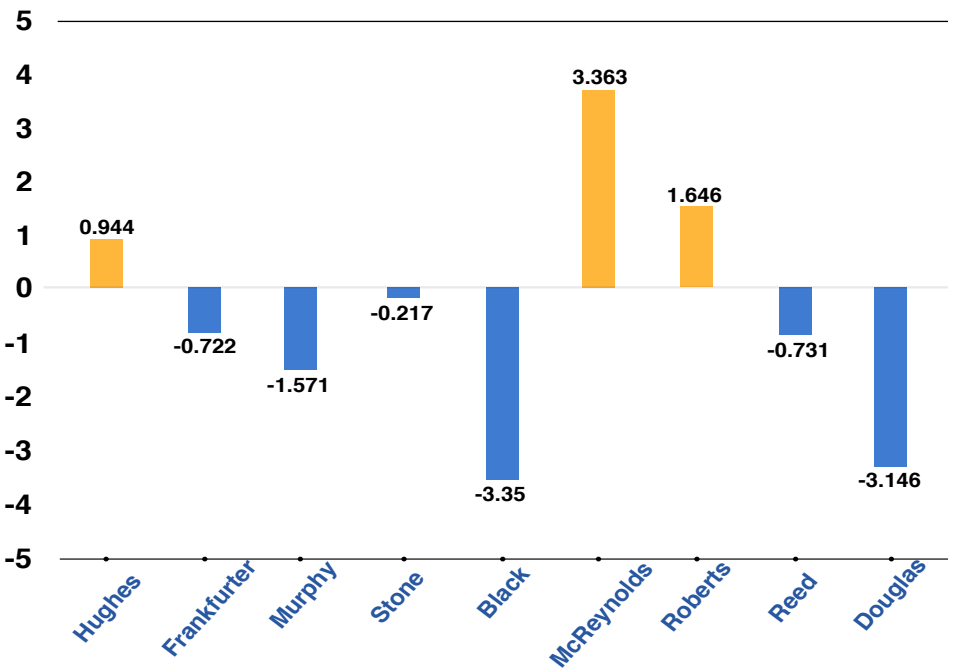
Justices serving on the Court, 1939

Justice	Mean	President	Party of President	Years Served
Hughes	0.349	Hoover	Republican	1930-1941
Frankfurter	-1.252	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.612	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.617	Coolidge	Republican	1925-1946
Black	-3.317	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.543	Wilson	Democrat	1914-1941
Roberts	1.006	Hoover	Republican	1930-1945
Reed	-1.049	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.016	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1939

Chief Justice	Median	Court Score
Hughes	-0.526	-0.66

1940



Justices serving on the Court and Martin Quinn Ideology scores, 1940

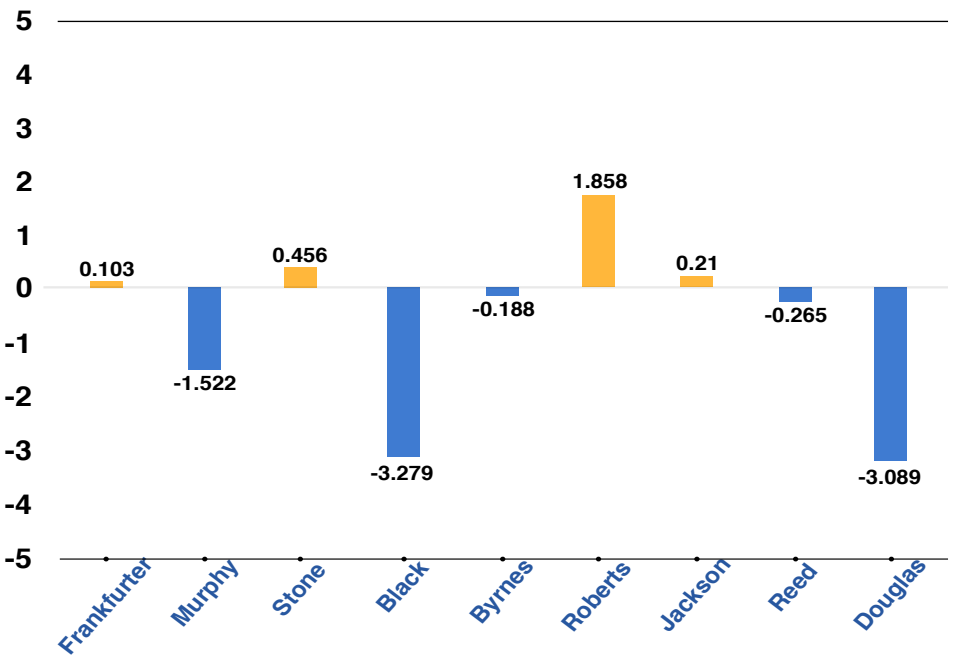
Justices serving on the Court, 1940

Justice	Mean	President	Party of President	Years Served
Hughes	0.944	Hoover	Republican	1930-1941
Frankfurter	-0.722	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.571	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.217	Coolidge	Republican	1925-1946
Black	-3.35	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.363	Wilson	Democrat	1914-1941
Roberts	1.646	Hoover	Republican	1930-1945
Reed	-0.731	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.146	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1940

Chief Justice	Median	Court Score
Hughes	-0.624	-0.42

1941



Justices serving on the Court and Martin Quinn Ideology scores, 1941

Justices serving on the Court, 1941

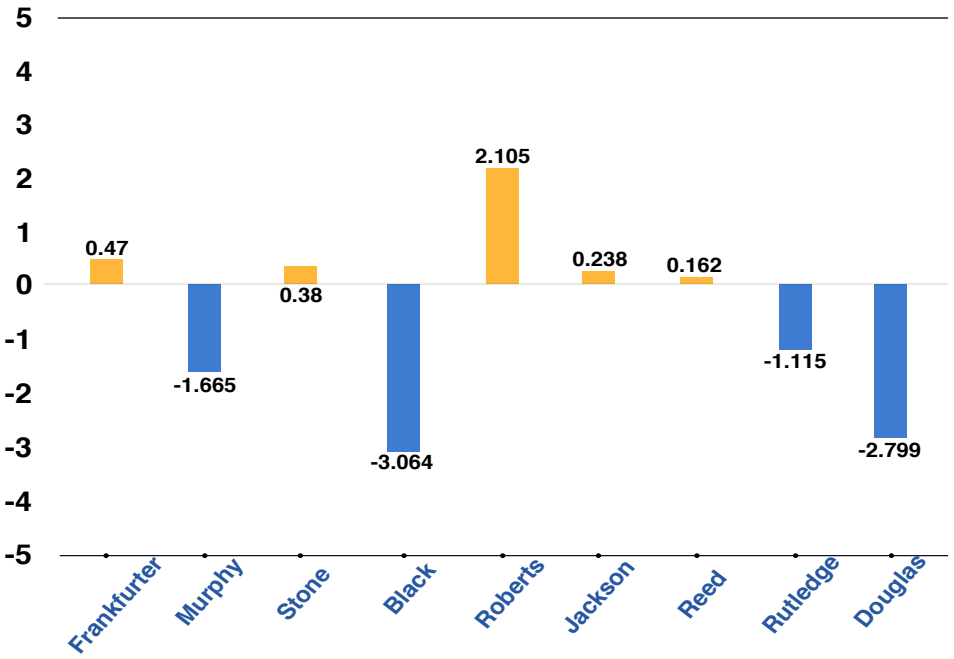
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.103	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.522	F.D. Roosevelt	Democrat	1940-1949
Stone	0.456	Coolidge	Republican	1925-1946
Black	-3.279	F.D. Roosevelt	Democrat	1937-1971
Byrnes	-0.188	F.D. Roosevelt	Democrat	1941-1942
Roberts	1.858	Hoover	Republican	1930-1945
Jackson	0.21	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.265	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.089	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1941

Chief Justice	Median	Court Score
Stone	-0.141	-0.64

United States v. Darby Lumber Co. (1941)

1942



Justices serving on the Court and Martin Quinn Ideology scores, 1942

Justices serving on the Court, 1942

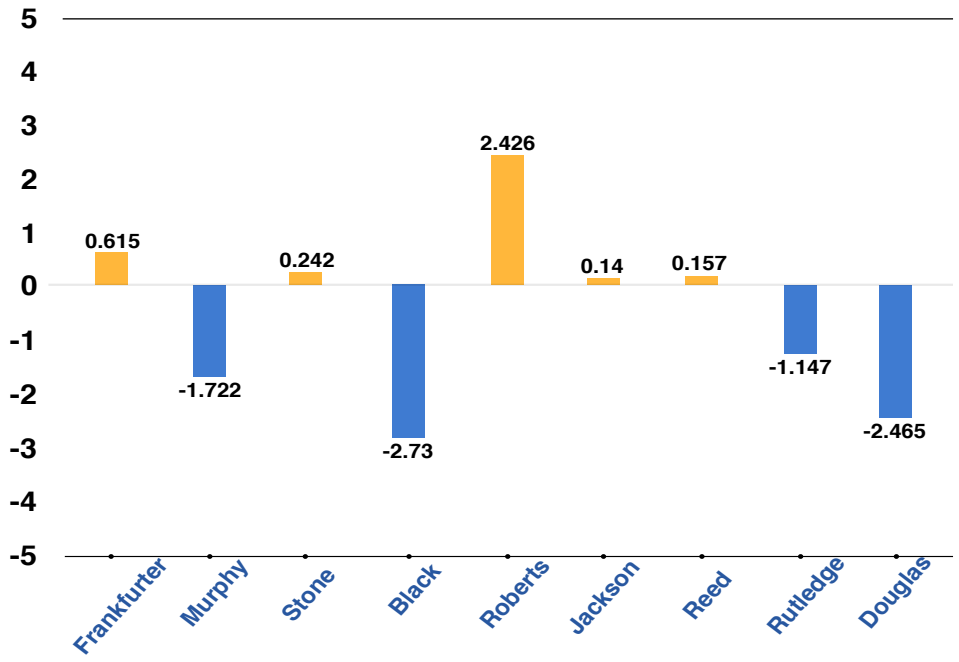
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.47	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.665	F.D. Roosevelt	Democrat	1940-1949
Stone	0.38	Coolidge	Republican	1925-1946
Black	-3.064	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.105	Hoover	Republican	1930-1945
Jackson	0.238	F.D. Roosevelt	Democrat	1941-1954
Reed	0.162	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.115	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.799	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1942

Chief Justice	Median	Court Score
Stone	0.094	-0.59

Wickard v. Filburn (1942)

1943



Justices serving on the Court and Martin Quinn Ideology scores, 1943

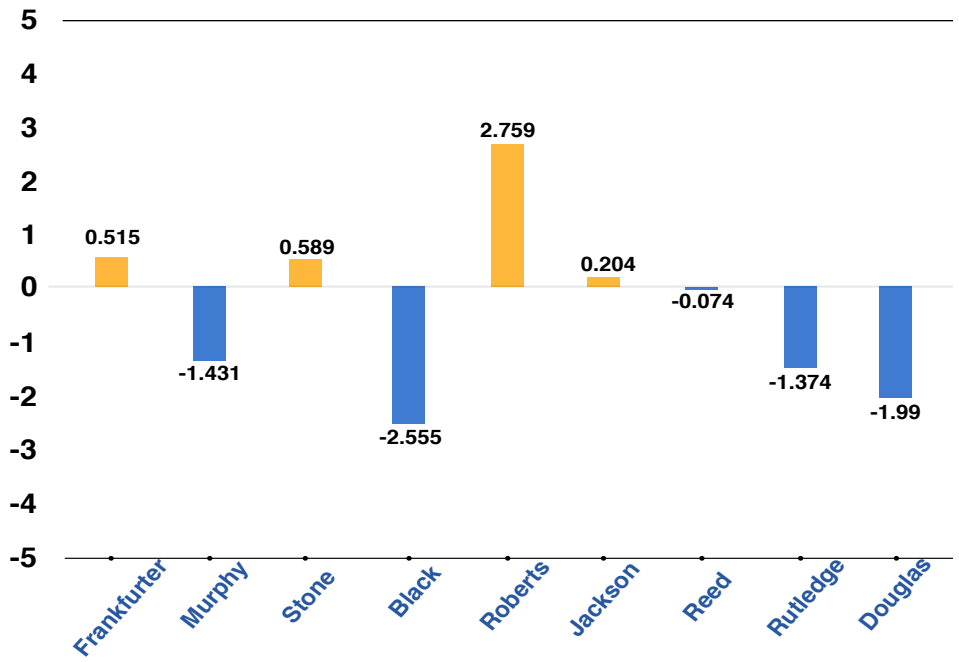
Justices serving on the Court, 1943

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.615	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.722	F.D. Roosevelt	Democrat	1940-1949
Stone	0.242	Coolidge	Republican	1925-1946
Black	-2.73	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.426	Hoover	Republican	1930-1945
Jackson	0.14	F.D. Roosevelt	Democrat	1941-1954
Reed	0.157	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.147	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.465	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1943

Chief Justice	Median	Court Score
Stone	0.038	-0.50

1944



Justices serving on the Court and Martin Quinn Ideology scores, 1944

Justices serving on the Court, 1944

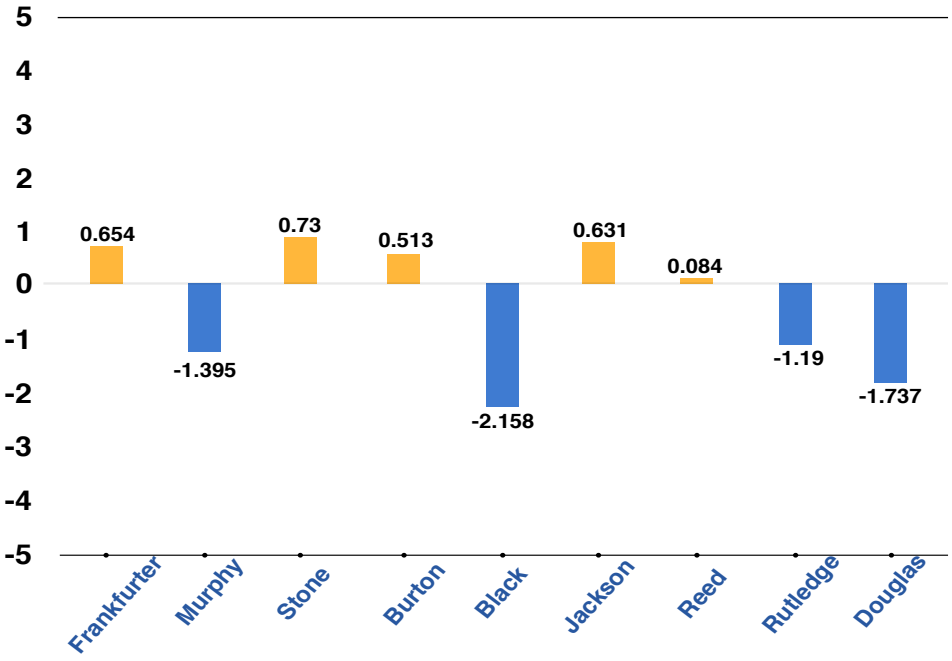
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.515	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.431	F.D. Roosevelt	Democrat	1940-1949
Stone	0.589	Coolidge	Republican	1925-1946
Black	-2.555	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.759	Hoover	Republican	1930-1945
Jackson	0.204	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.074	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.374	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.99	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1944

Chief Justice	Median	Court Score
Stone	-0.084	-0.37

Korematsu v. United States (1944)

1945



Justices serving on the Court and Martin Quinn Ideology scores, 1945

Justices serving on the Court, 1945

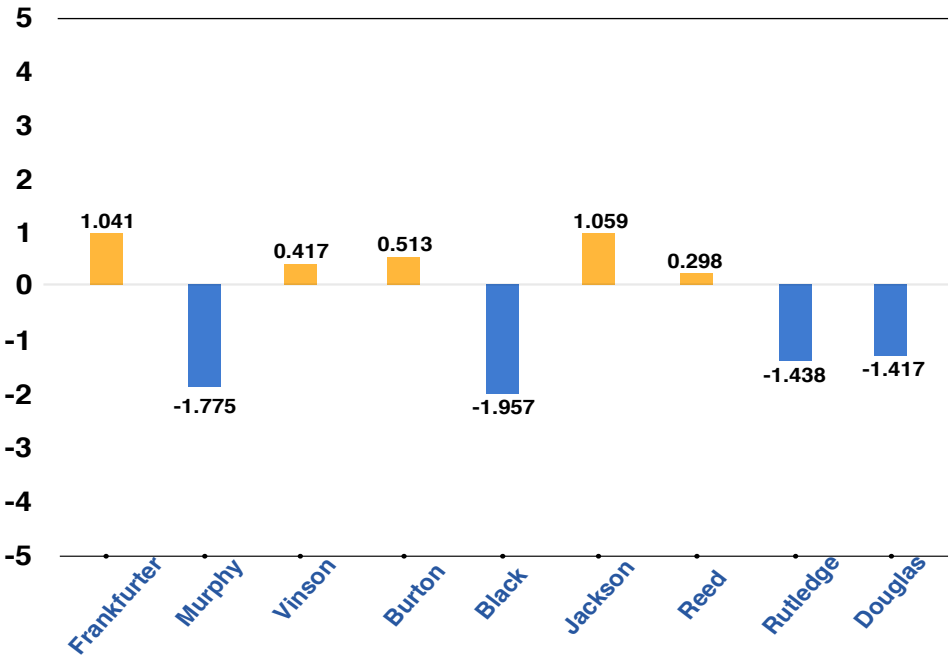
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.654	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.395	F.D. Roosevelt	Democrat	1940-1949
Stone	0.73	Coolidge	Republican	1925-1946
Burton	0.513	Truman	Democrat	1945-1958
Black	-2.158	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.631	F.D. Roosevelt	Democrat	1941-1954
Reed	0.084	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.19	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.737	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1945

Chief Justice	Median	Court Score
Stone	0.069	-0.43

Southern Pacific Co. v. Arizona (1945)

1946



Justices serving on the Court and Martin Quinn Ideology scores, 1946

Justices serving on the Court, 1946

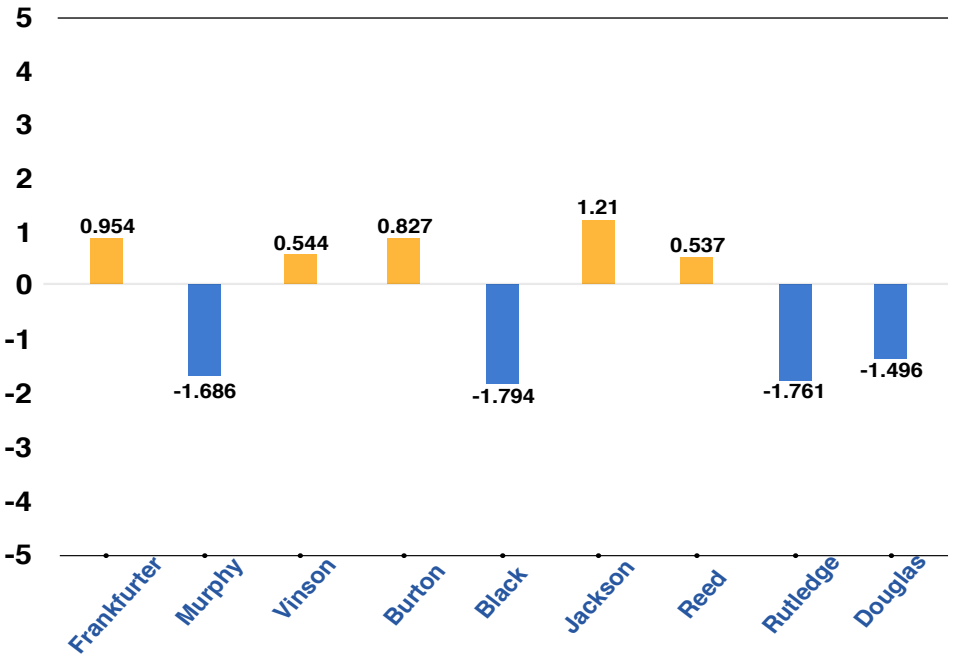
Justice	Mean	President	Party of President	Years Served
Frankfurter	1.041	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.775	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.417	Truman	Democrat	1946-1953
Burton	0.531	Truman	Democrat	1945-1958
Black	-1.957	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.059	F.D. Roosevelt	Democrat	1941-1954
Reed	0.298	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.438	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.417	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1946

Chief Justice	Median	Court Score
Vinson	0.245	-0.36

United States v. Causby (1946)

1947



Justices serving on the Court and Martin Quinn Ideology scores, 1947

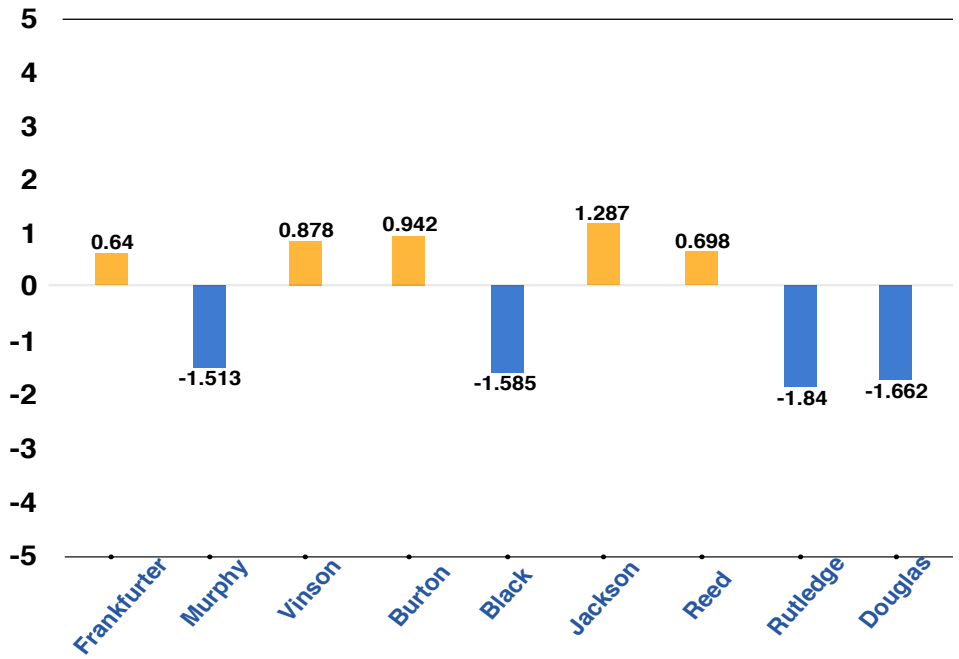
Justices serving on the Court, 1947

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.954	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.686	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.544	Truman	Democrat	1946-1953
Burton	0.827	Truman	Democrat	1945-1958
Black	-1.794	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.21	F.D. Roosevelt	Democrat	1941-1954
Reed	0.537	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.761	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.496	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1947

Chief Justice	Median	Court Score
Vinson	0.448	-0.30

1948



Justices serving on the Court and Martin Quinn Ideology scores, 1948

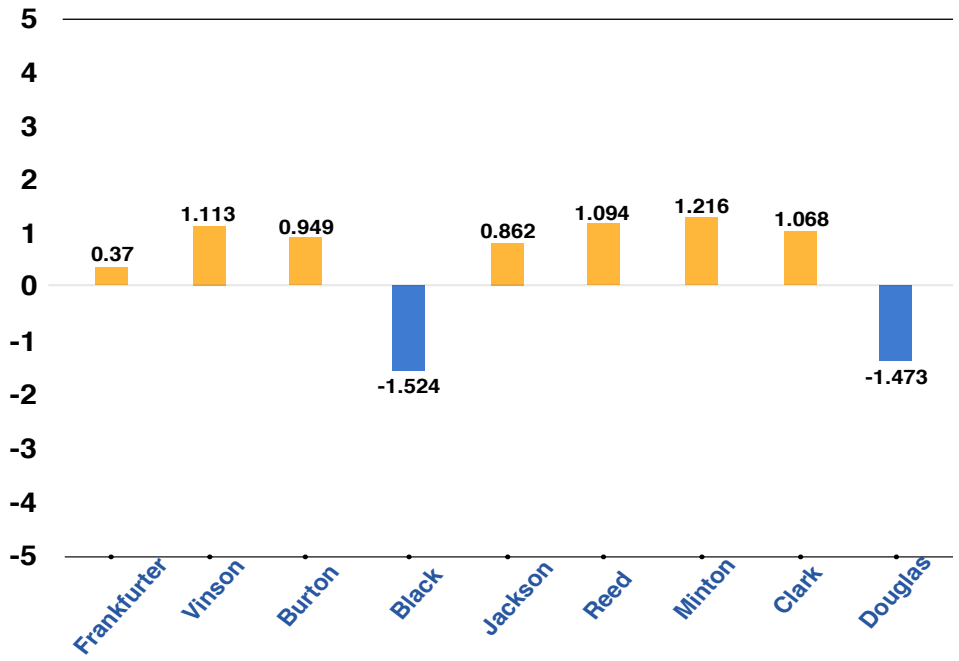
Justices serving on the Court, 1948

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.64	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.513	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.878	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.585	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.287	F.D. Roosevelt	Democrat	1941-1954
Reed	0.698	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.84	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.662	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1948

Chief Justice	Median	Court Score
Vinson	0.549	-0.24

1949



Justices serving on the Court and Martin Quinn Ideology scores, 1949

Justices serving on the Court, 1949

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.37	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.113	Truman	Democrat	1946-1953
Burton	0.949	Truman	Democrat	1945-1958
Black	-1.524	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.862	F.D. Roosevelt	Democrat	1941-1954
Reed	1.094	F.D. Roosevelt	Democrat	1941-1954
Minton	1.216	Truman	Democrat	1949-1956
Clark	1.068	Truman	Democrat	1949-1967
Douglas	-1.473	F.D. Roosevelt	Democrat	1939-1975

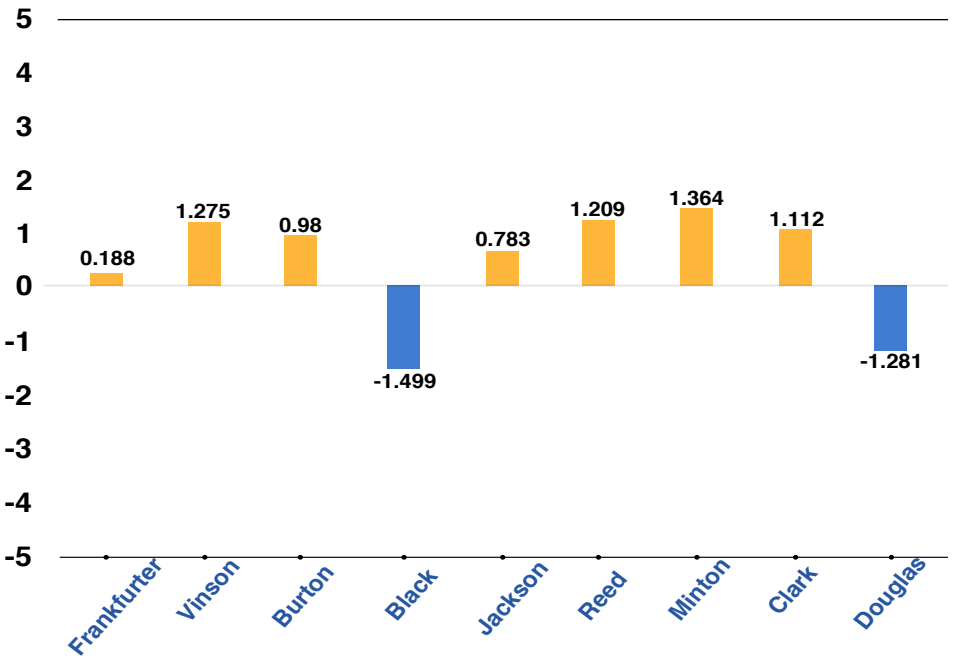
Chief Justice, 1949

Chief Justice	Median	Court Score
Vinson	0.88	0.41

Justices Serving on the Court 1950 - 1969

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1950



Justices serving on the Court and Martin Quinn Ideology scores, 1950

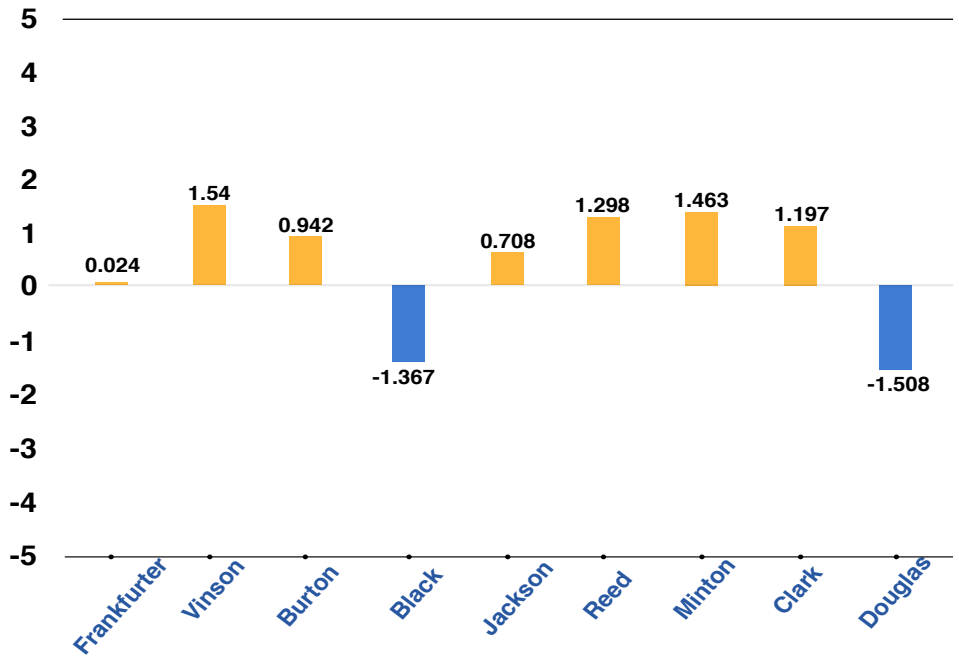
Justices serving on the Court, 1950

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.188	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.275	Truman	Democrat	1946-1953
Burton	0.98	Truman	Democrat	1945-1958
Black	-1.499	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.783	F.D. Roosevelt	Democrat	1941-1954
Reed	1.209	F.D. Roosevelt	Democrat	1941-1954
Minton	1.364	Truman	Democrat	1949-1956
Clark	1.112	Truman	Democrat	1949-1967
Douglas	-1.281	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1950

Chief Justice	Median	Court Score
Vinson	0.923	0.46

1951



Justices serving on the Court and Martin Quinn Ideology scores, 1951

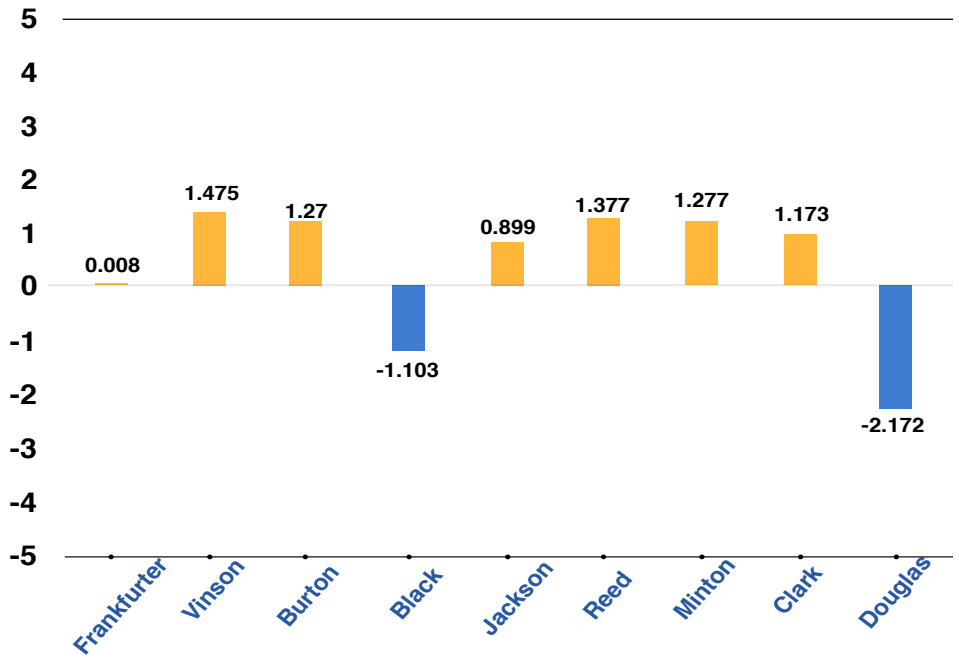
Justices serving on the Court, 1951

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.024	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.54	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.367	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.708	F.D. Roosevelt	Democrat	1941-1954
Reed	1.298	F.D. Roosevelt	Democrat	1941-1954
Minton	1.463	Truman	Democrat	1949-1956
Clark	1.197	Truman	Democrat	1949-1967
Douglas	-1.508	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1951

Chief Justice	Median	Court Score
Vinson	0.929	0.48

1952



Justices serving on the Court and Martin Quinn Ideology scores, 1952

Justices serving on the Court, 1952

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.008	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.475	Truman	Democrat	1946-1953
Burton	1.27	Truman	Democrat	1945-1958
Black	-1.103	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.899	F.D. Roosevelt	Democrat	1941-1954
Reed	1.377	F.D. Roosevelt	Democrat	1941-1954
Minton	1.277	Truman	Democrat	1949-1956
Clark	1.173	Truman	Democrat	1949-1967
Douglas	-2.172	F.D. Roosevelt	Democrat	1939-1975

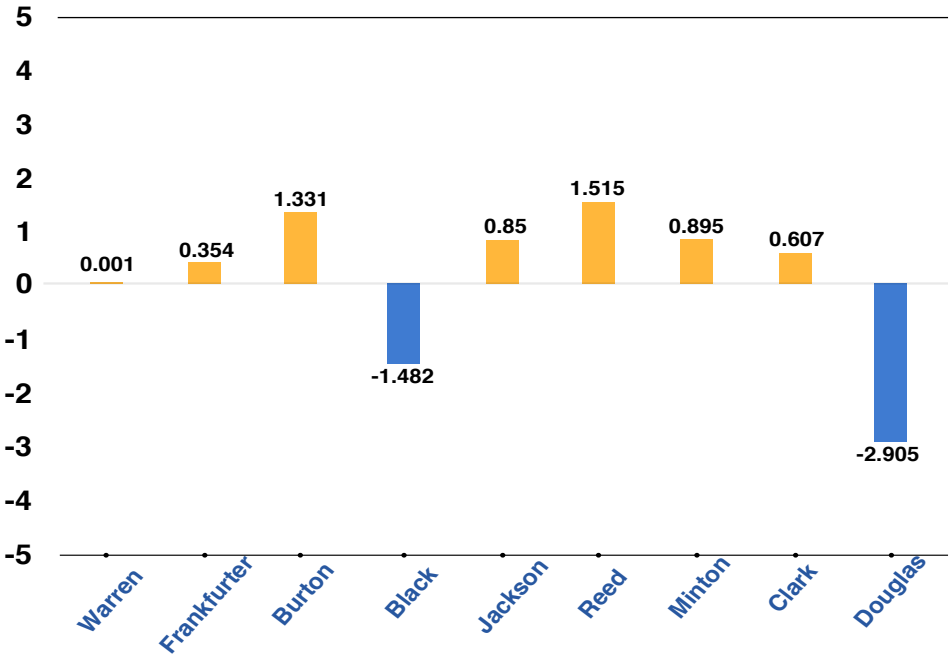
Chief Justice, 1952

Chief Justice	Median	Court Score
Vinson	1.064	0.47

Youngstown Sheet and Tube v. Sawyer (1952)

United States v. Caltex Inc. (1952)

1953



Justices serving on the Court and Martin Quinn Ideology scores, 1953

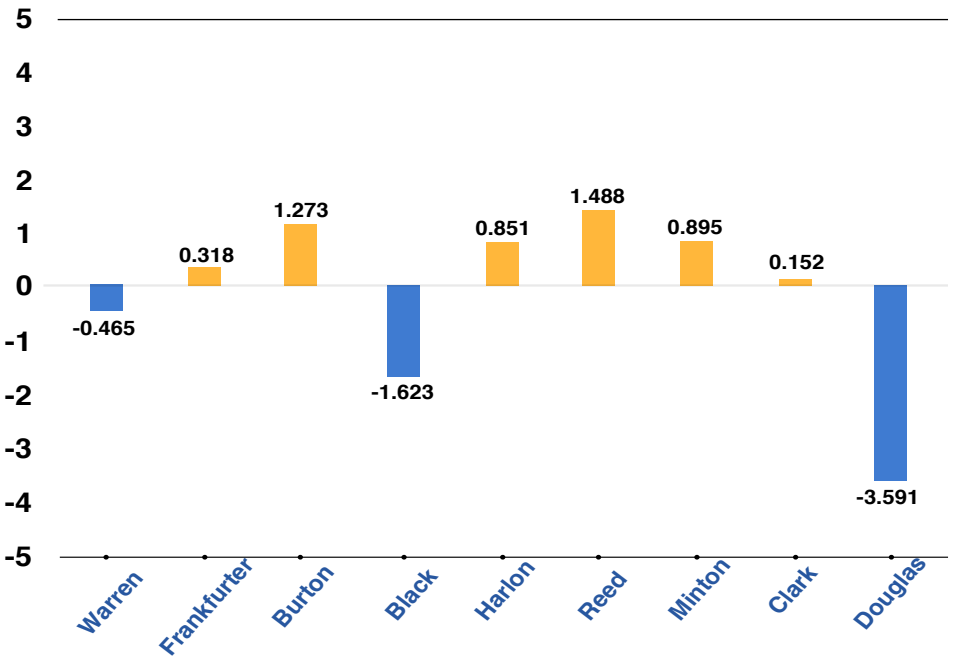
Justices serving on the Court, 1953

Justice	Mean	President	Party of President	Years Served
Warren	0.001	Eisenhower	Republican	1953-1969
Frankfurter	0.354	F.D. Roosevelt	Democrat	1939-1962
Burton	1.331	Truman	Democrat	1945-1958
Black	-1.482	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.85	F.D. Roosevelt	Democrat	1941-1954
Reed	1.515	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.607	Truman	Democrat	1949-1967
Douglas	-2.905	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1953

Chief Justice	Median	Court Score
Warren	0.574	0.13

1954



Justices serving on the Court and Martin Quinn Ideology scores, 1954

Justices serving on the Court, 1954

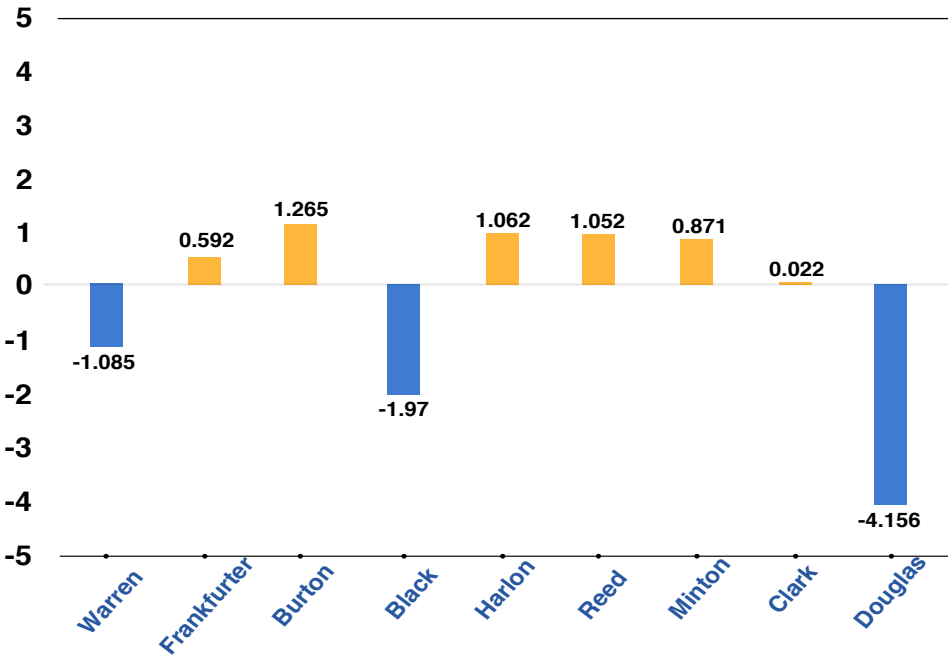
Justice	Mean	President	Party of President	Years Served
Warren	-0.465	Eisenhower	Republican	1953-1969
Frankfurter	0.318	F.D. Roosevelt	Democrat	1939-1962
Burton	1.273	Truman	Democrat	1945-1958
Black	-1.623	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.851	Eisenhower	Republican	1954-1971
Reed	1.488	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.152	Truman	Democrat	1949-1967
Douglas	-3.591	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1954

Chief Justice	Median	Court Score
Warren	0.348	-0.08

Berman v. Parker (1954)

1955



Justices serving on the Court and Martin Quinn Ideology scores, 1955

Justices serving on the Court, 1955

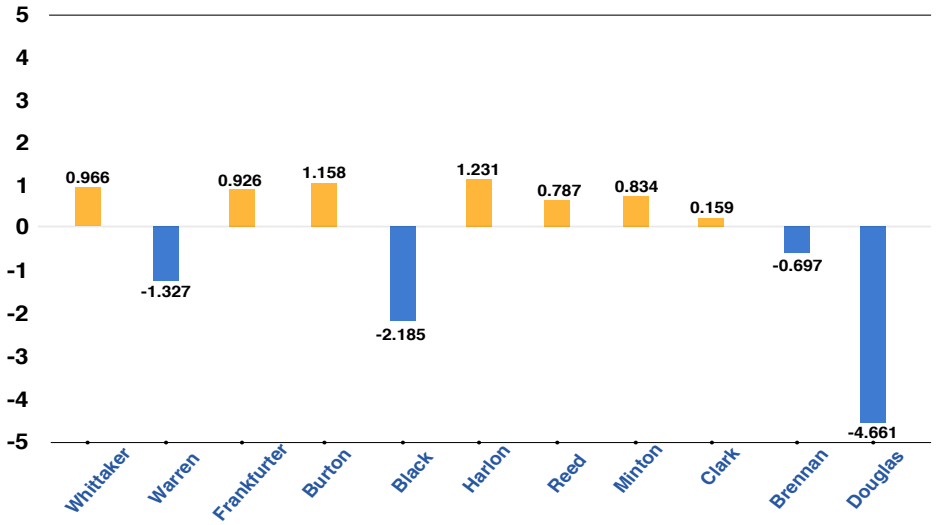
Justice	Mean	President	Party of President	Years Served
Warren	-1.085	Eisenhower	Republican	1953-1969
Frankfurter	0.592	F.D. Roosevelt	Democrat	1939-1962
Burton	1.265	Truman	Democrat	1945-1958
Black	-1.97	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.062	Eisenhower	Republican	1954-1971
Reed	1.052	F.D. Roosevelt	Democrat	1941-1954
Minton	0.871	Truman	Democrat	1949-1956
Clark	0.022	Truman	Democrat	1949-1967
Douglas	-4.156	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1955

Chief Justice	Median	Court Score
Warren	0.56	-0.26

Williamson v. Lee Optical Co. (1955)

1956



Justices serving on the Court and Martin Quinn Ideology scores, 1956

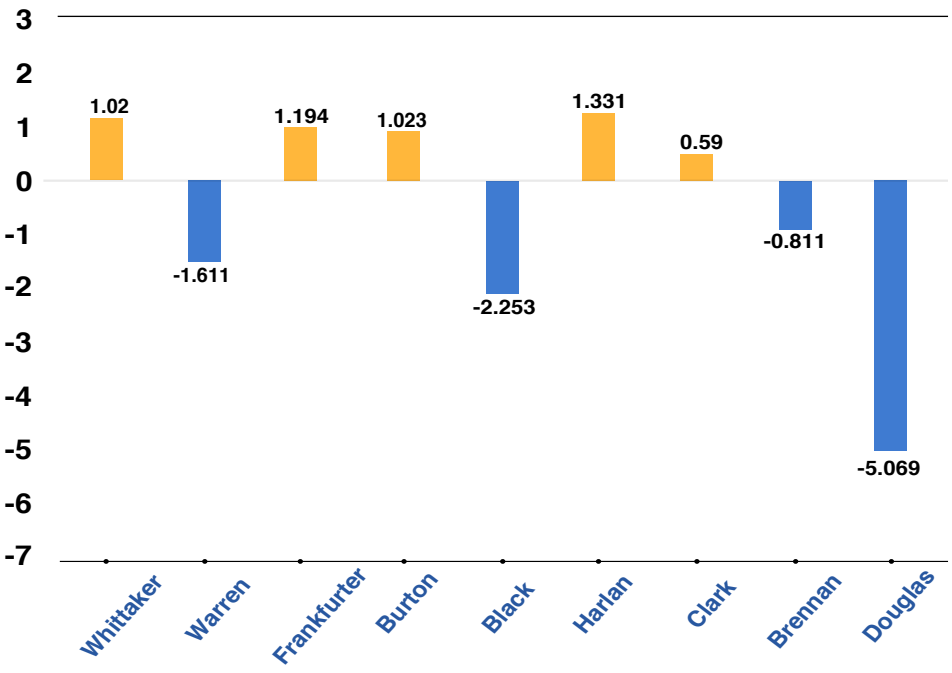
Justices serving on the Court, 1956

Justice	Mean	President	Party of President	Years Served
Whittaker	0.966	Eisenhower	Republican	1957-1962
Warren	-1.327	Eisenhower	Republican	1953-1969
Frankfurter	0.926	F.D. Roosevelt	Democrat	1939-1962
Burton	1.158	Truman	Democrat	1945-1958
Black	-2.185	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.231	Eisenhower	Republican	1954-1971
Reed	0.787	F.D. Roosevelt	Democrat	1941-1954
Minton	0.834	Truman	Democrat	1949-1956
Clark	0.159	Truman	Democrat	1949-1967
Brennan	-0.697	Eisenhower	Republican	1956-1990
Douglas	-4.661	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1956

Chief Justice	Median	Court Score
Warren	0.158	-0.26
Warren (2)	0.159	-0.26

1957



Justices serving on the Court and Martin Quinn Ideology scores, 1957

Justices serving on the Court, 1957

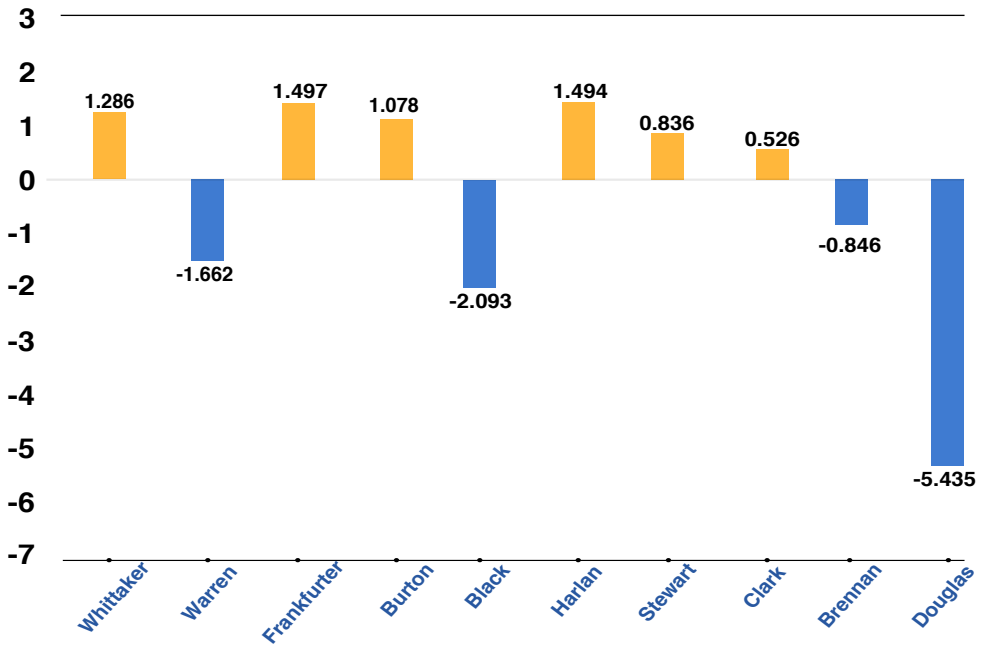
Justice	Mean	President	Party of President	Years Served
Whittaker	1.02	Eisenhower	Republican	1957-1962
Warren	-1.611	Eisenhower	Republican	1953-1969
Frankfurter	1.194	F.D. Roosevelt	Democrat	1939-1962
Burton	1.023	Truman	Democrat	1945-1958
Black	-2.253	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.331	Eisenhower	Republican	1954-1971
Clark	0.59	Truman	Democrat	1949-1967
Brennan	-0.811	Eisenhower	Republican	1956-1990
Douglas	-5.069	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1957

Chief Justice	Median	Court Score
Warren	0.585	-0.51

Watkins v. United States (1957)

1958



Justices serving on the Court and Martin Quinn Ideology scores, 1958

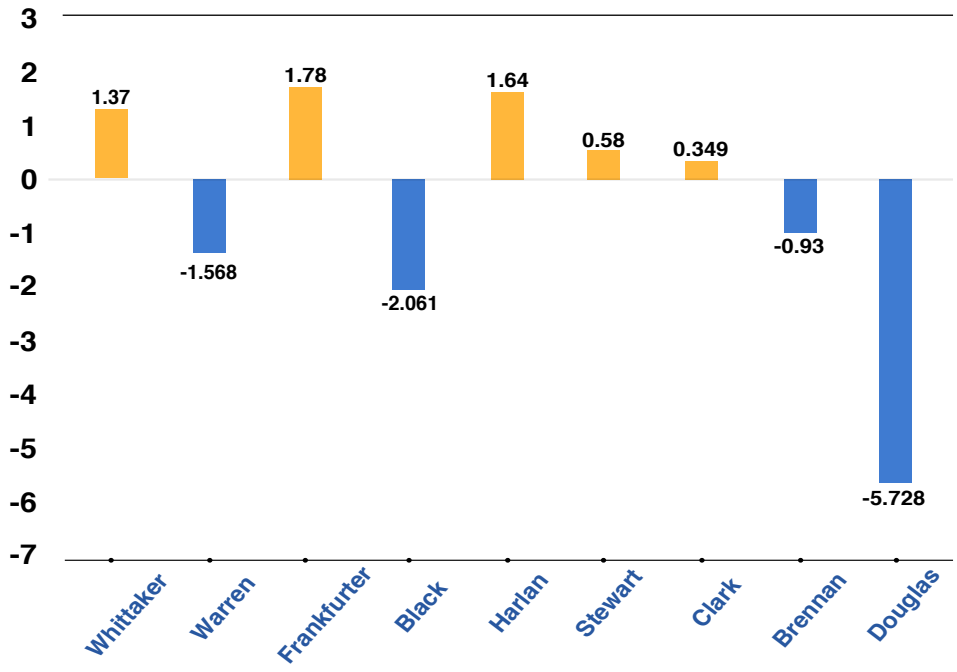
Justices serving on the Court, 1958

Justice	Mean	President	Party of President	Years Served
Whittaker	1.286	Eisenhower	Republican	1957-1962
Warren	-1.662	Eisenhower	Republican	1953-1969
Frankfurter	1.497	F.D. Roosevelt	Democrat	1939-1962
Burton	1.078	Truman	Democrat	1945-1958
Black	-2.093	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.494	Eisenhower	Republican	1954-1971
Stewart	0.836	Eisenhower	Republican	1958-1981
Clark	0.526	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-5.435	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1958

Chief Justice	Median	Court Score
Warren	0.643	-0.33

1959



Justices serving on the Court and Martin Quinn Ideology scores, 1959

Justices serving on the Court, 1959

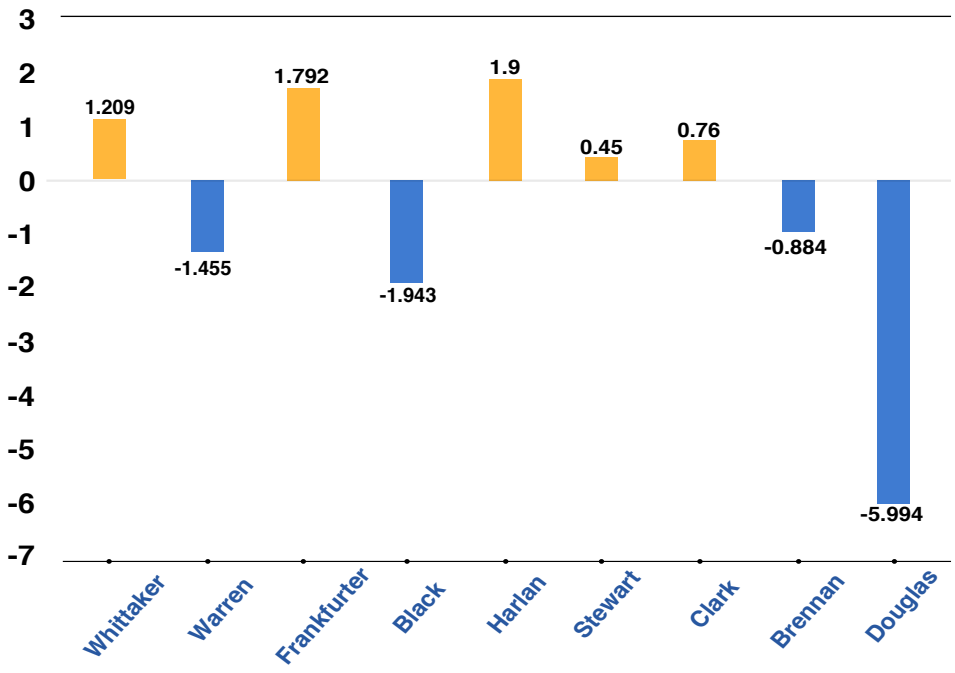
Justice	Mean	President	Party of President	Years Served
Whittaker	1.37	Eisenhower	Republican	1957-1962
Warren	-1.568	Eisenhower	Republican	1953-1969
Frankfurter	1.78	F.D. Roosevelt	Democrat	1939-1962
Black	-2.061	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.64	Eisenhower	Republican	1954-1971
Stewart	0.58	Eisenhower	Republican	1958-1981
Clark	0.349	Truman	Democrat	1949-1967
Brennan	-0.93	Eisenhower	Republican	1956-1990
Douglas	-5.728	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1959

Chief Justice	Median	Court Score
Warren	0.335	-0.51

Barenblatt v. United States (1959)

1960



Justices serving on the Court and Martin Quinn Ideology scores, 1960

Justices serving on the Court, 1960

Justice	Mean	President	Party of President	Years Served
Whittaker	1.209	Eisenhower	Republican	1957-1962
Warren	-1.455	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.943	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.9	Eisenhower	Republican	1954-1971
Stewart	0.45	Eisenhower	Republican	1958-1981
Clark	0.76	Truman	Democrat	1949-1967
Brennan	-0.884	Eisenhower	Republican	1956-1990
Douglas	-5.994	F.D. Roosevelt	Democrat	1939-1975

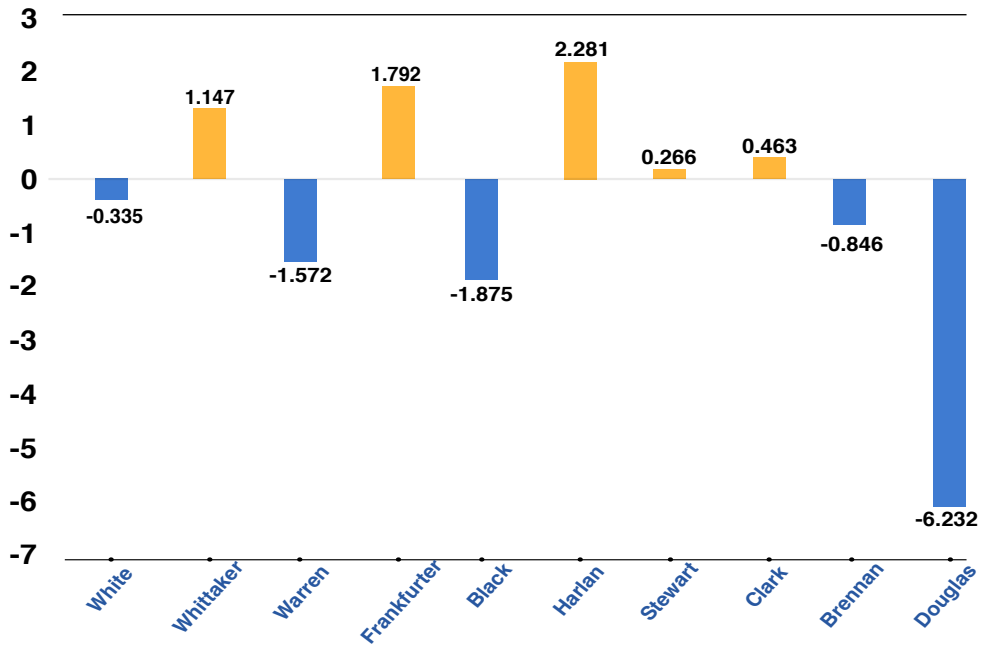
Chief Justice, 1960

Chief Justice	Median	Court Score
Warren	0.442	-0.46

Flemming v. Nestor (1960)

Armstrong v. United States (1960)

1961



Justices serving on the Court and Martin Quinn Ideology scores, 1961

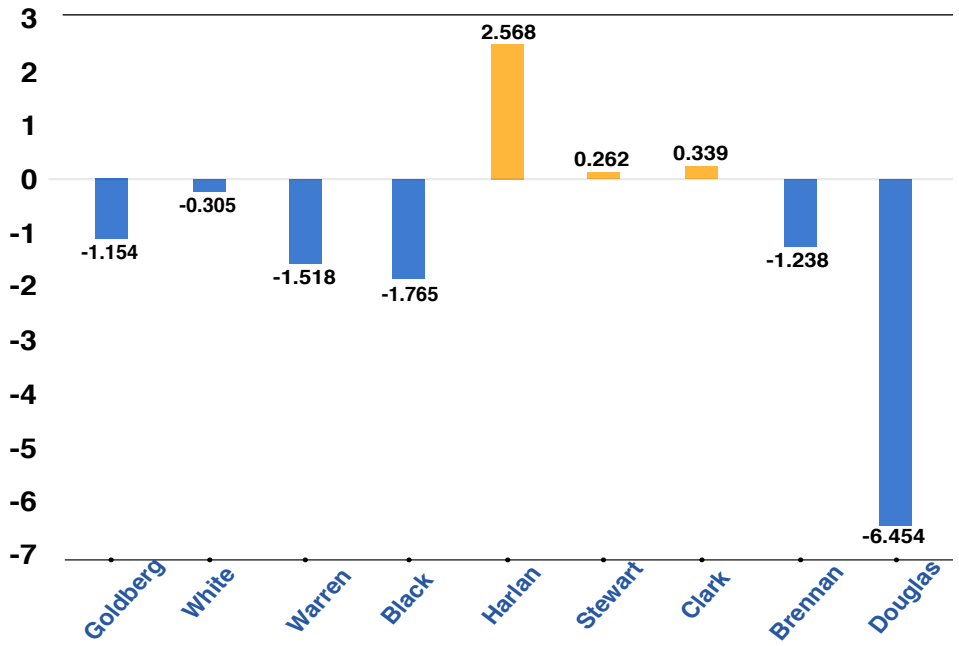
Justices serving on the Court, 1961

Justice	Mean	President	Party of President	Years Served
White	-0.335	Kennedy	Democrat	1961-1993
Whittaker	1.147	Eisenhower	Republican	1957-1962
Warren	-1.572	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.875	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.281	Eisenhower	Republican	1954-1971
Stewart	0.266	Eisenhower	Republican	1958-1981
Clark	0.463	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-6.232	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1961

Chief Justice	Median	Court Score
Warren	-0.043	-0.49

1962



Justices serving on the Court and Martin Quinn Ideology scores, 1962

Justices serving on the Court, 1962

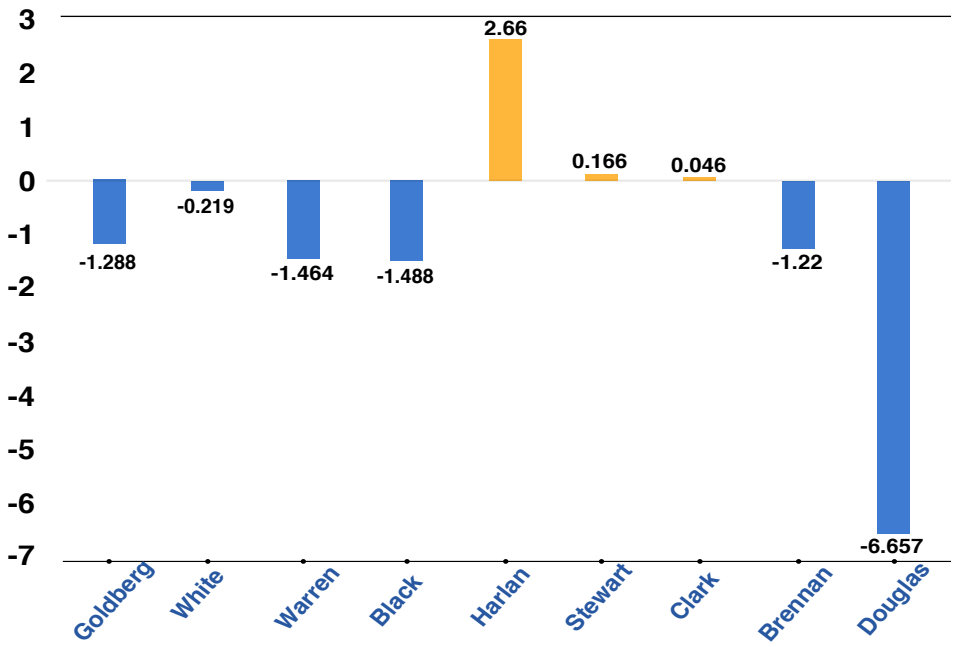
Justice	Mean	President	Party of President	Years Served
Goldberg	-1.154	Kennedy	Democrat	1962-1965
White	-0.305	Kennedy	Democrat	1961-1993
Warren	-1.518	Eisenhower	Republican	1953-1969
Black	-1.765	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.568	Eisenhower	Republican	1954-1971
Stewart	0.262	Eisenhower	Republican	1958-1981
Clark	0.339	Truman	Democrat	1949-1967
Brennan	-1.238	Eisenhower	Republican	1956-1990
Douglas	-6.454	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1962

Chief Justice	Median	Court Score
Warren	-1.078	-1.03

Baker v. Carr (1962)

1963



Justices serving on the Court and Martin Quinn Ideology scores, 1963

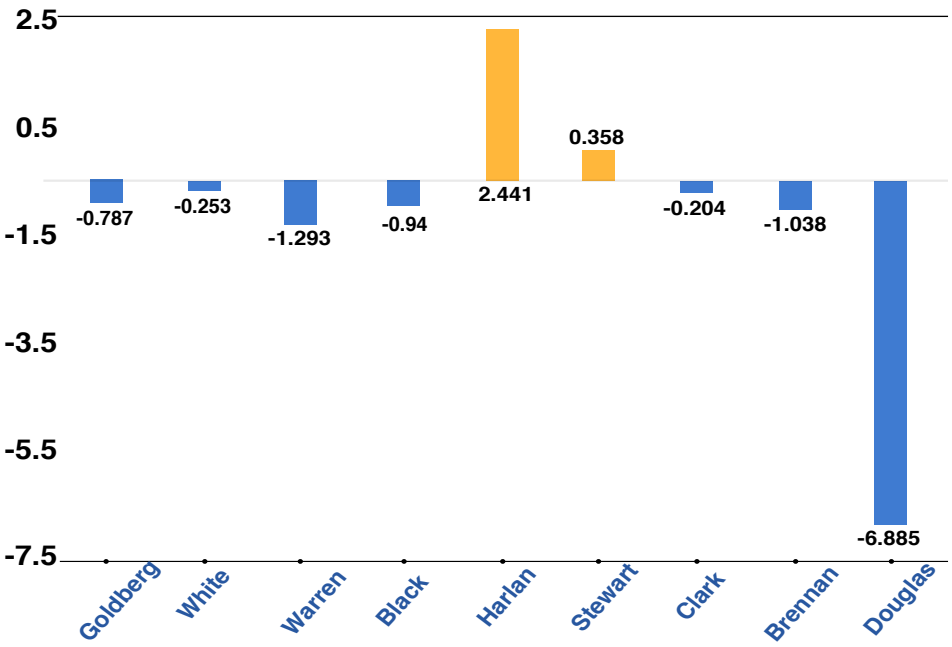
Justices serving on the Court, 1963

Justice	Mean	President	Party of President	Years Served
Goldberg	-1.288	Kennedy	Democrat	1962-1965
White	-0.219	Kennedy	Democrat	1961-1993
Warren	-1.464	Eisenhower	Republican	1953-1969
Black	-1.488	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.66	Eisenhower	Republican	1954-1971
Stewart	0.166	Eisenhower	Republican	1958-1981
Clark	0.046	Truman	Democrat	1949-1967
Brennan	-1.22	Eisenhower	Republican	1956-1990
Douglas	-6.657	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1963

Chief Justice	Median	Court Score
Warren	-1.131	-1.05

1964



Justices serving on the Court and Martin Quinn Ideology scores, 1964

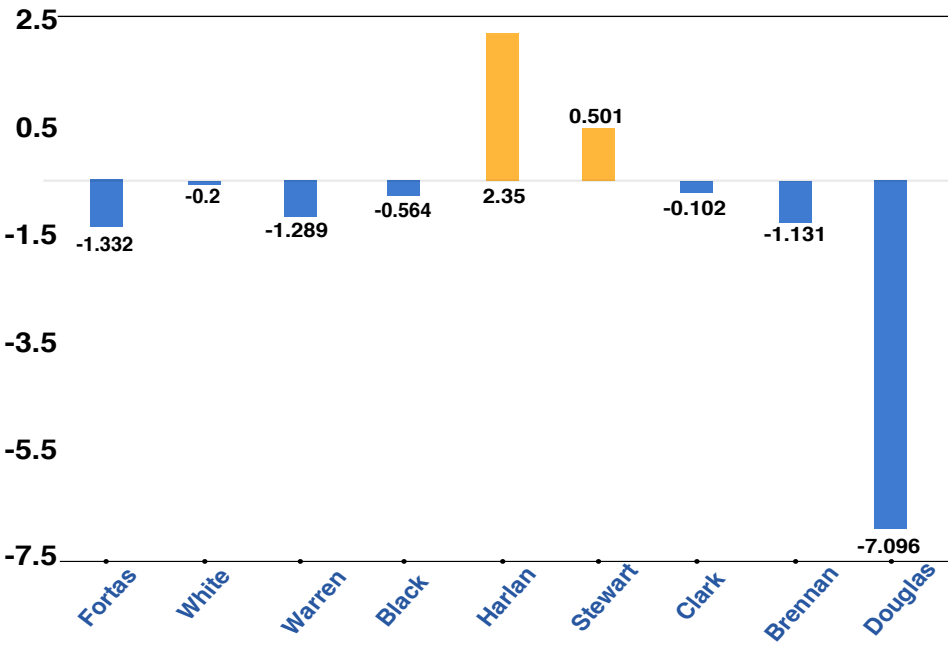
Justices serving on the Court, 1964

Justice	Mean	President	Party of President	Years Served
Goldberg	-0.787	Kennedy	Democrat	1962-1965
White	-0.253	Kennedy	Democrat	1961-1993
Warren	-1.293	Eisenhower	Republican	1953-1969
Black	-0.94	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.441	Eisenhower	Republican	1954-1971
Stewart	0.358	Eisenhower	Republican	1958-1981
Clark	-0.204	Truman	Democrat	1949-1967
Brennan	-1.038	Eisenhower	Republican	1956-1990
Douglas	-6.885	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1964

Chief Justice	Median	Court Score
Warren	-0.708	-0.96

1965



Justices serving on the Court and Martin Quinn Ideology scores, 1965

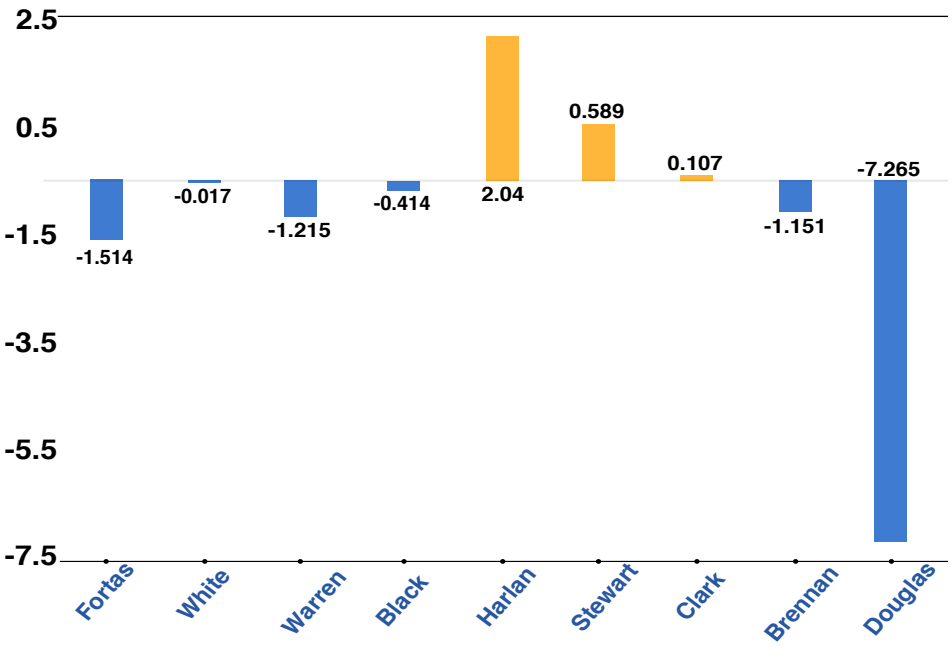
Justices serving on the Court, 1965

Justice	Mean	President	Party of President	Years Served
Fortas	-1.332	Johnson	Democrat	1965-1969
White	-0.2	Kennedy	Democrat	1961-1993
Warren	-1.289	Eisenhower	Republican	1953-1969
Black	-0.564	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.35	Eisenhower	Republican	1954-1971
Stewart	0.501	Eisenhower	Republican	1958-1981
Clark	-0.102	Truman	Democrat	1949-1967
Brennan	-1.131	Eisenhower	Republican	1956-1990
Douglas	-7.096	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1965

Chief Justice	Median	Court Score
Warren	-0.569	-0.98

1966



Justices serving on the Court and Martin Quinn Ideology scores, 1966

Justices serving on the Court, 1966

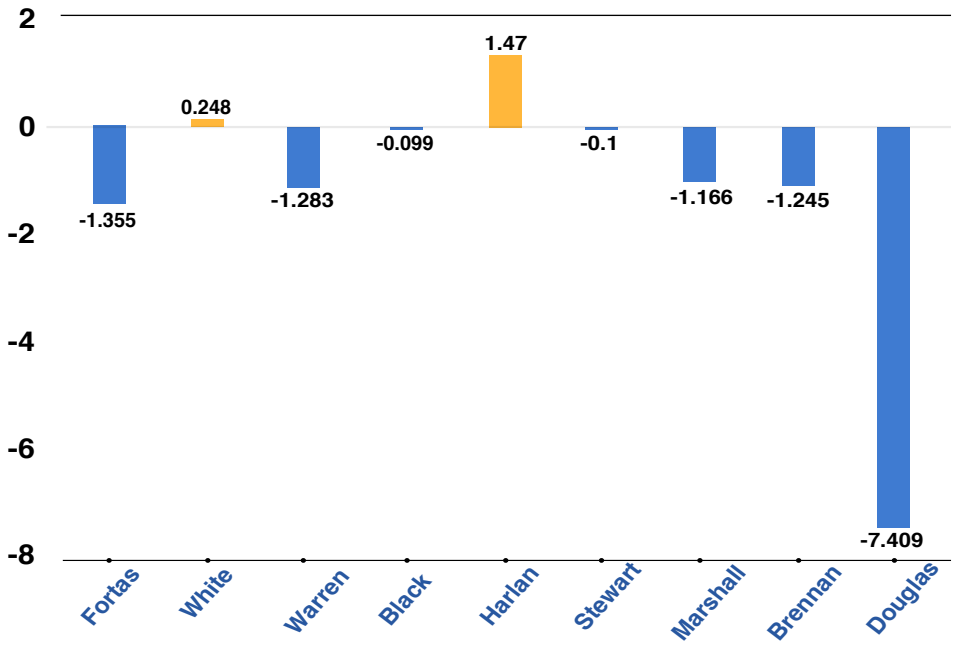
Justice	Mean	President	Party of President	Years Served
Fortas	-1.514	Johnson	Democrat	1965-1969
White	-0.017	Kennedy	Democrat	1961-1993
Warren	-1.215	Eisenhower	Republican	1953-1969
Black	-0.414	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.04	Eisenhower	Republican	1954-1971
Stewart	0.589	Eisenhower	Republican	1958-1981
Clark	0.107	Truman	Democrat	1949-1967
Brennan	-1.151	Eisenhower	Republican	1956-1990
Douglas	-7.265	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1966

Chief Justice	Median	Court Score
Warren	-0.416	-0.98

South Carolina v. Katzenbach (1966)

1967



Justices serving on the Court and Martin Quinn Ideology scores, 1967

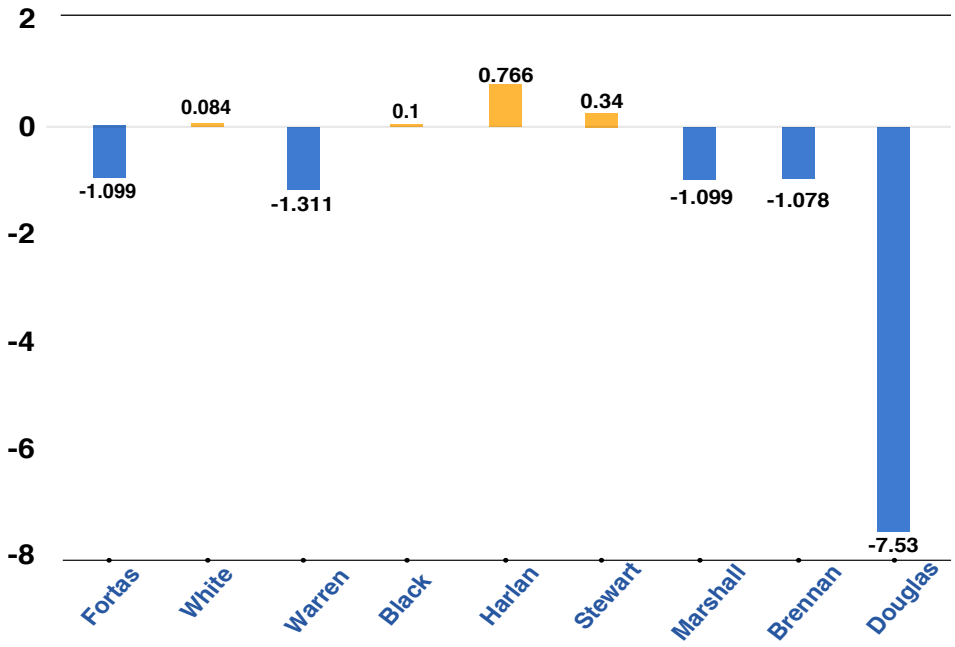
Justices serving on the Court, 1967

Justice	Mean	President	Party of President	Years Served
Fortas	-1.355	Johnson	Democrat	1965-1969
White	0.248	Kennedy	Democrat	1961-1993
Warren	-1.283	Eisenhower	Republican	1953-1969
Black	-0.099	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.47	Eisenhower	Republican	1954-1971
Stewart	-0.1	Eisenhower	Republican	1958-1981
Marshall	-1.166	Johnson	Democrat	1967-1991
Brennan	-1.245	Eisenhower	Republican	1956-1990
Douglas	-7.409	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1967

Chief Justice	Median	Court Score
Warren	-1.046	-1.22

1968



Justices serving on the Court and Martin Quinn Ideology scores, 1968

Justices serving on the Court, 1968

Justice	Mean	President	Party of President	Years Served
Fortas	-1.099	Johnson	Democrat	1965-1969
White	0.084	Kennedy	Democrat	1961-1993
Warren	-1.311	Eisenhower	Republican	1953-1969
Black	0.1	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.766	Eisenhower	Republican	1954-1971
Stewart	0.34	Eisenhower	Republican	1958-1981
Marshall	-1.099	Johnson	Democrat	1967-1991
Brennan	-1.078	Eisenhower	Republican	1956-1990
Douglas	-7.53	F.D. Roosevelt	Democrat	1939-1975

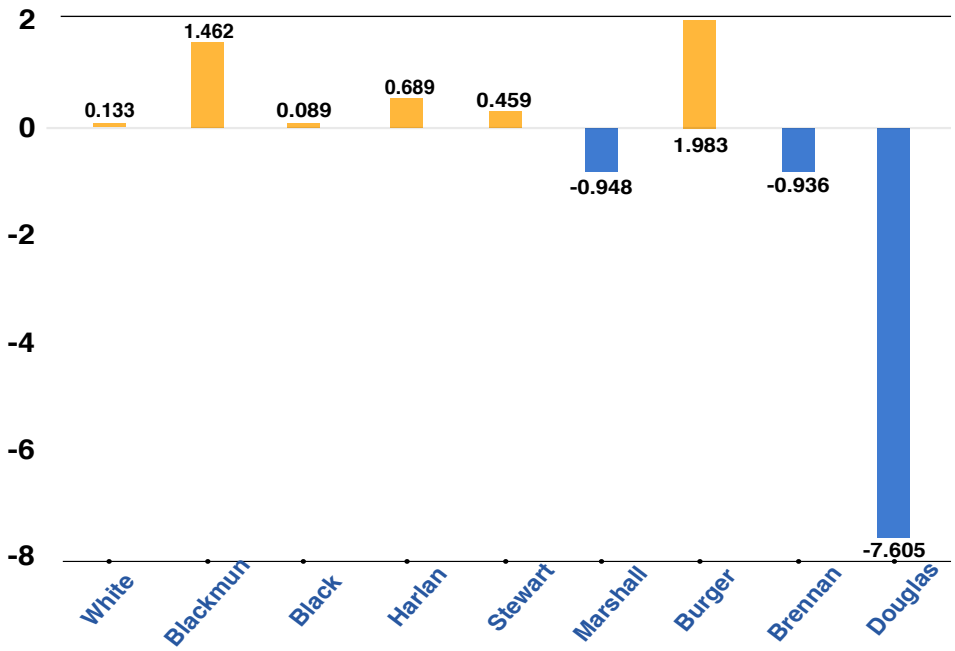
Chief Justice, 1968

Chief Justice	Median	Court Score
Warren	-0.9	-1.20

Sibron v. New York (1968)

Flast v. Cohen (1968)

1969



Justices serving on the Court and Martin Quinn Ideology scores, 1969

Justices serving on the Court, 1969

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1969

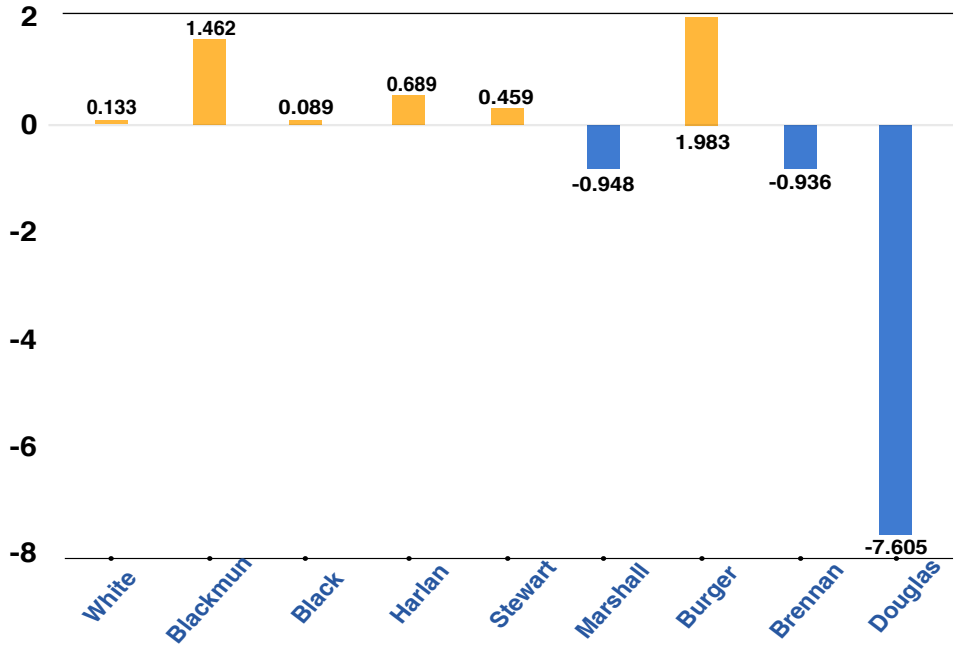
Chief Justice	Median	Court Score
Burger	0.193	-0.52

Powell v. McCormack (1969)

Justices Serving on the Court 1970 - 1989

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1970



Justices serving on the Court and Martin Quinn Ideology scores, 1970

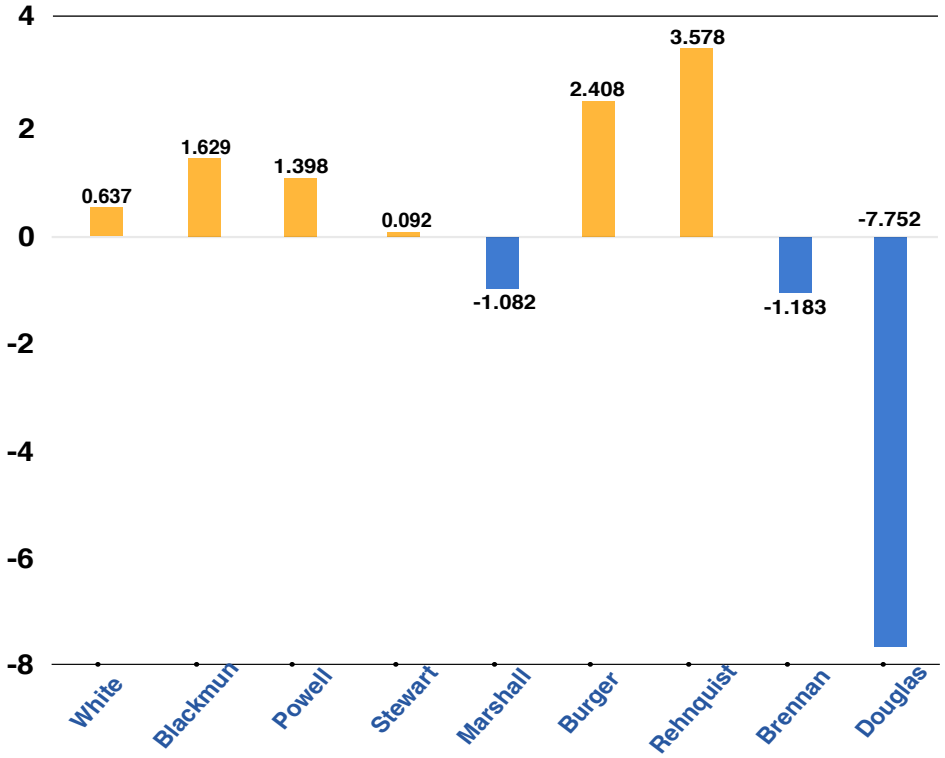
Justices serving on the Court, 1970

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1970

Chief Justice	Median	Court Score
Burger	0.378	-0.52

1971



Justices serving on the Court and Martin Quinn Ideology scores, 1971

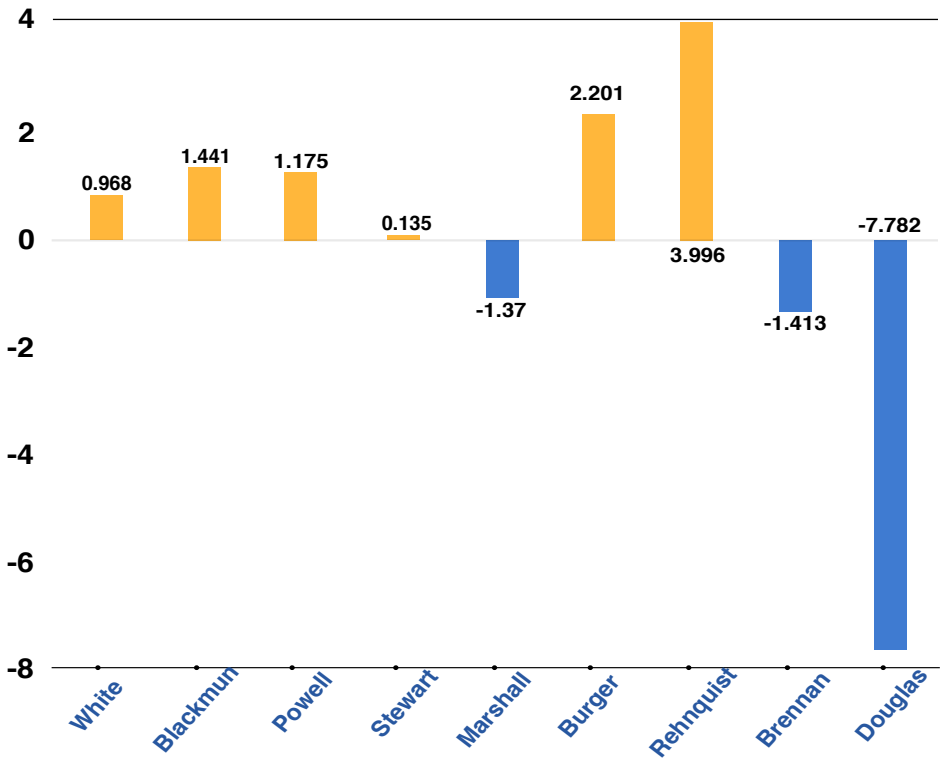
Justices serving on the Court, 1971

Justice	Mean	President	Party of President	Years Served
White	0.637	Kennedy	Democrat	1961-1993
Blackmun	1.629	Nixon	Republican	1969-1994
Powell	1.398	Nixon	Republican	1971-1987
Stewart	0.092	Eisenhower	Republican	1958-1981
Marshall	-1.082	Johnson	Democrat	1967-1991
Burger	2.408	Nixon	Republican	1969-1986
Rehnquist	3.578	Nixon	Republican	1971-2005
Brennan	-1.183	Eisenhower	Republican	1956-1990
Douglas	-7.752	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1971

Chief Justice	Median	Court Score
Burger	0.637	-0.03

1972



Justices serving on the Court and Martin Quinn Ideology scores, 1972

Justices serving on the Court, 1972

Justice	Mean	President	Party of President	Years Served
White	0.968	Kennedy	Democrat	1961-1993
Blackmun	1.441	Nixon	Republican	1969-1994
Powell	1.175	Nixon	Republican	1971-1987
Stewart	0.135	Eisenhower	Republican	1958-1981
Marshall	-1.37	Johnson	Democrat	1967-1991
Burger	2.201	Nixon	Republican	1969-1986
Rehnquist	3.996	Nixon	Republican	1971-2005
Brennan	-1.413	Eisenhower	Republican	1956-1990
Douglas	-7.782	F.D. Roosevelt	Democrat	1939-1975

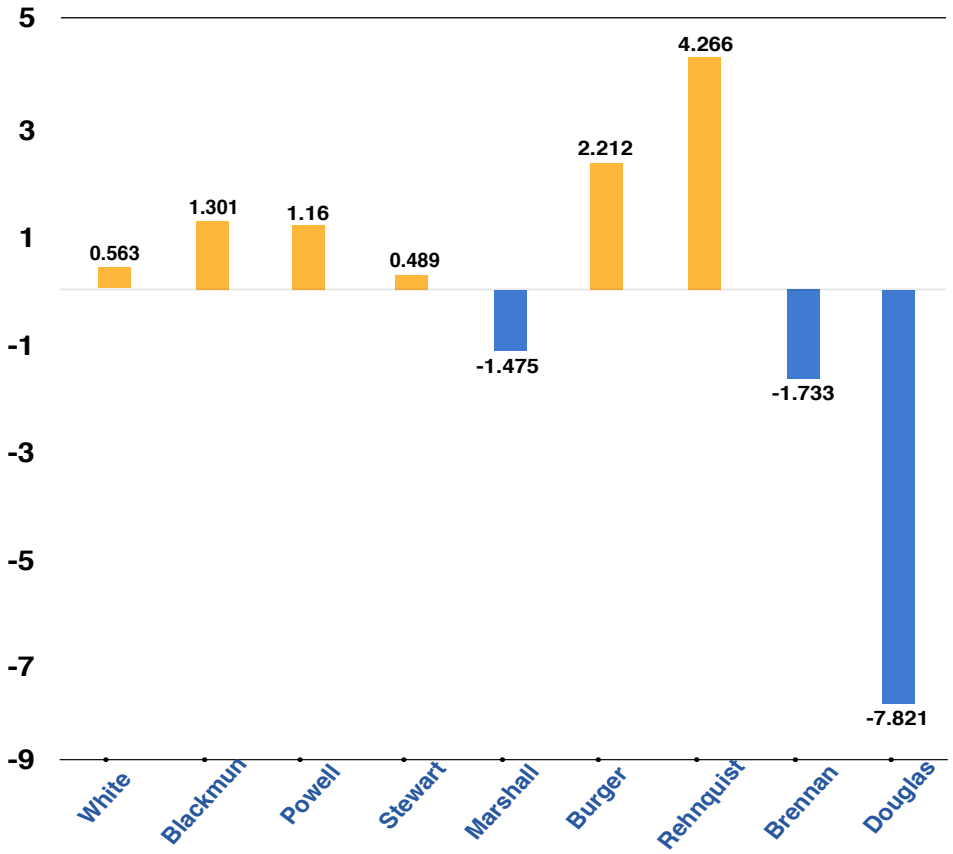
Chief Justice, 1972

Chief Justice	Median	Court Score
Burger	0.944	-0.07

Richardson v. Wright (1972)

Gravel v. United States (1972)

1973



Justices serving on the Court and Martin Quinn Ideology scores, 1973

Justices serving on the Court, 1973

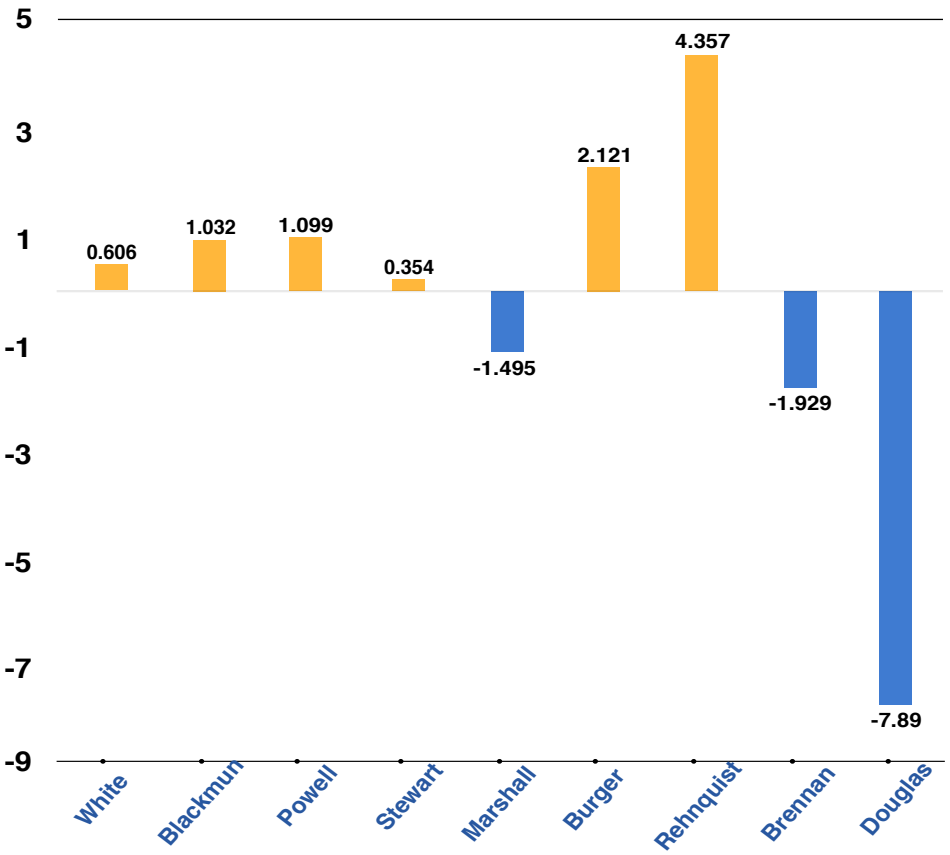
Justice	Mean	President	Party of President	Years Served
White	0.563	Kennedy	Democrat	1961-1993
Blackmun	1.301	Nixon	Republican	1969-1994
Powell	1.16	Nixon	Republican	1971-1987
Stewart	0.489	Eisenhower	Republican	1958-1981
Marshall	-1.475	Johnson	Democrat	1967-1991
Burger	2.212	Nixon	Republican	1969-1986
Rehnquist	4.266	Nixon	Republican	1971-2005
Brennan	-1.733	Eisenhower	Republican	1956-1990
Douglas	-7.821	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1973

Chief Justice	Median	Court Score
Burger	0.61	-0.12

Roe v. Wade (1973)

1974



Justices serving on the Court and Martin Quinn Ideology scores, 1974

Justices serving on the Court, 1974

Justice	Mean	President	Party of President	Years Served
White	0.606	Kennedy	Democrat	1961-1993
Blackmun	1.032	Nixon	Republican	1969-1994
Powell	1.099	Nixon	Republican	1971-1987
Stewart	0.354	Eisenhower	Republican	1958-1981
Marshall	-1.495	Johnson	Democrat	1967-1991
Burger	2.121	Nixon	Republican	1969-1986
Rehnquist	4.357	Nixon	Republican	1971-2005
Brennan	-1.929	Eisenhower	Republican	1956-1990
Douglas	-7.89	F.D. Roosevelt	Democrat	1939-1975

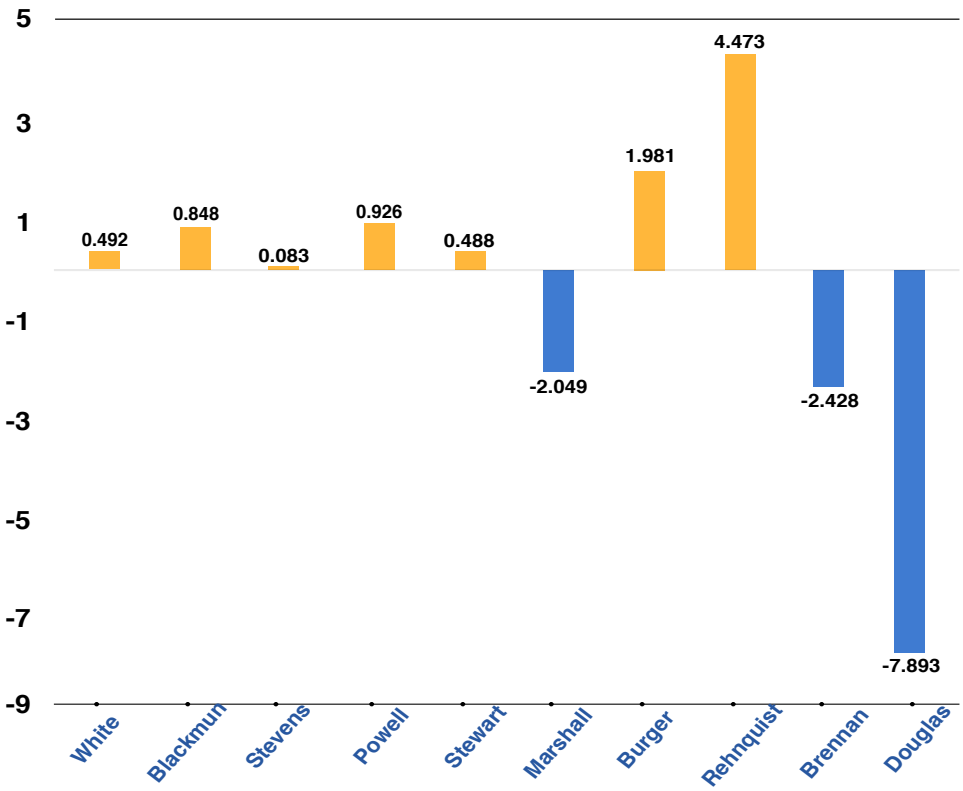
Chief Justice, 1974

Chief Justice	Median	Court Score
Burger	0.614	-0.19

De Funis v. Odegaard (1974)

United States v. Nixon (1974)

1975



Justices serving on the Court and Martin Quinn Ideology scores, 1975

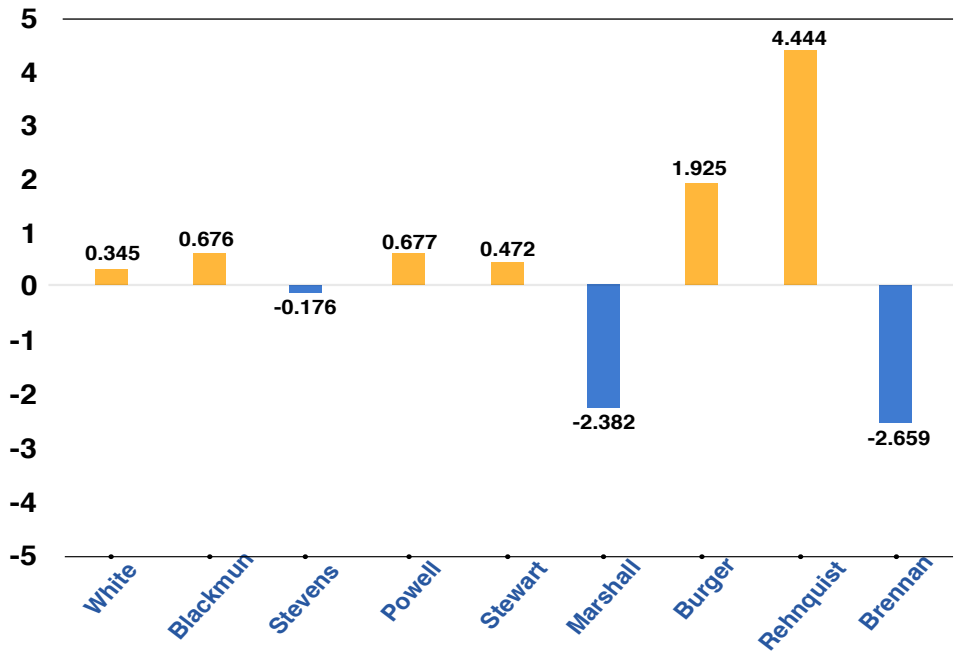
Justices serving on the Court, 1975

Justice	Mean	President	Party of President	Years Served
White	0.492	Kennedy	Democrat	1961-1993
Blackmun	0.848	Nixon	Republican	1969-1994
Stevens	0.083	Ford	Republican	1975-2010
Powell	0.926	Nixon	Republican	1971-1987
Stewart	0.488	Eisenhower	Republican	1958-1981
Marshall	-2.049	Johnson	Democrat	1967-1991
Burger	1.981	Nixon	Republican	1969-1986
Rehnquist	4.473	Nixon	Republican	1971-2005
Brennan	-2.428	Eisenhower	Republican	1956-1990
Douglas	-7.893	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1975

Chief Justice	Median	Court Score
Burger	0.489	-0.36

1976



Justices serving on the Court and Martin Quinn Ideology scores, 1976

Justices serving on the Court, 1976

Justice	Mean	President	Party of President	Years Served
White	0.345	Kennedy	Democrat	1961-1993
Blackmun	0.676	Nixon	Republican	1969-1994
Stevens	-0.176	Ford	Republican	1975-2010
Powell	0.677	Nixon	Republican	1971-1987
Stewart	0.472	Eisenhower	Republican	1958-1981
Marshall	-2.382	Johnson	Democrat	1967-1991
Burger	1.925	Nixon	Republican	1969-1986
Rehnquist	4.444	Nixon	Republican	1971-2005
Brennan	-2.659	Eisenhower	Republican	1956-1990

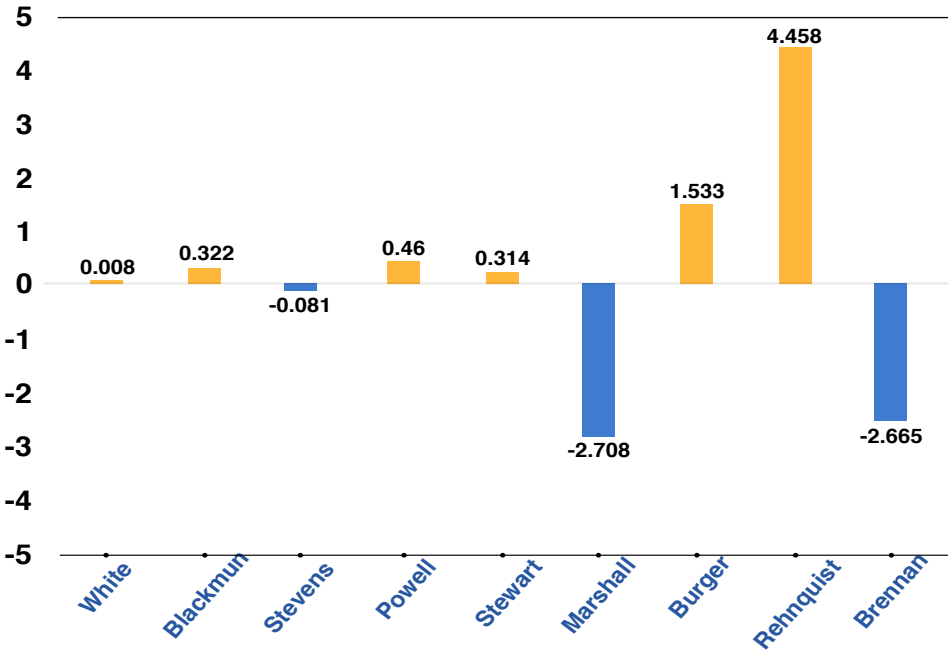
Chief Justice, 1976

Chief Justice	Median	Court Score
Burger	0.474	0.37

Michelin Tire Corp v. Wages (1976)

National League of Cities v. Usery (1976)

1977



Justices serving on the Court and Martin Quinn Ideology scores, 1977

Justices serving on the Court, 1977

Justice	Mean	President	Party of President	Years Served
White	0.008	Kennedy	Democrat	1961-1993
Blackmun	0.322	Nixon	Republican	1969-1994
Stevens	-0.081	Ford	Republican	1975-2010
Powell	0.46	Nixon	Republican	1971-1987
Stewart	0.314	Eisenhower	Republican	1958-1981
Marshall	-2.708	Johnson	Democrat	1967-1991
Burger	1.533	Nixon	Republican	1969-1986
Rehnquist	4.458	Nixon	Republican	1971-2005
Brennan	-2.665	Eisenhower	Republican	1956-1990

Chief Justice, 1977

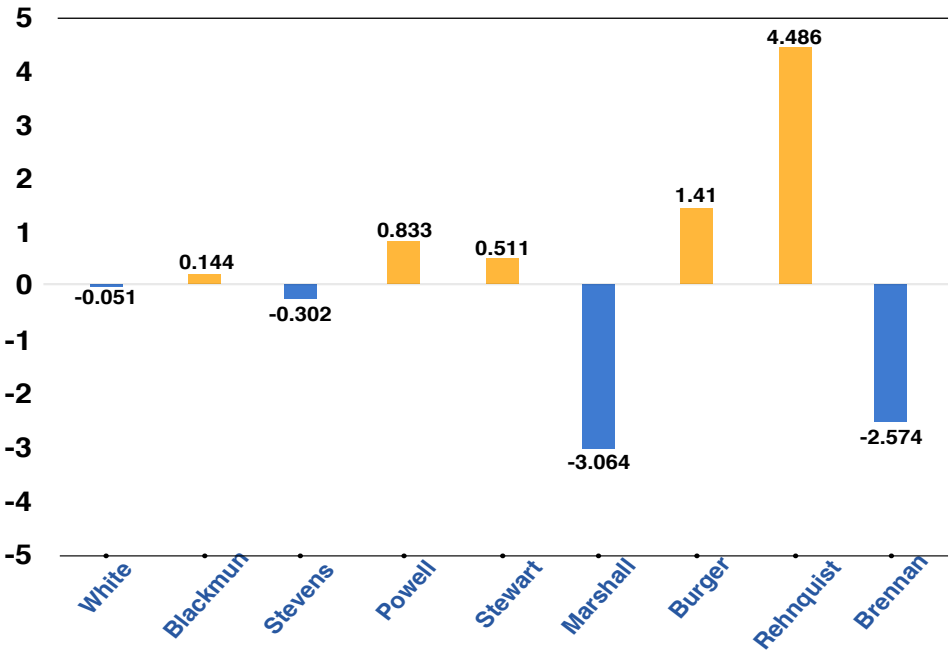
Chief Justice	Median	Court Score
Burger	0.234	0.18

Nixon v. Administrator of General Services (1977)

Hunt v. WA State Apple Advertising Commission (1977)

Complete Auto Transit v. Brady (1977)

1978



Justices serving on the Court and Martin Quinn Ideology scores, 1978

Justices serving on the Court, 1978

Justice	Mean	President	Party of President	Years Served
White	-0.051	Kennedy	Democrat	1961-1993
Blackmun	0.144	Nixon	Republican	1969-1994
Stevens	-0.302	Ford	Republican	1975-2010
Powell	0.833	Nixon	Republican	1971-1987
Stewart	0.511	Eisenhower	Republican	1958-1981
Marshall	-3.064	Johnson	Democrat	1967-1991
Burger	1.41	Nixon	Republican	1969-1986
Rehnquist	4.486	Nixon	Republican	1971-2005
Brennan	-2.574	Eisenhower	Republican	1956-1990

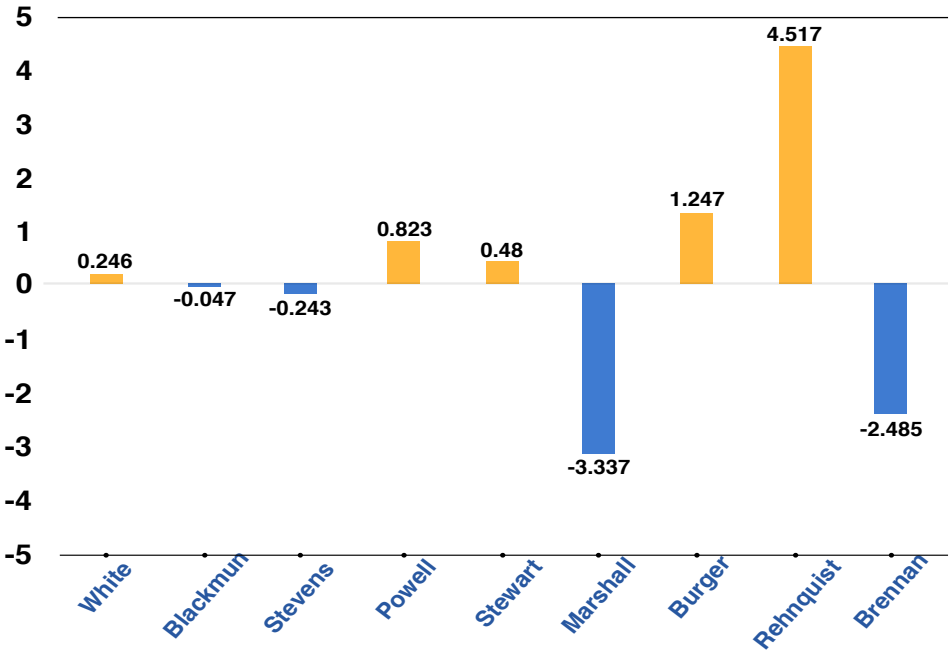
Chief Justice, 1978

Chief Justice	Median	Court Score
Burger	0.156	0.15

Allied Steel Co. v. Spannaus (1978)

Penn Central Transportation Co. v. City of New York (1978)

1979



Justices serving on the Court and Martin Quinn Ideology scores, 1979

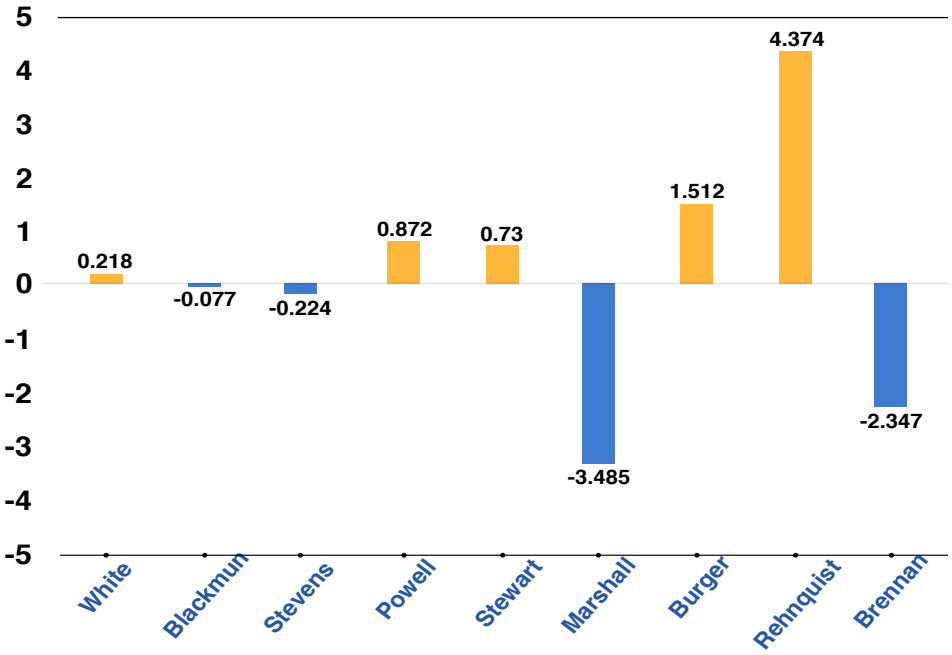
Justices serving on the Court, 1979

Justice	Mean	President	Party of President	Years Served
White	0.246	Kennedy	Democrat	1961-1993
Blackmun	-0.047	Nixon	Republican	1969-1994
Stevens	-0.243	Ford	Republican	1975-2010
Powell	0.823	Nixon	Republican	1971-1987
Stewart	0.48	Eisenhower	Republican	1958-1981
Marshall	-3.337	Johnson	Democrat	1967-1991
Burger	1.247	Nixon	Republican	1969-1986
Rehnquist	4.517	Nixon	Republican	1971-2005
Brennan	-2.485	Eisenhower	Republican	1956-1990

Chief Justice, 1979

Chief Justice	Median	Court Score
Burger	0.239	0.13

1980



Justices serving on the Court and Martin Quinn Ideology scores, 1980

Justices serving on the Court, 1980

Justice	Mean	President	Party of President	Years Served
White	0.218	Kennedy	Democrat	1961-1993
Blackmun	-0.077	Nixon	Republican	1969-1994
Stevens	-0.224	Ford	Republican	1975-2010
Powell	0.872	Nixon	Republican	1971-1987
Stewart	0.73	Eisenhower	Republican	1958-1981
Marshall	-3.485	Johnson	Democrat	1967-1991
Burger	1.512	Nixon	Republican	1969-1986
Rehnquist	4.374	Nixon	Republican	1971-2005
Brennan	-2.347	Eisenhower	Republican	1956-1990

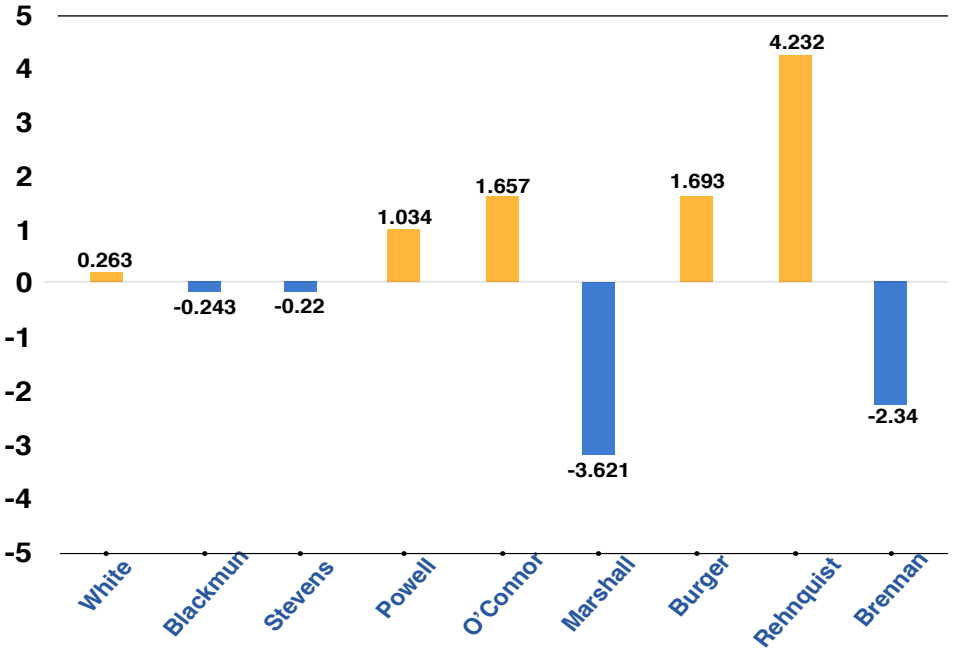
Chief Justice, 1980

Chief Justice	Median	Court Score
Burger	0.224	0.17

Fullilove v. Klutznick (1980)

Agins v. City of Tiburon (1980)

1981



Justices serving on the Court and Martin Quinn Ideology scores, 1981

Justices serving on the Court, 1981

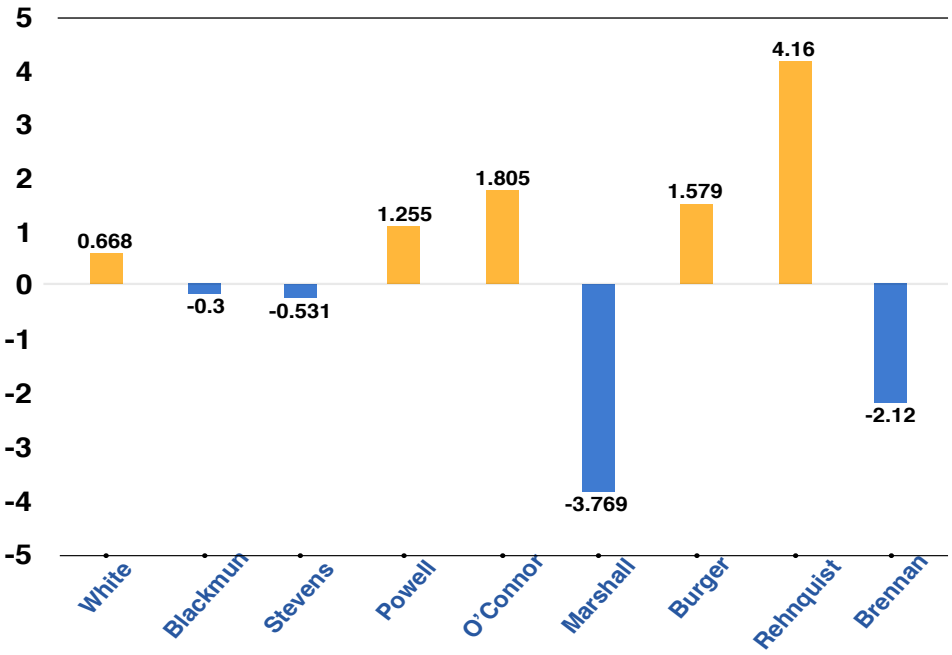
Justice	Mean	President	Party of President	Years Served
White	0.263	Kennedy	Democrat	1961-1993
Blackmun	-0.243	Nixon	Republican	1969-1994
Stevens	-0.22	Ford	Republican	1975-2010
Powell	1.034	Nixon	Republican	1971-1987
O'Connor	1.657	Reagan	Republican	1981-2006
Marshall	-3.621	Johnson	Democrat	1967-1991
Burger	1.693	Nixon	Republican	1969-1986
Rehnquist	4.232	Nixon	Republican	1971-2005
Brennan	-2.34	Eisenhower	Republican	1956-1990

Chief Justice, 1981

Chief Justice	Median	Court Score
Burger	0.263	0.27

Dames & Moore v. Regan (1981)

1982



Justices serving on the Court and Martin Quinn Ideology scores, 1982

Justices serving on the Court, 1982

Justice	Mean	President	Party of President	Years Served
White	0.668	Kennedy	Democrat	1961-1993
Blackmun	-0.3	Nixon	Republican	1969-1994
Stevens	-0.531	Ford	Republican	1975-2010
Powell	1.255	Nixon	Republican	1971-1987
O'Connor	1.805	Reagan	Republican	1981-2006
Marshall	-3.796	Johnson	Democrat	1967-1991
Burger	1.579	Nixon	Republican	1969-1986
Rehnquist	4.16	Nixon	Republican	1971-2005
Brennan	-2.12	Eisenhower	Republican	1956-1990

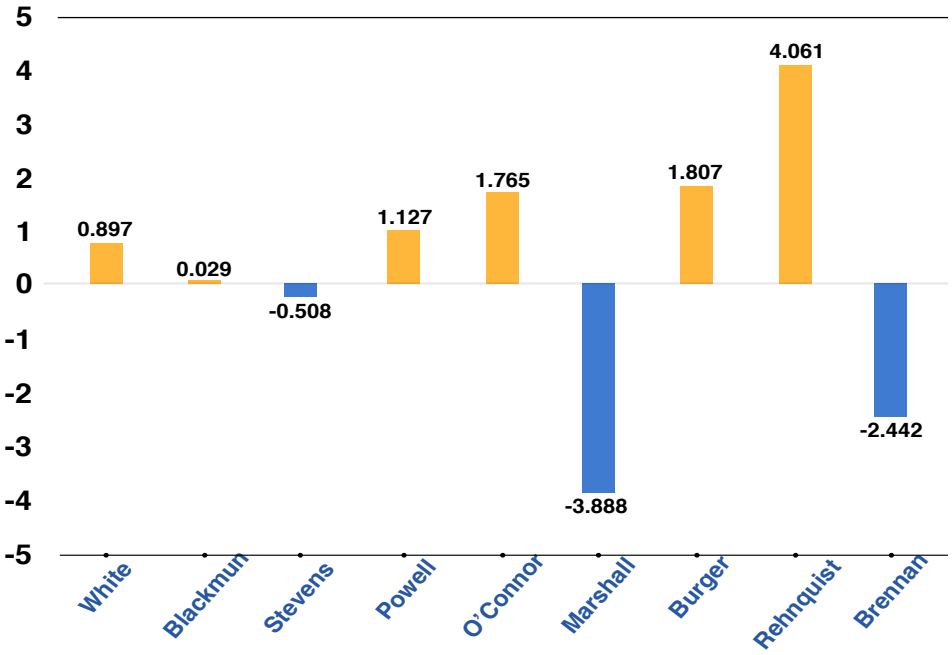
Chief Justice, 1982

Chief Justice	Median	Court Score
Burger	0.667	0.30

Nixon v. Fitzgerald (1982)

Harlow v. Fitzgerald (1982)

1983



Justices serving on the Court and Martin Quinn Ideology scores, 1983

Justices serving on the Court, 1983

Justice	Mean	President	Party of President	Years Served
White	0.897	Kennedy	Democrat	1961-1993
Blackmun	0.029	Nixon	Republican	1969-1994
Stevens	-0.508	Ford	Republican	1975-2010
Powell	1.127	Nixon	Republican	1971-1987
O'Connor	1.765	Reagan	Republican	1981-2006
Marshall	-3.888	Johnson	Democrat	1967-1991
Burger	1.807	Nixon	Republican	1969-1986
Rehnquist	4.061	Nixon	Republican	1971-2005
Brennan	-2.442	Eisenhower	Republican	1956-1990

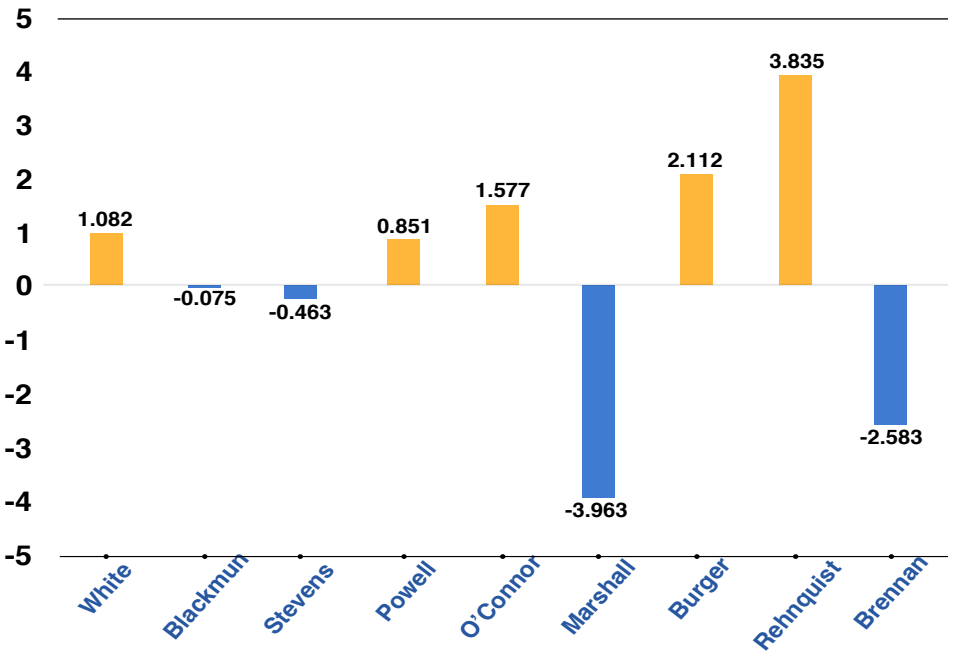
Chief Justice, 1983

Chief Justice	Median	Court Score
Burger	0.875	0.32

Exxon Corp v. Eagerton (1983)

Energy Reserves Group v. Kansas Power and Light (1983)

1984



Justices serving on the Court and Martin Quinn Ideology scores, 1984

Justices serving on the Court, 1984

Justice	Mean	President	Party of President	Years Served
White	1.082	Kennedy	Democrat	1961-1993
Blackmun	-0.075	Nixon	Republican	1969-1994
Stevens	-0.463	Ford	Republican	1975-2010
Powell	0.851	Nixon	Republican	1971-1987
O'Connor	1.577	Reagan	Republican	1981-2006
Marshall	-3.963	Johnson	Democrat	1967-1991
Burger	2.112	Nixon	Republican	1969-1986
Rehnquist	3.835	Nixon	Republican	1971-2005
Brennan	-2.583	Eisenhower	Republican	1956-1990

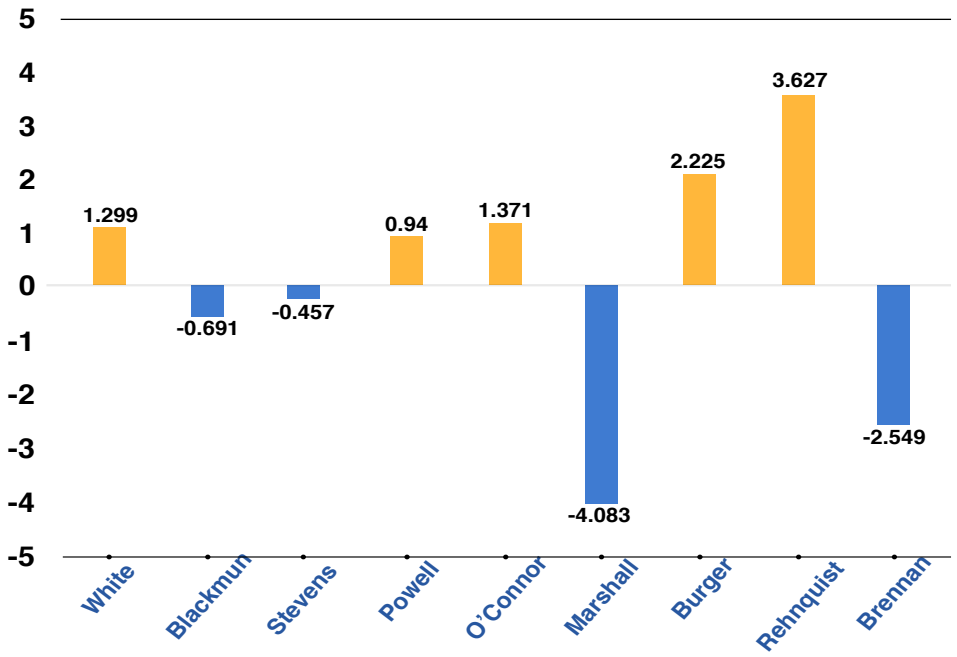
Chief Justice, 1984

Chief Justice	Median	Court Score
Burger	0.824	0.26

Pennhurst State School and Hospital v. Halderman (1984)

Hawaii Housing Authority v. Midkiff (1984)

1985



Justices serving on the Court and Martin Quinn Ideology scores, 1985

Justices serving on the Court, 1985

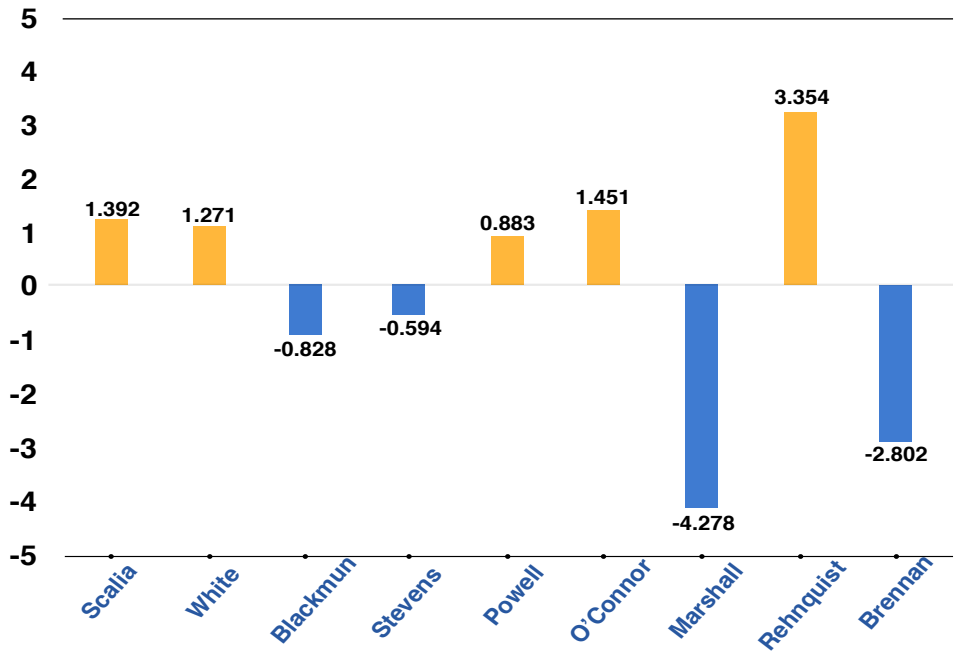
Justice	Mean	President	Party of President	Years Served
White	1.299	Kennedy	Democrat	1961-1993
Blackmun	-0.691	Nixon	Republican	1969-1994
Stevens	-0.457	Ford	Republican	1975-2010
Powell	0.94	Nixon	Republican	1971-1987
O'Connor	1.371	Reagan	Republican	1981-2006
Marshall	-4.083	Johnson	Democrat	1967-1991
Burger	2.225	Nixon	Republican	1969-1986
Rehnquist	3.627	Nixon	Republican	1971-2005
Brennan	-2.549	Eisenhower	Republican	1956-1990

Chief Justice, 1985

Chief Justice	Median	Court Score
Burger	0.93	0.19

Garcia v. SAMTA (1985)

1986



Justices serving on the Court and Martin Quinn Ideology scores, 1986

Justices serving on the Court, 1986

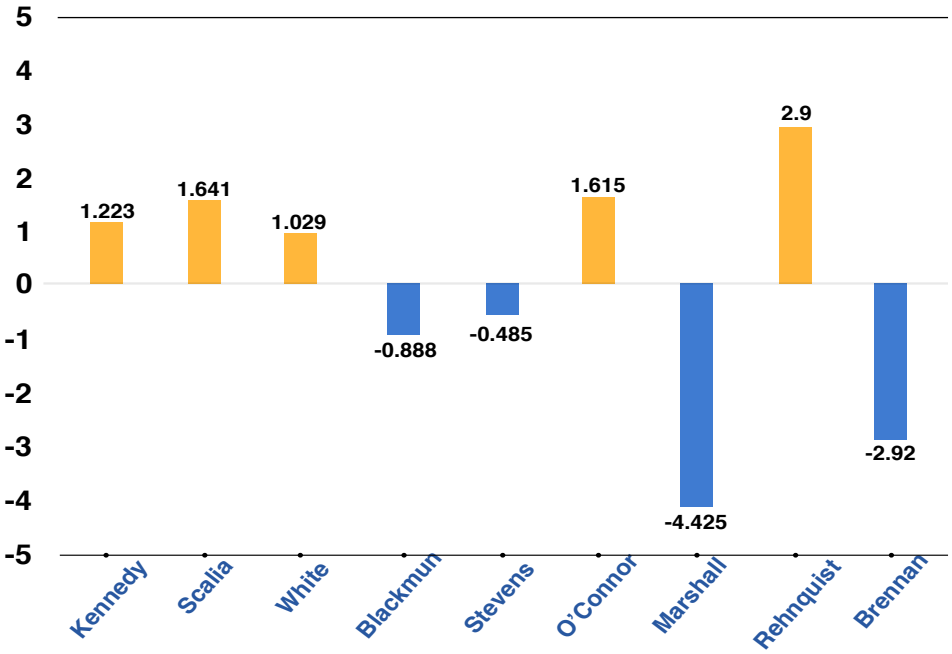
Justice	Mean	President	Party of President	Years Served
Scalia	1.392	Reagan	Republican	1986-2016
White	1.271	Kennedy	Democrat	1961-1993
Blackmun	-0.828	Nixon	Republican	1969-1994
Stevens	-0.594	Ford	Republican	1975-2010
Powell	0.883	Nixon	Republican	1971-1987
O'Connor	1.451	Reagan	Republican	1981-2006
Marshall	-4.278	Johnson	Democrat	1967-1991
Rehnquist	3.354	Nixon	Republican	1971-2005
Brennan	-2.802	Eisenhower	Republican	1956-1990

Chief Justice, 1986

Chief Justice	Median	Court Score
Rehnquist	0.875	-0.02

Maine v. Taylor (1986)

1987



Justices serving on the Court and Martin Quinn Ideology scores, 1987

Justices serving on the Court, 1987

Justice	Mean	President	Party of President	Years Served
Kennedy	1.223	Reagan	Republican	1987-2018
Scalia	1.641	Reagan	Republican	1986-2016
White	1.029	Kennedy	Democrat	1961-1993
Blackmun	-0.888	Nixon	Republican	1969-1994
Stevens	-0.485	Ford	Republican	1975-2010
O'Connor	1.615	Reagan	Republican	1981-2006
Marshall	-4.425	Johnson	Democrat	1967-1991
Rehnquist	2.9	Nixon	Republican	1971-2005
Brennan	-2.92	Eisenhower	Republican	1956-1990

Chief Justice, 1987

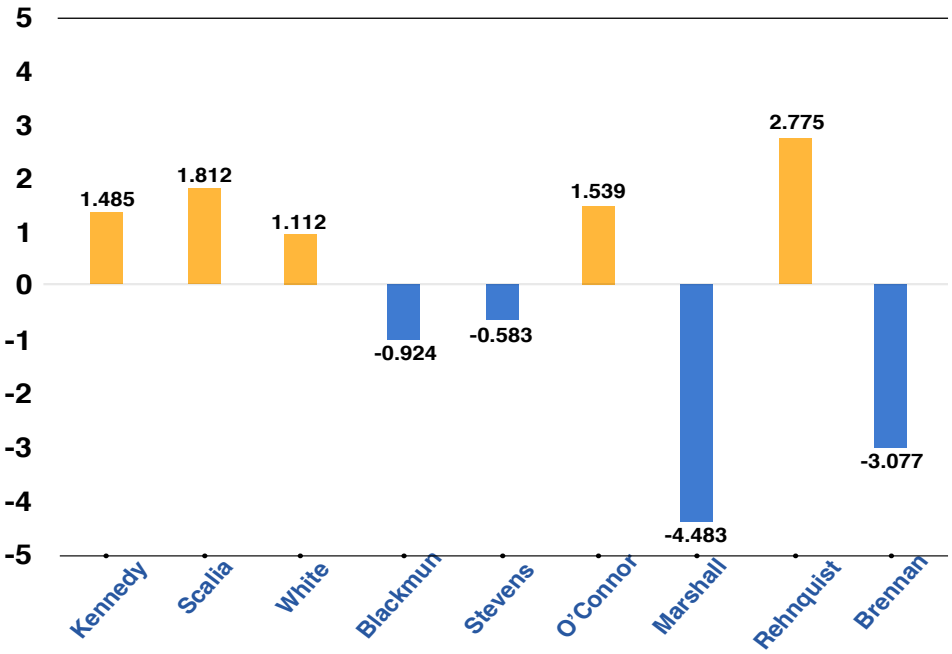
Chief Justice	Median	Court Score
Rehnquist	0.974	-0.03

Keystone Bituminous Coal Association v. DeBenedictis (1987)

First English Evangelical Lutheran Church v. Los Angeles County (1987)

Nollan v. California Coastal Commission (1987)

1988



Justices serving on the Court and Martin Quinn Ideology scores, 1988

Justices serving on the Court, 1988

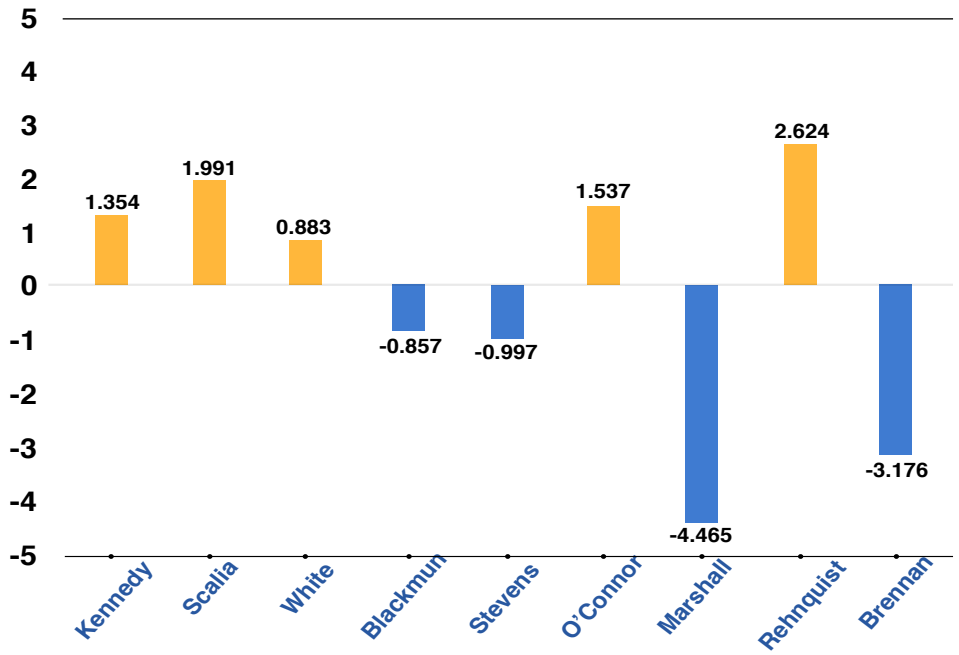
Justice	Mean	President	Party of President	Years Served
Kennedy	1.485	Reagan	Republican	1987-2018
Scalia	1.812	Reagan	Republican	1986-2016
White	1.112	Kennedy	Democrat	1961-1993
Blackmun	-0.924	Nixon	Republican	1969-1994
Stevens	-0.583	Ford	Republican	1975-2010
O'Connor	1.539	Reagan	Republican	1981-2006
Marshall	-4.483	Johnson	Democrat	1967-1991
Rehnquist	2.775	Nixon	Republican	1971-2005
Brennan	-3.077	Eisenhower	Republican	1956-1990

Chief Justice, 1988

Chief Justice	Median	Court Score
Rehnquist	1.094	-0.04

Morrison v. Olson (1988)

1989



Justices serving on the Court and Martin Quinn Ideology scores, 1989

Justices serving on the Court, 1989

Justice	Mean	President	Party of President	Years Served
Kennedy	1.354	Reagan	Republican	1987-2018
Scalia	1.991	Reagan	Republican	1986-2016
White	0.883	Kennedy	Democrat	1961-1993
Blackmun	-0.857	Nixon	Republican	1969-1994
Stevens	-0.997	Ford	Republican	1975-2010
O'Connor	1.537	Reagan	Republican	1981-2006
Marshall	-4.465	Johnson	Democrat	1967-1991
Rehnquist	2.624	Nixon	Republican	1971-2005
Brennan	-3.176	Eisenhower	Republican	1956-1990

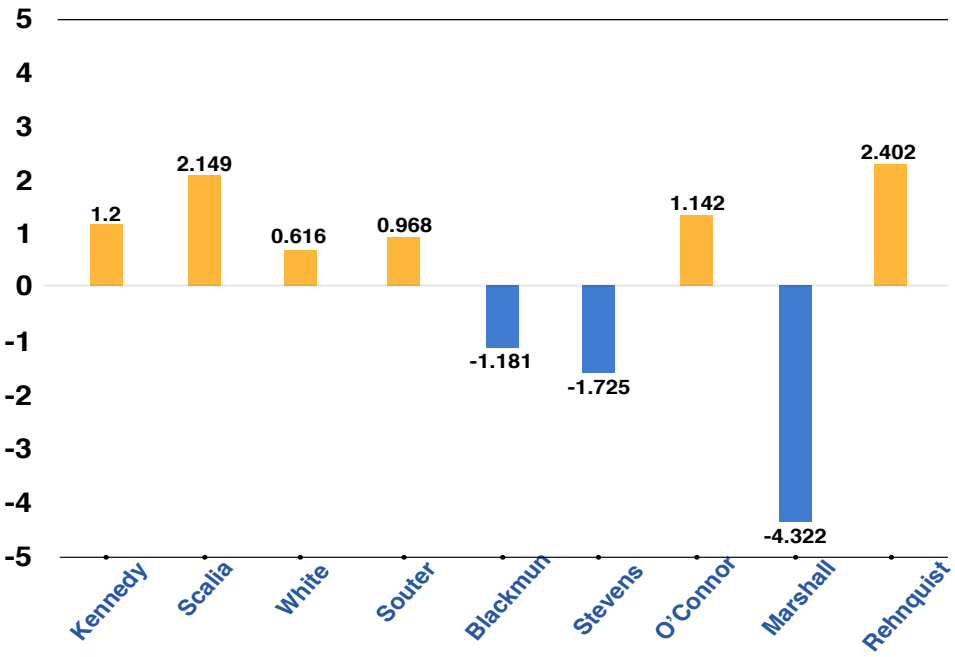
Chief Justice, 1989

Chief Justice	Median	Court Score
Rehnquist	0.88	-0.12

Justices Serving on the Court 1990 - 2009

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1990



Justices serving on the Court and Martin Quinn Ideology scores, 1990

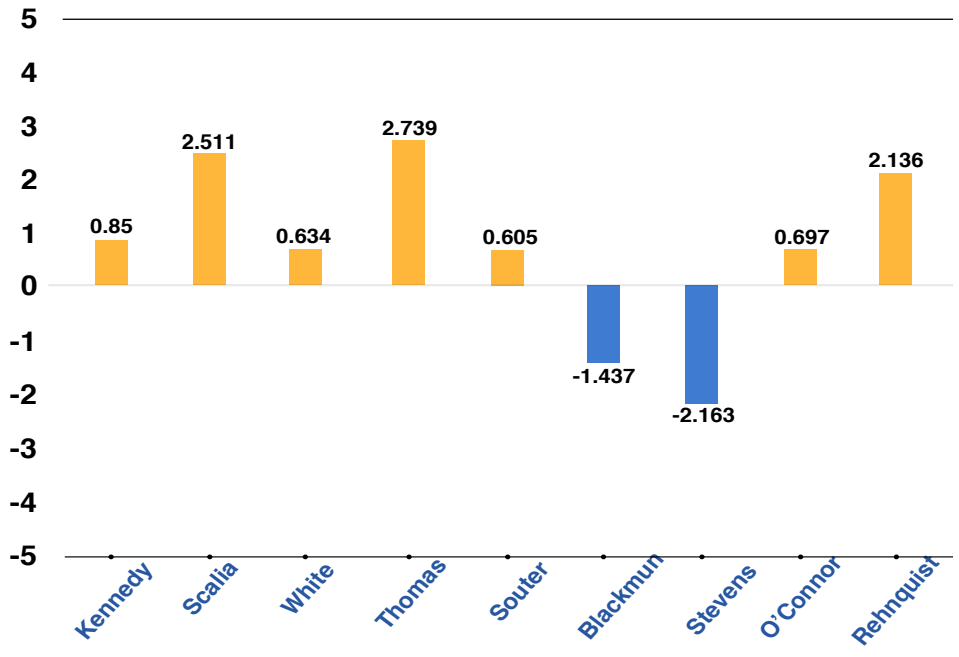
Justices serving on the Court, 1990

Justice	Mean	President	Party of President	Years Served
Kennedy	1.2	Reagan	Republican	1987-2018
Scalia	2.149	Reagan	Republican	1986-2016
White	0.616	Kennedy	Democrat	1961-1993
Souter	0.968	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.181	Nixon	Republican	1969-1994
Stevens	-1.725	Ford	Republican	1975-2010
O'Connor	1.142	Reagan	Republican	1981-2006
Marshall	-4.322	Johnson	Democrat	1967-1991
Rehnquist	2.402	Nixon	Republican	1971-2005

Chief Justice, 1990

Chief Justice	Median	Court Score
Rehnquist	0.916	0.14

1991



Justices serving on the Court and Martin Quinn Ideology scores, 1991

Justices serving on the Court, 1991

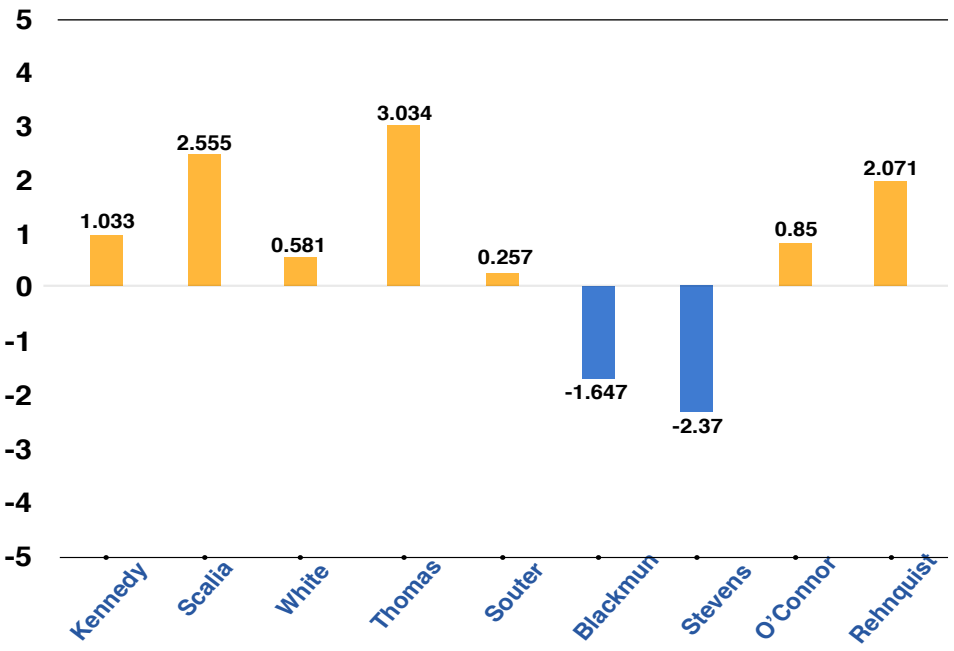
Justice	Mean	President	Party of President	Years Served
Kennedy	0.85	Reagan	Republican	1987-2018
Scalia	2.511	Reagan	Republican	1986-2016
White	0.634	Kennedy	Democrat	1961-1993
Thomas	2.739	Bush, G.H.W	Republican	1991-
Souter	0.605	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.437	Nixon	Republican	1969-1994
Stevens	-2.163	Ford	Republican	1975-2010
O'Connor	0.697	Reagan	Republican	1981-2006
Rehnquist	2.136	Nixon	Republican	1971-2005

Chief Justice, 1991

Chief Justice	Median	Court Score
Rehnquist	0.753	0.73

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. (1991)

1992



Justices serving on the Court and Martin Quinn Ideology scores, 1992

Justices serving on the Court, 1992

Justice	Mean	President	Party of President	Years Served
Kennedy	1.033	Reagan	Republican	1987-2018
Scalia	2.555	Reagan	Republican	1986-2016
White	0.581	Kennedy	Democrat	1961-1993
Thomas	3.034	Bush, G.H.W	Republican	1991-
Souter	0.257	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.647	Nixon	Republican	1969-1994
Stevens	-2.37	Ford	Republican	1975-2010
O'Connor	0.85	Reagan	Republican	1981-2006
Rehnquist	2.071	Nixon	Republican	1971-2005

Chief Justice, 1992

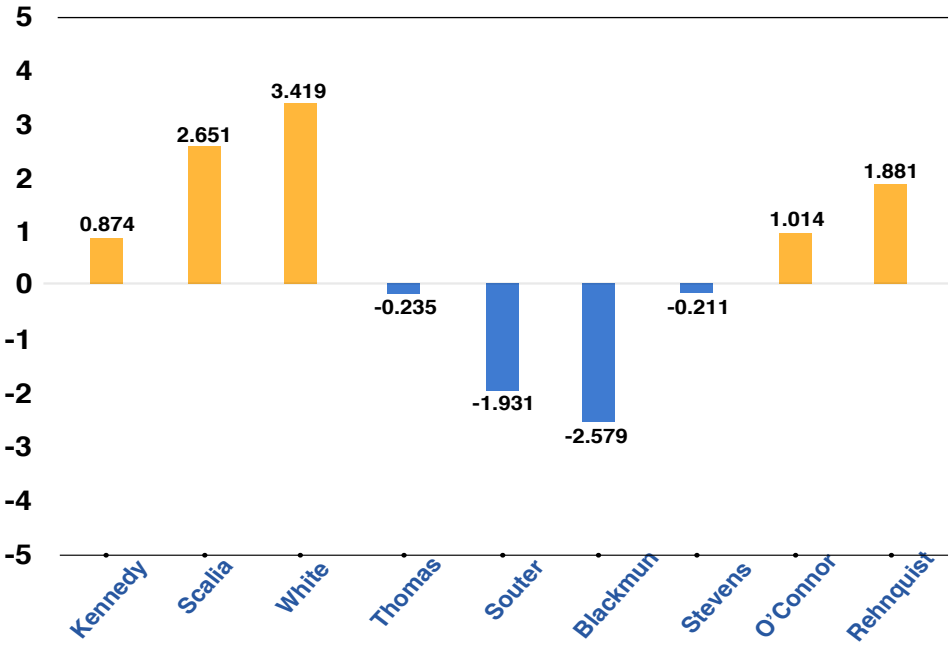
Chief Justice	Median	Court Score
Rehnquist	0.853	0.71

Lujan v. Defenders of Wildlife (1992)

New York v. United States (1992)

Lucas v. South Carolina Coastal Council (1992)

1993



Justices serving on the Court and Martin Quinn Ideology scores, 1993

Justices serving on the Court, 1993

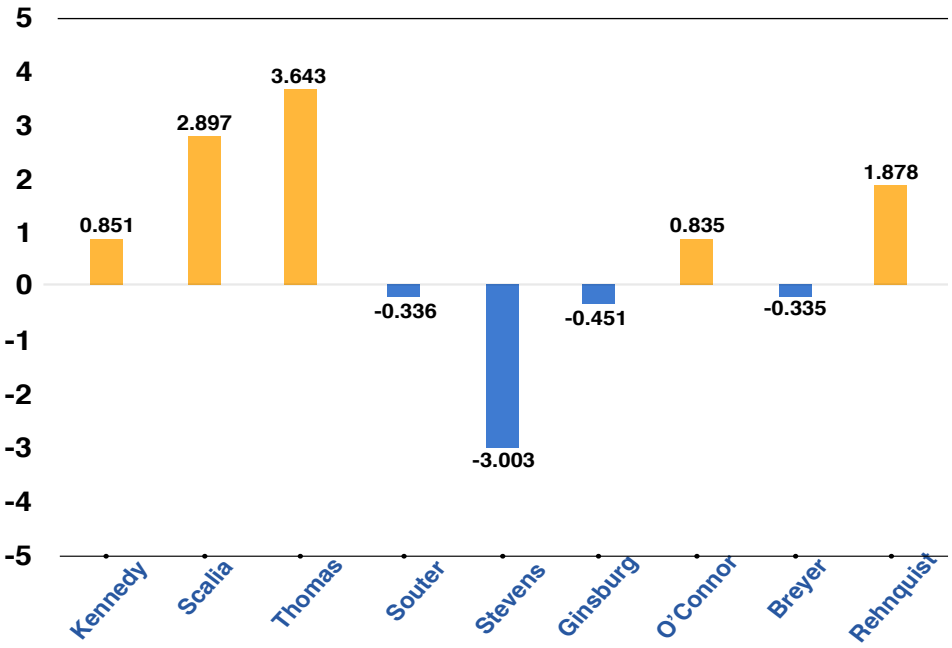
Justice	Mean	President	Party of President	Years Served
Kennedy	0.874	Reagan	Republican	1987-2018
Scalia	2.651	Reagan	Republican	1986-2016
Thomas	3.419	Bush, G.H.W	Republican	1991-
Souter	-0.235	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.931	Nixon	Republican	1969-1994
Stevens	-2.579	Ford	Republican	1975-2010
Ginsburg	-0.211	Clinton	Democrat	1993-2020
O'Connor	1.014	Reagan	Republican	1981-2006
Rehnquist	1.881	Nixon	Republican	1971-2005

Chief Justice, 1993

Chief Justice	Median	Court Score
Rehnquist	0.82	0.54

Nixon v. United States (1993)

1994



Justices serving on the Court and Martin Quinn Ideology scores, 1994

Justices serving on the Court, 1994

Justice	Mean	President	Party of President	Years Served
Kennedy	0.851	Reagan	Republican	1987-2018
Scalia	2.897	Reagan	Republican	1986-2016
Thomas	3.643	Bush, G.H.W	Republican	1991-
Souter	-0.336	Bush, G.H.W	Republican	1990-2009
Stevens	-3.003	Ford	Republican	1975-2010
Ginsburg	-0.451	Clinton	Democrat	1993-2020
O'Connor	0.835	Reagan	Republican	1981-2006
Breyer	-0.335	Clinton	Democrat	1994-2022
Rehnquist	1.878	Nixon	Republican	1971-2005

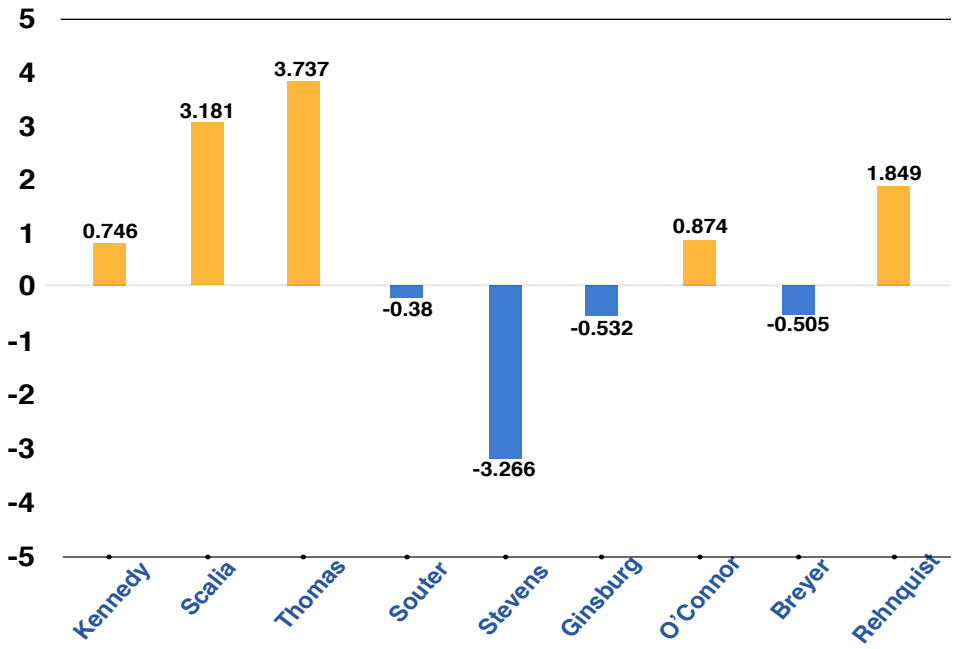
Chief Justice, 1994

Chief Justice	Median	Court Score
Rehnquist	0.735	0.66

US v. Carlton (1994)

Oregon Waste Systems v. Dept of Environmental Quality of Oregon (1994)

1995



Justices serving on the Court and Martin Quinn Ideology scores, 1995

Justices serving on the Court, 1995

Justice	Mean	President	Party of President	Years Served
Kennedy	0.746	Reagan	Republican	1987-2018
Scalia	3.181	Reagan	Republican	1986-2016
Thomas	3.737	Bush, G.H.W	Republican	1991-
Souter	-0.38	Bush, G.H.W	Republican	1990-2009
Stevens	-3.266	Ford	Republican	1975-2010
Ginsburg	-0.532	Clinton	Democrat	1993-2020
O'Connor	0.874	Reagan	Republican	1981-2006
Breyer	-0.505	Clinton	Democrat	1994-2022
Rehnquist	1.849	Nixon	Republican	1971-2005

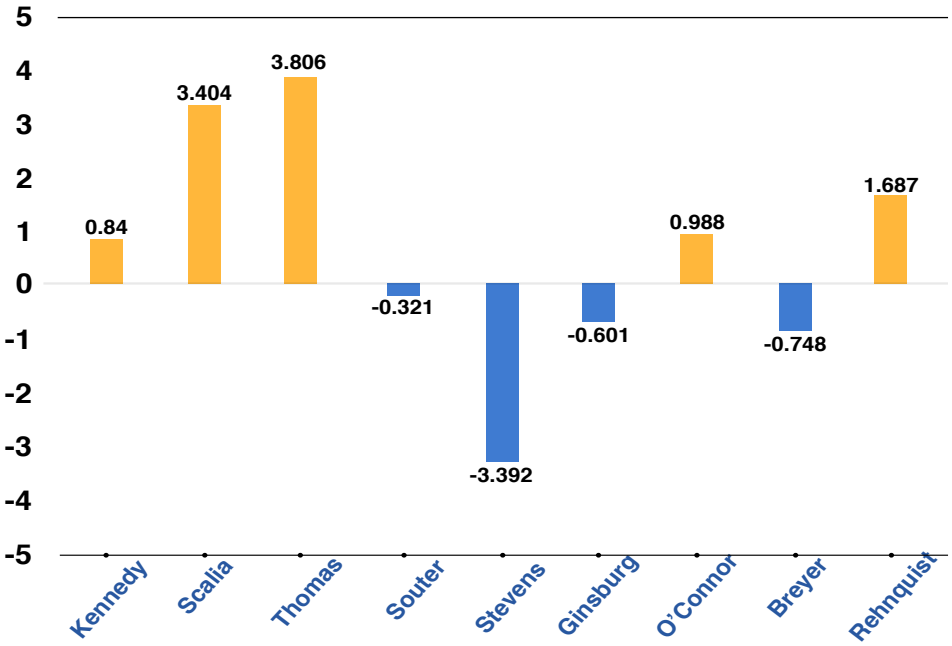
Chief Justice, 1995

Chief Justice	Median	Court Score
Rehnquist	0.689	0.63

U.S. Term Limits, Inc. v. Thornton (1995)

United States v. Lopez (1995)

1996



Justices serving on the Court and Martin Quinn Ideology scores, 1996

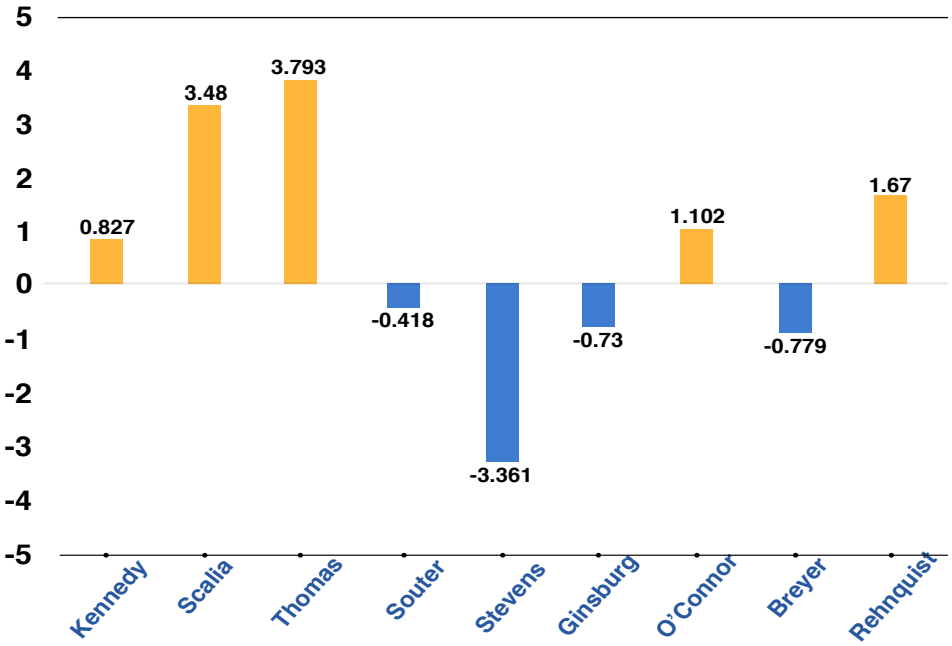
Justices serving on the Court, 1996

Justice	Mean	President	Party of President	Years Served
Kennedy	0.84	Reagan	Republican	1987-2018
Scalia	3.404	Reagan	Republican	1986-2016
Thomas	3.806	Bush, G.H.W	Republican	1991-
Souter	-0.321	Bush, G.H.W	Republican	1990-2009
Stevens	-3.392	Ford	Republican	1975-2010
Ginsburg	-0.601	Clinton	Democrat	1993-2020
O'Connor	0.988	Reagan	Republican	1981-2006
Breyer	-0.748	Clinton	Democrat	1994-2022
Rehnquist	1.687	Nixon	Republican	1971-2005

Chief Justice, 1996

Chief Justice	Median	Court Score
Rehnquist	0.788	0.63

1997



Justices serving on the Court and Martin Quinn Ideology scores, 1997

Justices serving on the Court, 1997

Justice	Mean	President	Party of President	Years Served
Kennedy	0.827	Reagan	Republican	1987-2018
Scalia	3.48	Reagan	Republican	1986-2016
Thomas	3.793	Bush, G.H.W	Republican	1991-
Souter	-0.418	Bush, G.H.W	Republican	1990-2009
Stevens	-3.361	Ford	Republican	1975-2010
Ginsburg	-0.73	Clinton	Democrat	1993-2020
O'Connor	1.102	Reagan	Republican	1981-2006
Breyer	-0.779	Clinton	Democrat	1994-2022
Rehnquist	1.67	Nixon	Republican	1971-2005

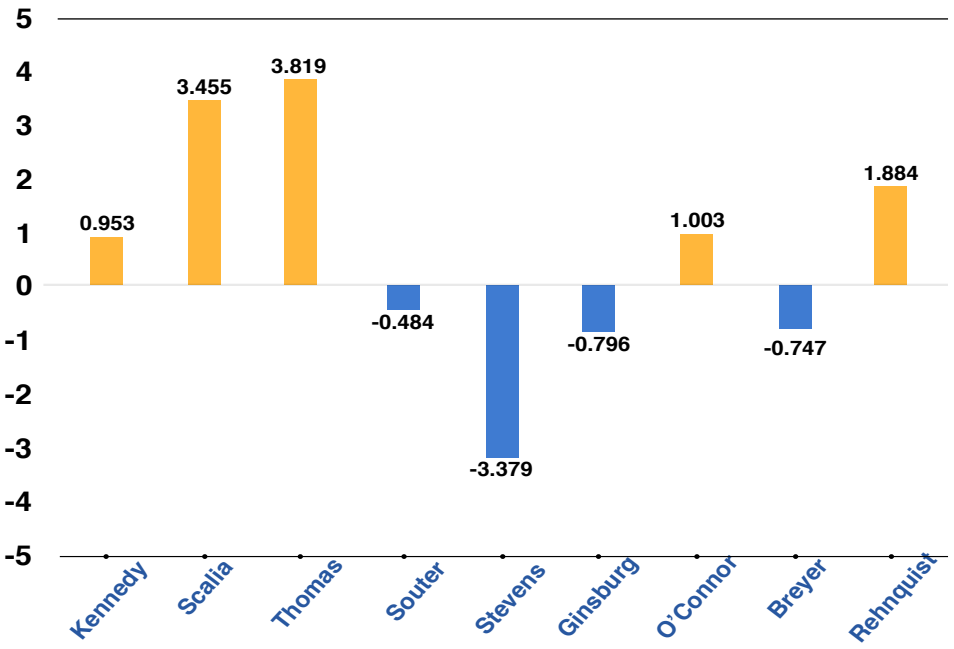
Chief Justice, 1997

Chief Justice	Median	Court Score
Rehnquist	0.8	0.62

Clinton v. Jones (1997)

Printz v. United States (1997)

1998



Justices serving on the Court and Martin Quinn Ideology scores, 1998

Justices serving on the Court, 1998

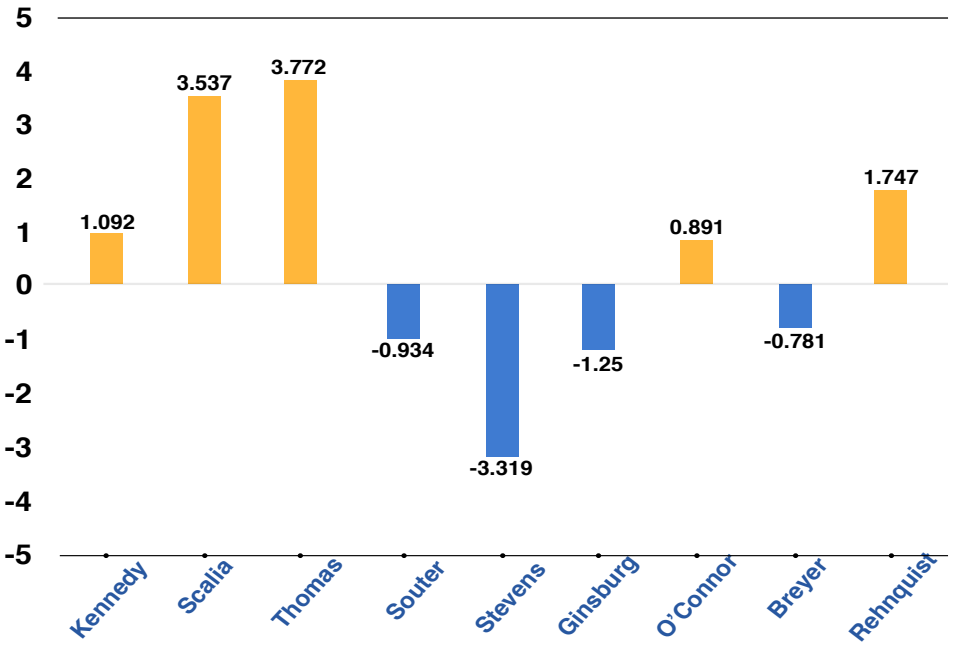
Justice	Mean	President	Party of President	Years Served
Kennedy	0.953	Reagan	Republican	1987-2018
Scalia	3.455	Reagan	Republican	1986-2016
Thomas	3.819	Bush, G.H.W	Republican	1991-
Souter	-0.484	Bush, G.H.W	Republican	1990-2009
Stevens	-3.379	Ford	Republican	1975-2010
Ginsburg	-0.796	Clinton	Democrat	1993-2020
O'Connor	1.003	Reagan	Republican	1981-2006
Breyer	-0.747	Clinton	Democrat	1994-2022
Rehnquist	1.884	Nixon	Republican	1971-2005

Chief Justice, 1998

Chief Justice	Median	Court Score
Rehnquist	0.863	0.63

Clinton v. City of New York (1998)

1999



Justices serving on the Court and Martin Quinn Ideology scores, 1999

Justices serving on the Court, 1999

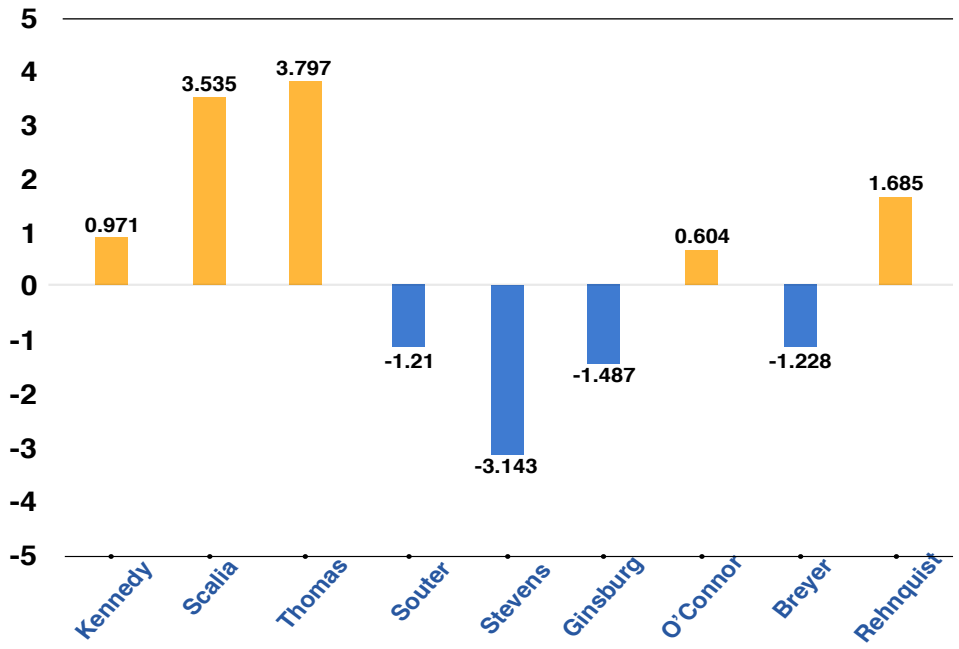
Justice	Mean	President	Party of President	Years Served
Kennedy	1.092	Reagan	Republican	1987-2018
Scalia	3.537	Reagan	Republican	1986-2016
Thomas	3.772	Bush, G.H.W	Republican	1991-
Souter	-0.934	Bush, G.H.W	Republican	1990-2009
Stevens	-3.319	Ford	Republican	1975-2010
Ginsburg	-1.25	Clinton	Democrat	1993-2020
O'Connor	0.891	Reagan	Republican	1981-2006
Breyer	-0.781	Clinton	Democrat	1994-2022
Rehnquist	1.747	Nixon	Republican	1971-2005

Chief Justice, 1999

Chief Justice	Median	Court Score
Rehnquist	0.85	0.53

Alden v. Maine (1999)

2000



Justices serving on the Court and Martin Quinn Ideology scores, 2000

Justices serving on the Court, 2000

Justice	Mean	President	Party of President	Years Served
Kennedy	0.971	Reagan	Republican	1987-2018
Scalia	3.535	Reagan	Republican	1986-2016
Thomas	3.797	Bush, G.H.W	Republican	1991-
Souter	-1.21	Bush, G.H.W	Republican	1990-2009
Stevens	-3.143	Ford	Republican	1975-2010
Ginsburg	-1.487	Clinton	Democrat	1993-2020
O'Connor	0.604	Reagan	Republican	1981-2006
Breyer	-1.228	Clinton	Democrat	1994-2022
Rehnquist	1.685	Nixon	Republican	1971-2005

Chief Justice, 2000

Chief Justice	Median	Court Score
Rehnquist	0.594	0.39

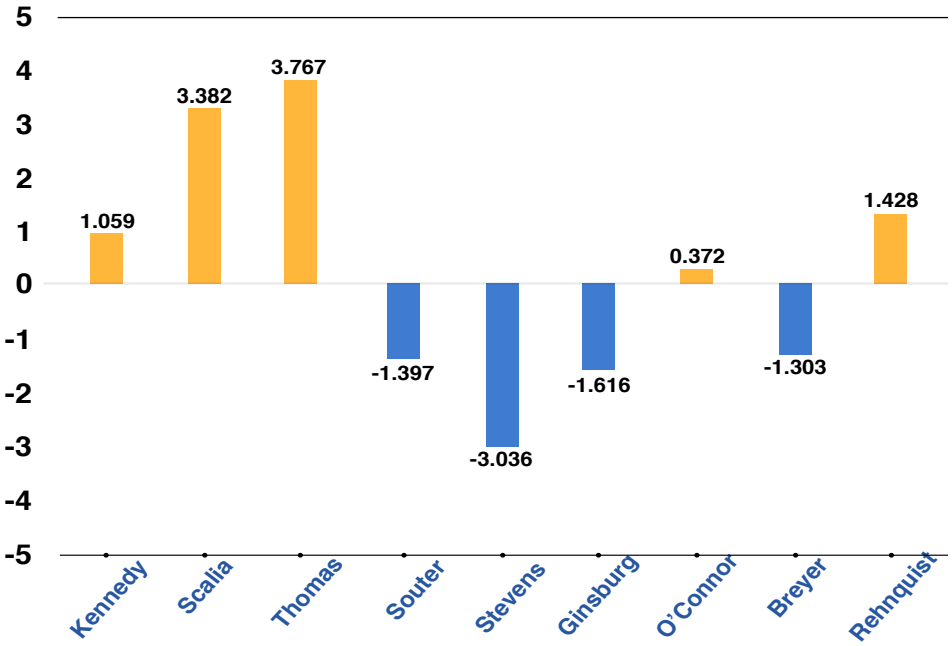
Bush v. Gore (2000)

Reno v. Condon (2000)

United States v. Morrison (2000)

Crosby v. NFTC (2000)

2001



Justices serving on the Court and Martin Quinn Ideology scores, 2001

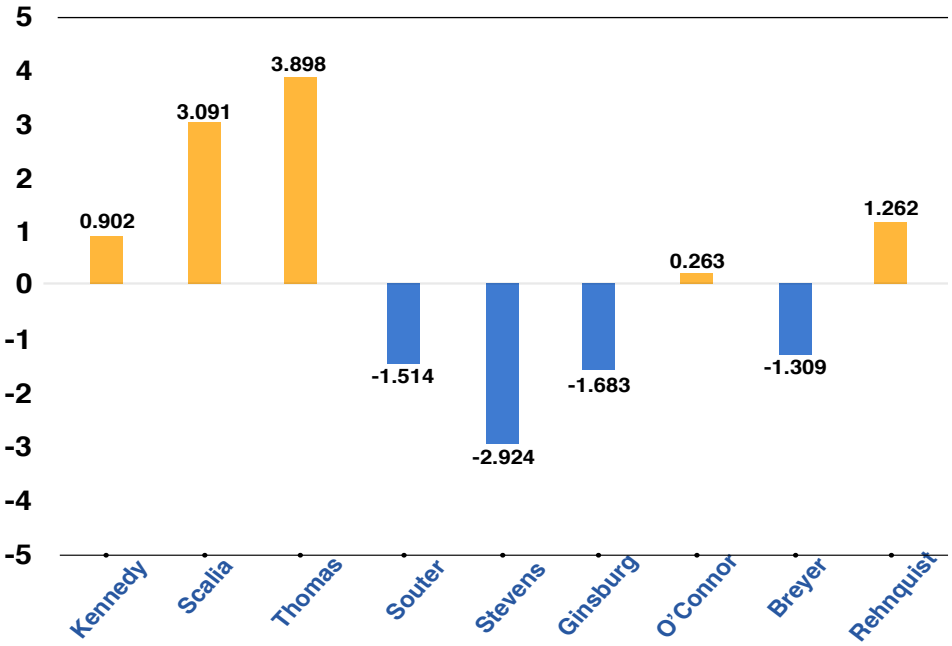
Justices serving on the Court, 2001

Justice	Mean	President	Party of President	Years Served
Kennedy	1.059	Reagan	Republican	1987-2018
Scalia	3.382	Reagan	Republican	1986-2016
Thomas	3.767	Bush, G.H.W	Republican	1991-
Souter	-1.397	Bush, G.H.W	Republican	1990-2009
Stevens	-3.036	Ford	Republican	1975-2010
Ginsburg	-1.616	Clinton	Democrat	1993-2020
O'Connor	0.372	Reagan	Republican	1981-2006
Breyer	-1.303	Clinton	Democrat	1994-2022
Rehnquist	1.428	Nixon	Republican	1971-2005

Chief Justice, 2001

Chief Justice	Median	Court Score
Rehnquist	0.371	0.30

2002



Justices serving on the Court and Martin Quinn Ideology scores, 2002

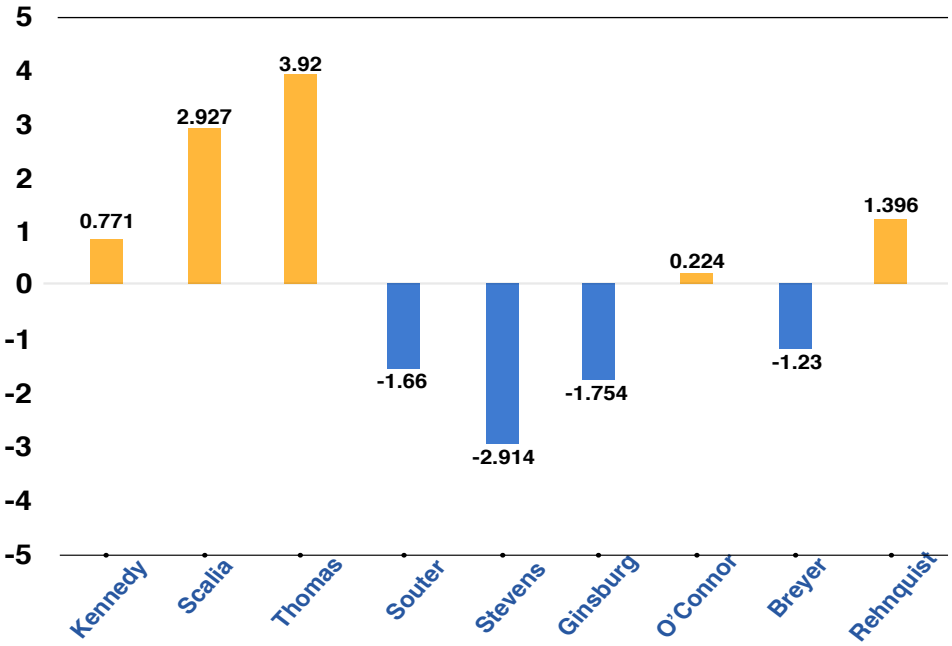
Justices serving on the Court, 2002

Justice	Mean	President	Party of President	Years Served
Kennedy	0.902	Reagan	Republican	1987-2018
Scalia	3.091	Reagan	Republican	1986-2016
Thomas	3.898	Bush, G.H.W	Republican	1991-
Souter	-1.514	Bush, G.H.W	Republican	1990-2009
Stevens	-2.924	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.263	Reagan	Republican	1981-2006
Breyer	-1.309	Clinton	Democrat	1994-2022
Rehnquist	1.262	Nixon	Republican	1971-2005

Chief Justice, 2002

Chief Justice	Median	Court Score
Rehnquist	0.262	0.22

2003



Justices serving on the Court and Martin Quinn Ideology scores, 2003

Justices serving on the Court, 2003

Justice	Mean	President	Party of President	Years Served
Kennedy	0.771	Reagan	Republican	1987-2018
Scalia	2.927	Reagan	Republican	1986-2016
Thomas	3.92	Bush, G.H.W	Republican	1991-
Souter	-1.66	Bush, G.H.W	Republican	1990-2009
Stevens	-2.914	Ford	Republican	1975-2010
Ginsburg	-1.754	Clinton	Democrat	1993-2020
O'Connor	0.224	Reagan	Republican	1981-2006
Breyer	-1.23	Clinton	Democrat	1994-2022
Rehnquist	1.396	Nixon	Republican	1971-2005

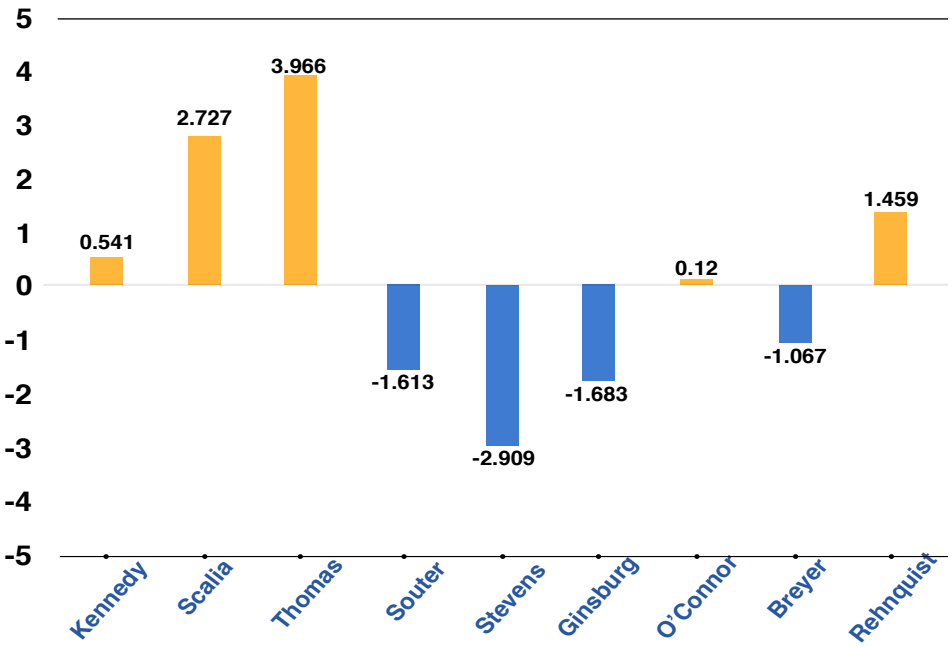
Chief Justice, 2003

Chief Justice	Median	Court Score
Rehnquist	0.222	0.19

Nevada State HR v. Hibbs (2003)

State Farm Insurance v. Campbell (2003)

2004



Justices serving on the Court and Martin Quinn Ideology scores, 2004

Justices serving on the Court, 2004

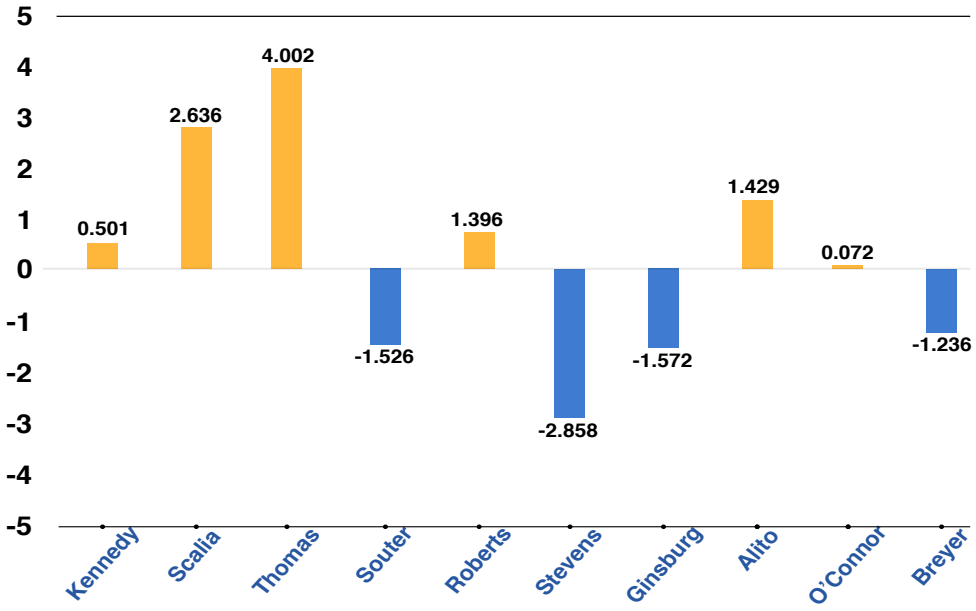
Justice	Mean	President	Party of President	Years Served
Kennedy	0.541	Reagan	Republican	1987-2018
Scalia	2.727	Reagan	Republican	1986-2016
Thomas	3.966	Bush, G.H.W	Republican	1991-
Souter	-1.613	Bush, G.H.W	Republican	1990-2009
Stevens	-2.909	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.12	Reagan	Republican	1981-2006
Breyer	-1.067	Clinton	Democrat	1994-2022
Rehnquist	1.459	Nixon	Republican	1971-2005

Chief Justice, 2004

Chief Justice	Median	Court Score
Rehnquist	0.111	0.17

Sabri v. United States (2004)

2005



Justices serving on the Court and Martin Quinn Ideology scores, 2005

Justices serving on the Court, 2005

Justice	Mean	President	Party of President	Years Served
Kennedy	0.501	Reagan	Republican	1987-2018
Scalia	2.636	Reagan	Republican	1986-2016
Thomas	4.002	Bush, G.H.W	Republican	1991-
Souter	-1.526	Bush, G.H.W	Republican	1990-2009
Roberts	1.396	Bush, G.W	Republican	2005-
Stevens	-2.858	Ford	Republican	1975-2010
Ginsburg	-1.572	Clinton	Democrat	1993-2020
Alito	1.429	Bush, G.W	Republican	2005-
O'Connor	0.072	Reagan	Republican	1981-2006
Breyer	-1.236	Clinton	Democrat	1994-2022

Chief Justice, 2005

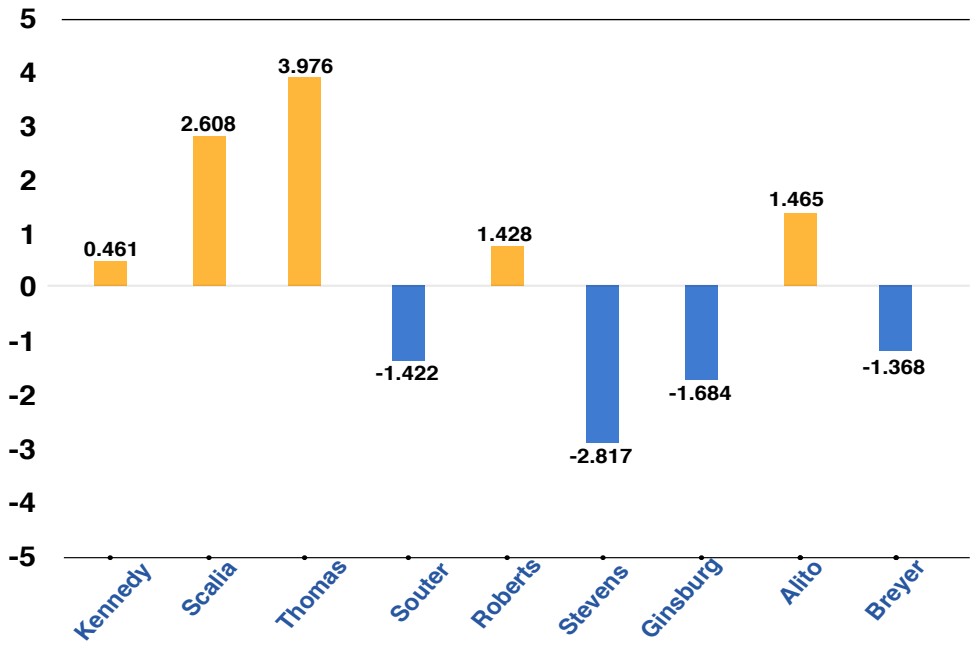
Chief Justice	Median	Court Score
Roberts (a)	0.044	0.28
Roberts (b)	0.499	

Granholm v. Heald (2005)

Gonzales v. Raich (2005)

Kelo v. City of New London (2005)

2006



Justices serving on the Court and Martin Quinn Ideology scores, 2006

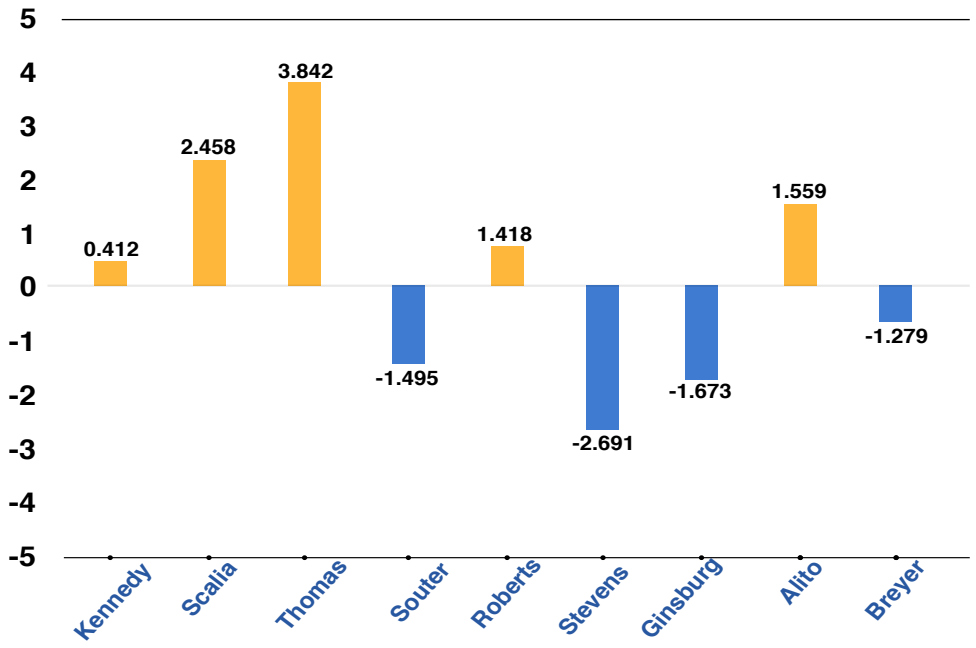
Justices serving on the Court, 2006

Justice	Mean	President	Party of President	Years Served
Kennedy	0.461	Reagan	Republican	1987-2018
Scalia	2.608	Reagan	Republican	1986-2016
Thomas	3.976	Bush, G.H.W	Republican	1991-
Souter	-1.422	Bush, G.H.W	Republican	1990-2009
Roberts	1.428	Bush, G.W	Republican	2005-
Stevens	-2.817	Ford	Republican	1975-2010
Ginsburg	-1.684	Clinton	Democrat	1993-2020
Alito	1.465	Bush, G.W	Republican	2005-
Breyer	-1.368	Clinton	Democrat	1994-2022

Chief Justice, 2006

Chief Justice	Median	Court Score
Roberts	0.461	0.29

2007



Justices serving on the Court and Martin Quinn Ideology scores, 2007

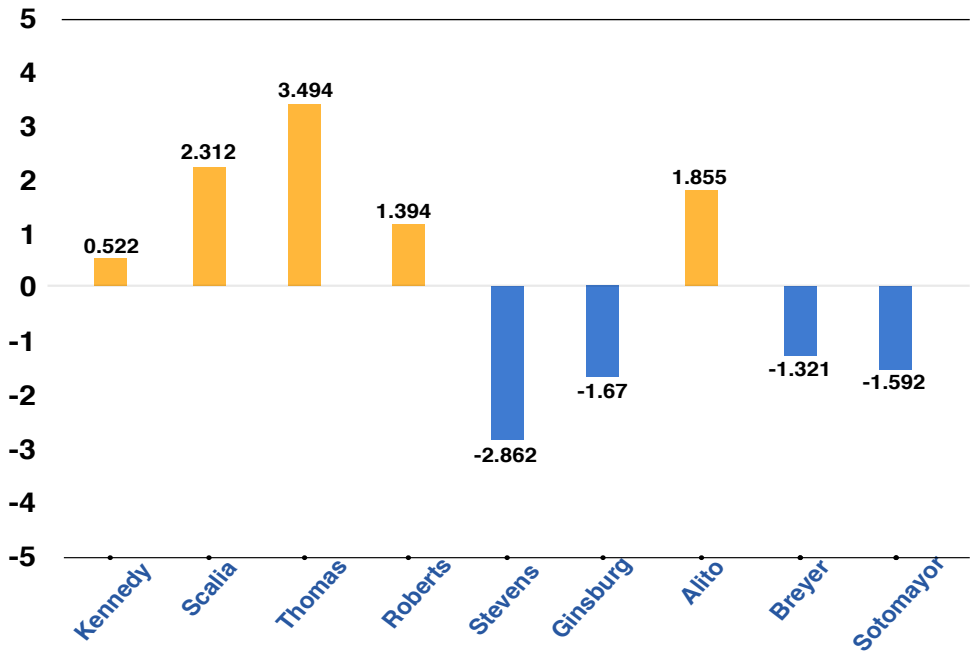
Justices serving on the Court, 2007

Justice	Mean	President	Party of President	Years Served
Kennedy	0.412	Reagan	Republican	1987-2018
Scalia	2.458	Reagan	Republican	1986-2016
Thomas	3.842	Bush, G.H.W	Republican	1991-
Souter	-1.495	Bush, G.H.W	Republican	1990-2009
Roberts	1.418	Bush, G.W	Republican	2005-
Stevens	-2.691	Ford	Republican	1975-2010
Ginsburg	-1.673	Clinton	Democrat	1993-2020
Alito	1.559	Bush, G.W	Republican	2005-
Breyer	-1.279	Clinton	Democrat	1994-2022

Chief Justice, 2007

Chief Justice	Median	Court Score
Roberts	0.412	0.28

2008



Justices serving on the Court and Martin Quinn Ideology scores, 2008

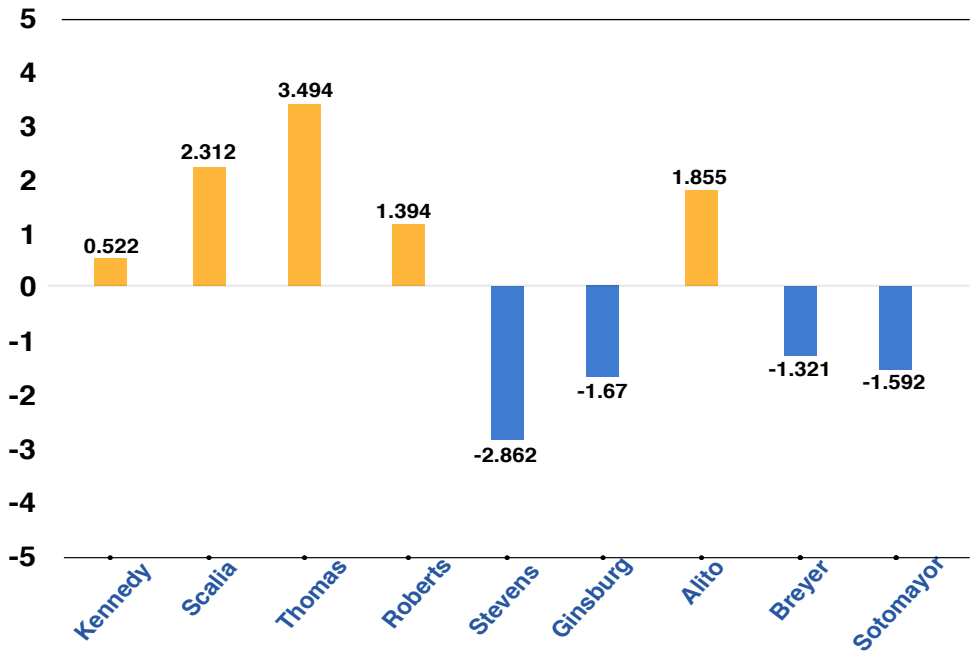
Justices serving on the Court, 2008

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

Chief Justice, 2008

Chief Justice	Median	Court Score
Roberts	0.579	0.24

2009



Justices serving on the Court and Martin Quinn Ideology scores, 2009

Justices serving on the Court, 2009

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

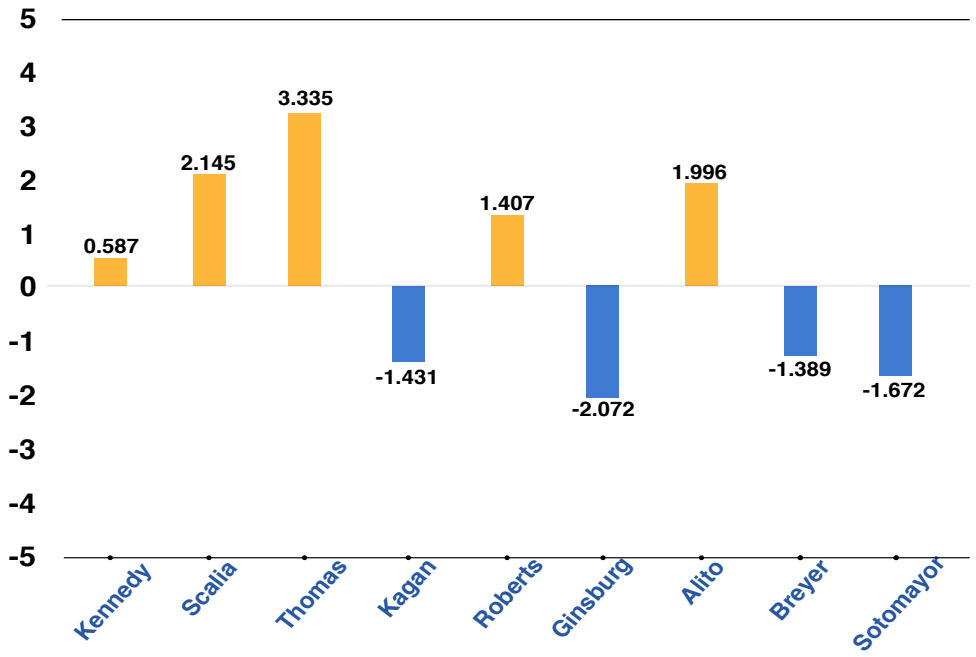
Chief Justice, 2009

Chief Justice	Median	Court Score
Roberts	0.522	0.24

Justices Serving on the Court 2010 - 2023

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

2010



Justices serving on the Court and Martin Quinn Ideology scores, 2010

Justices serving on the Court, 2010

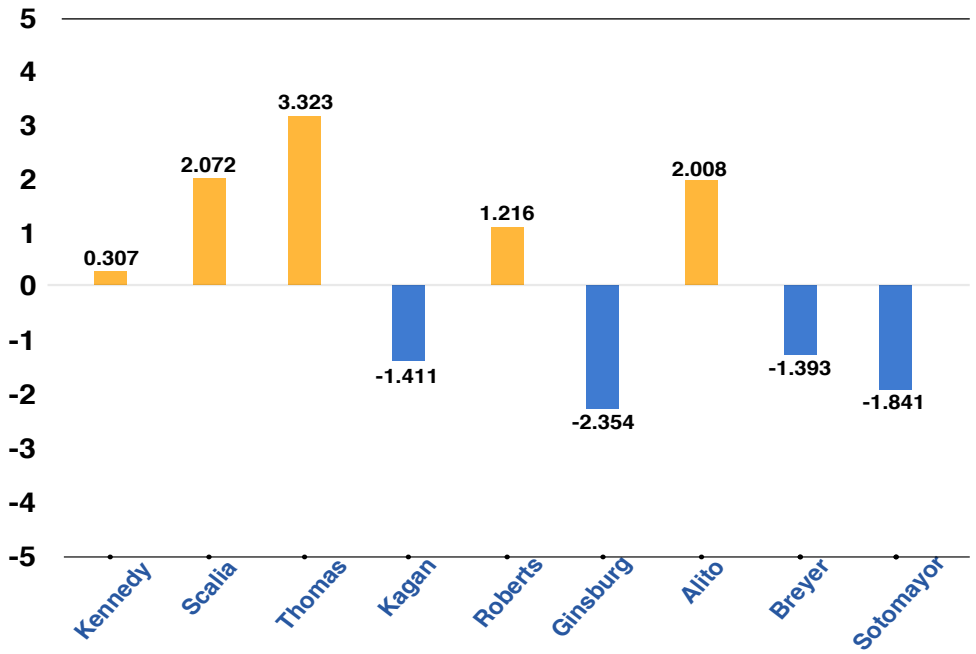
Justice	Mean	President	Party of President	Years Served
Kennedy	0.587	Reagan	Republican	1987-2018
Scalia	2.145	Reagan	Republican	1986-2016
Thomas	3.335	Bush, G.H.W	Republican	1991-
Kagan	-1.431	Obama	Democrat	2010-
Roberts	1.407	Bush, G.W	Republican	2005-
Ginsburg	-2.072	Clinton	Democrat	1993-2020
Alito	1.996	Bush, G.W	Republican	2005-
Breyer	-1.389	Clinton	Democrat	1994-2022
Sotomayor	-1.672	Obama	Democrat	2008-

Chief Justice, 2010

Chief Justice	Median	Court Score
Roberts	0.587	0.32

United States v. Comstock (2010)

2011



Justices serving on the Court and Martin Quinn Ideology scores, 2011

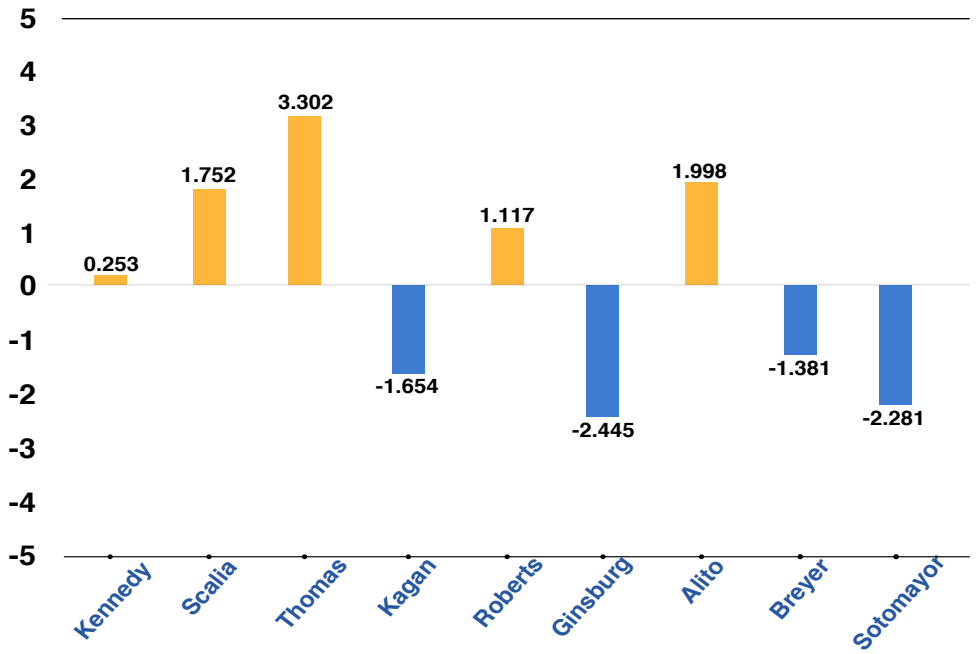
Justices serving on the Court, 2011

Justice	Mean	President	Party of President	Years Served
Kennedy	0.307	Reagan	Republican	1987-2018
Scalia	2.072	Reagan	Republican	1986-2016
Thomas	3.323	Bush, G.H.W	Republican	1991-
Kagan	-1.411	Obama	Democrat	2010-
Roberts	1.216	Bush, G.W	Republican	2005-
Ginsburg	-2.354	Clinton	Democrat	1993-2020
Alito	2.008	Bush, G.W	Republican	2005-
Breyer	-1.393	Clinton	Democrat	1994-2022
Sotomayor	-1.841	Obama	Democrat	2008-

Chief Justice, 2011

Chief Justice	Median	Court Score
Roberts	0.307	0.21

2012



Justices serving on the Court and Martin Quinn Ideology scores, 2012

Justices serving on the Court, 2012

Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2012

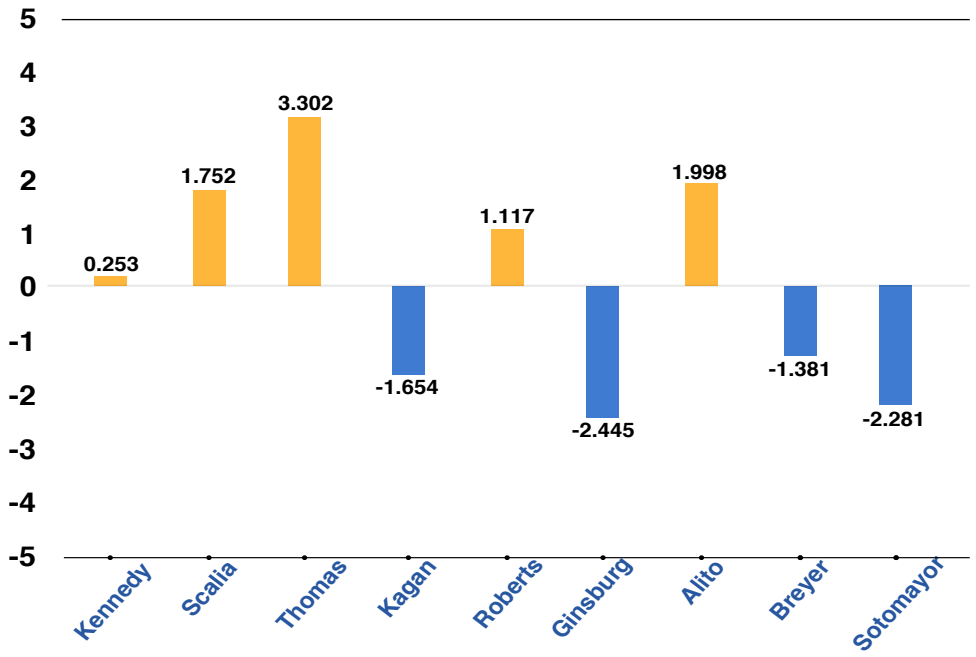
Chief Justice	Median	Court Score
Roberts	0.253	0.07

National Federation of Independent Business v. Sebelius (2012)

NFIB v. Sebelius (2012)

Arizona v. United States (2012)

2013



Justices serving on the Court and Martin Quinn Ideology scores, 2013

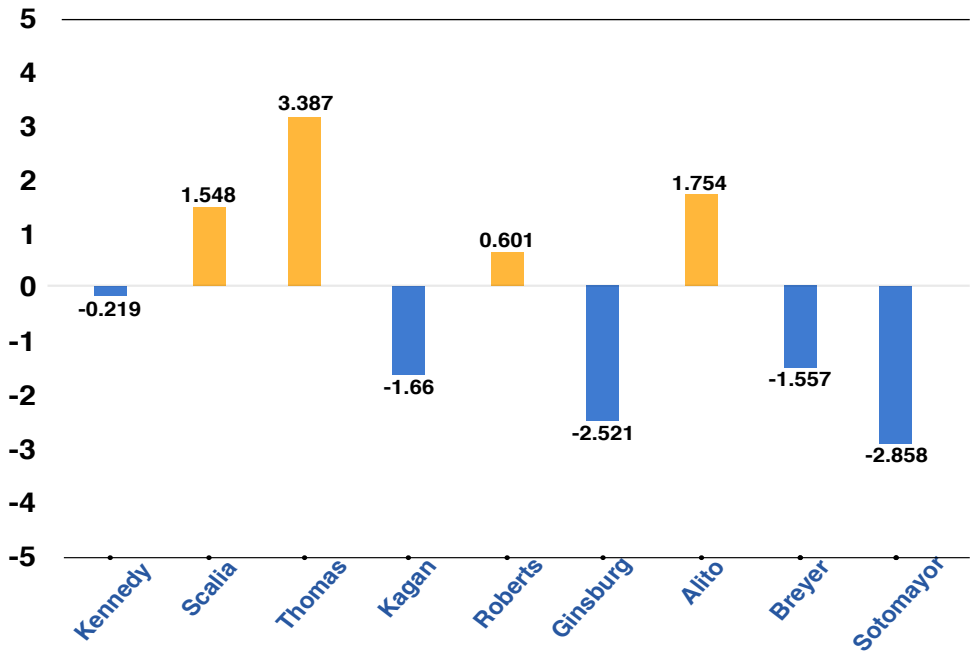
Justices serving on the Court, 2013

Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2013

Chief Justice	Median	Court Score
Roberts	0.074	0.07

2014



Justices serving on the Court and Martin Quinn Ideology scores, 2014

Justices serving on the Court, 2014

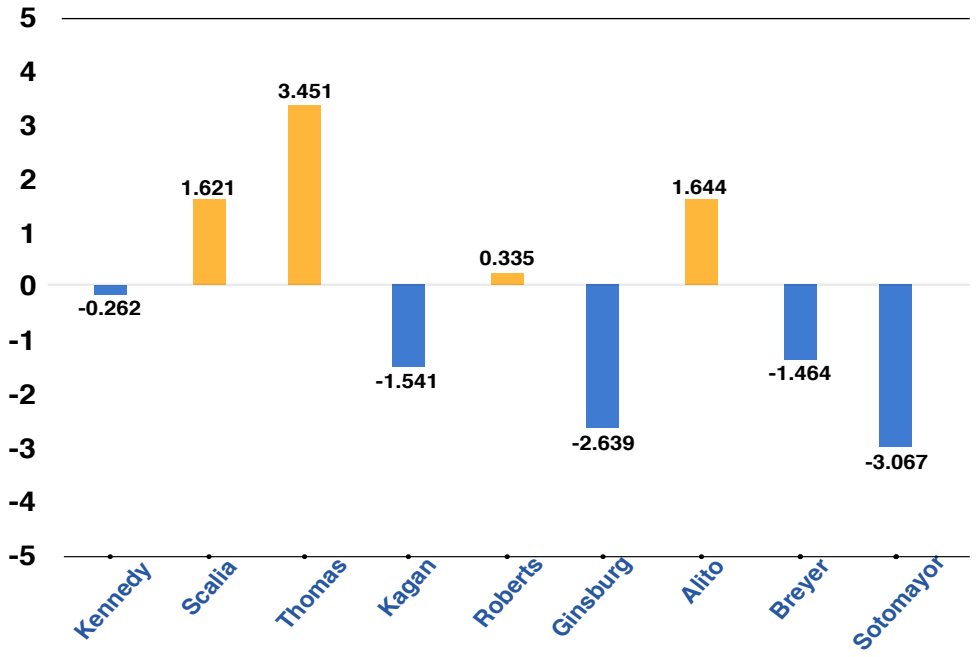
Justice	Mean	President	Party of President	Years Served
Kennedy	-0.219	Reagan	Republican	1987-2018
Scalia	1.548	Reagan	Republican	1986-2016
Thomas	3.387	Bush, G.H.W	Republican	1991-
Kagan	-1.66	Bush, G.W	Republican	2005-
Roberts	0.601	Bush, G.W	Republican	2005-
Ginsburg	-2.521	Clinton	Democrat	1993-2020
Alito	1.754	Bush, G.W	Republican	2005-
Breyer	-1.557	Clinton	Democrat	1994-2022
Sotomayor	-2.858	Obama	Democrat	2008-

Chief Justice, 2014

Chief Justice	Median	Court Score
Roberts	-0.219	-0.17

NLRB v. Canning (2014)

2015



Justices serving on the Court and Martin Quinn Ideology scores, 2015

Justices serving on the Court, 2015

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.262	Reagan	Republican	1987-2018
Scalia	1.621	Reagan	Republican	1986-2016
Thomas	3.451	Bush, G.H.W	Republican	1991-
Kagan	-1.541	Bush, G.W	Republican	2005-
Roberts	0.335	Bush, G.W	Republican	2005-
Ginsburg	-2.639	Clinton	Democrat	1993-2020
Alito	1.644	Bush, G.W	Republican	2005-
Breyer	-1.464	Clinton	Democrat	1994-2022
Sotomayor	-3.067	Obama	Democrat	2008-

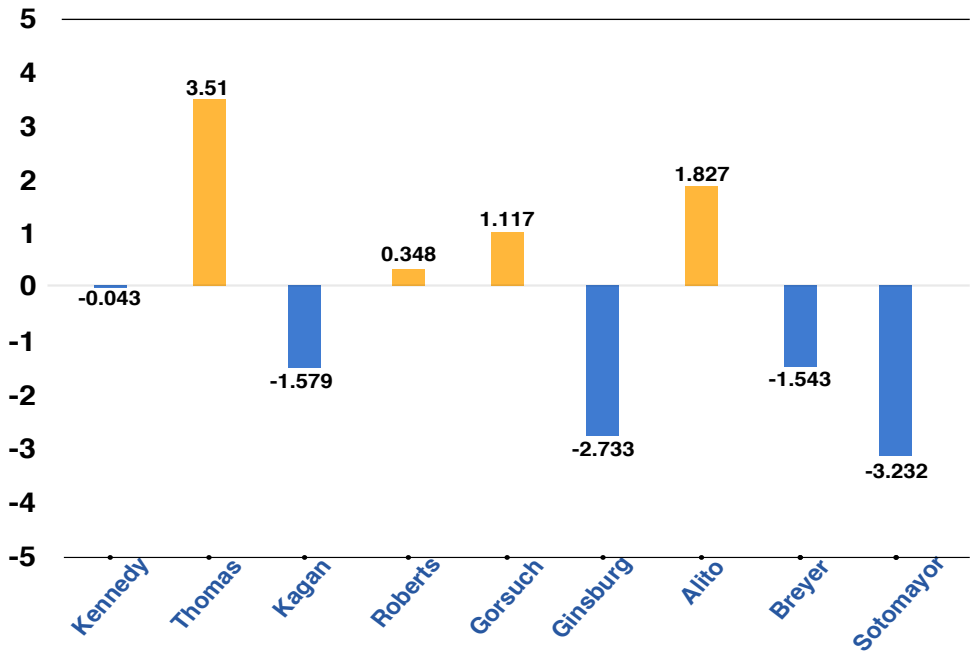
Chief Justice, 2015

Chief Justice	Median	Court Score
Roberts	-0.264	-0.21

Zivotofsky v. Kerry (2015)

Horne v. Department of Agriculture (2015)

2016



Justices serving on the Court and Martin Quinn Ideology scores, 2016

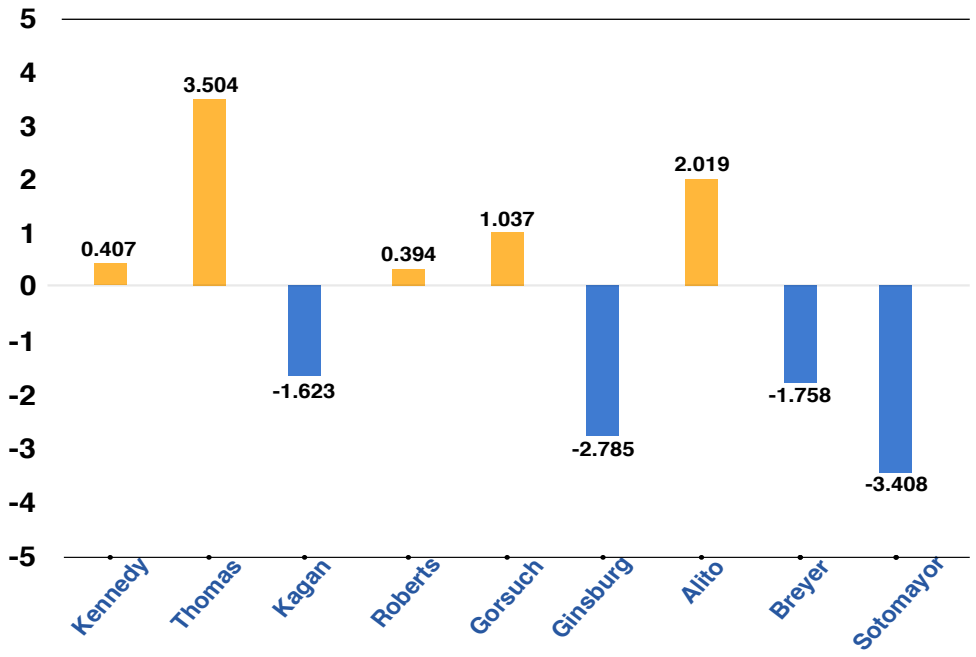
Justices serving on the Court, 2016

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.043	Reagan	Republican	1987-2018
Thomas	3.51	Bush, G.H.W	Republican	1991-
Kagan	-1.579	Bush, G.W	Republican	2005-
Roberts	0.348	Bush, G.W	Republican	2005-
Gorsuch	1.117	Trump	Republican	2016-
Ginsburg	-2.733	Clinton	Democrat	1993-2020
Alito	1.827	Bush, G.W	Republican	2005-
Breyer	-1.543	Clinton	Democrat	1994-2022
Sotomayor	-3.232	Obama	Democrat	2008-

Chief Justice, 2016

Chief Justice	Median	Court Score
Roberts	-0.055	-0.26

2017



Justices serving on the Court and Martin Quinn Ideology scores, 2017

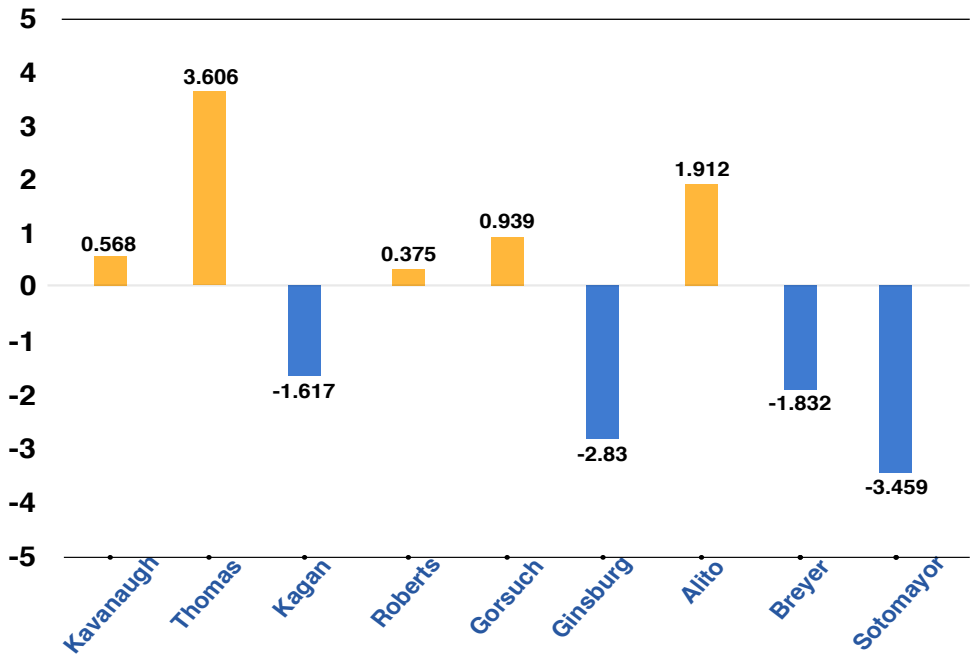
Justices serving on the Court, 2017

Justice	Mean	President	Party of President	Years Served
Kennedy	0.407	Reagan	Republican	1987-2018
Thomas	3.504	Bush, G.H.W	Republican	1991-
Kagan	-1.623	Bush, G.W	Republican	2005-
Roberts	0.394	Bush, G.W	Republican	2005-
Gorsuch	1.037	Trump	Republican	2016-
Ginsburg	-2.785	Clinton	Democrat	1993-2020
Alito	2.019	Bush, G.W	Republican	2005-
Breyer	-1.758	Clinton	Democrat	1994-2022
Sotomayor	-3.408	Obama	Democrat	2008-

Chief Justice, 2017

Chief Justice	Median	Court Score
Roberts	0.29	-0.25

2018



Justices serving on the Court and Martin Quinn Ideology scores, 2018

Justices serving on the Court, 2018

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.568	Trump	Republican	2018-
Thomas	3.606	Bush, G.H.W	Republican	1991-
Kagan	-1.617	Bush, G.W	Republican	2005-
Roberts	0.375	Bush, G.W	Republican	2005-
Gorsuch	0.939	Trump	Republican	2016-
Ginsburg	-2.83	Clinton	Democrat	1993-2020
Alito	1.912	Bush, G.W	Republican	2005-
Breyer	-1.832	Clinton	Democrat	1994-2022
Sotomayor	-3.459	Obama	Democrat	2008-

Chief Justice, 2018

Chief Justice	Median	Court Score
Roberts	0.326	-0.26

Patchak v. Zinke (2018)

Lucia v. SEC (2018)

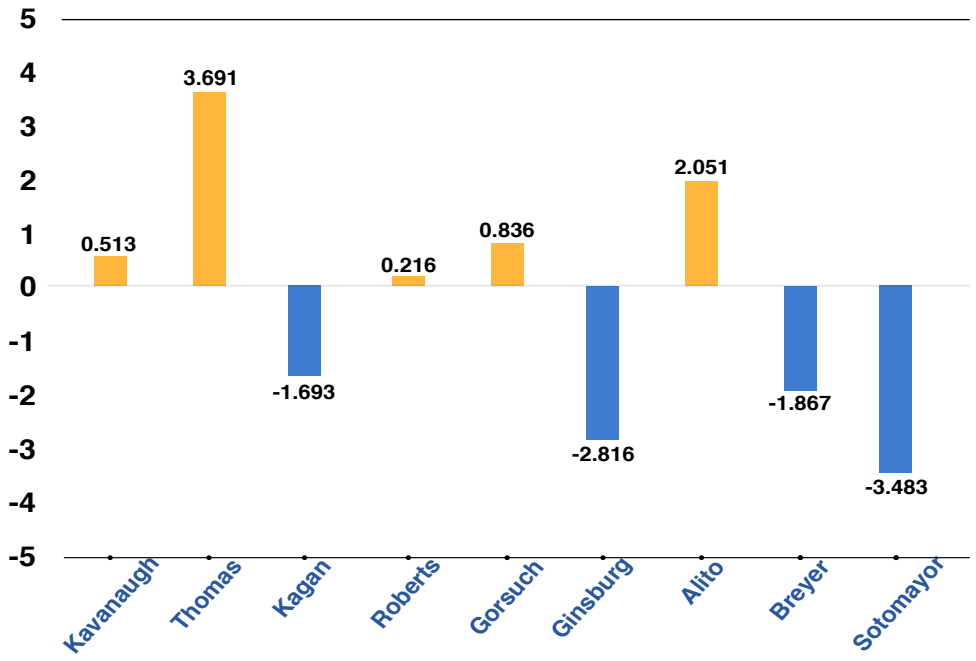
Trump v. Hawaii (2018)

South Dakota v. Wayfair (2018)

Murphy v. NCAA (2018)

Sveen v. Melin (2018)

2019



Justices serving on the Court and Martin Quinn Ideology scores, 2019

Justices serving on the Court, 2019

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.513	Trump	Republican	2018-
Thomas	3.691	Bush, G.H.W	Republican	1991-
Kagan	-1.693	Bush, G.W	Republican	2005-
Roberts	0.216	Bush, G.W	Republican	2005-
Gorsuch	0.836	Trump	Republican	2016-
Ginsburg	-2.816	Clinton	Democrat	1993-2020
Alito	2.051	Bush, G.W	Republican	2005-
Breyer	-1.867	Clinton	Democrat	1994-2022
Sotomayor	-3.483	Obama	Democrat	2008-

Chief Justice, 2019

Chief Justice	Median	Court Score
Roberts	0.185	-0.28

2020

No Martin Quinn Scores

Justices serving on the Court, 2020

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Ginsburg	Clinton	Democrat	1993-2020
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

Trump v. New York (2020)

2021

No Martin Quinn Scores

Justices serving on the Court, 2021

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Barrett	Trump	Republican	2021-
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

2022

No Martin Quinn Scores

West VA v. EPA (2022)*Trump v. Thompson* (2022)

West Virginia v. EPA (2022)

2023

No Martin Quinn Scores

National Pork Producers Council v. Ross (2023)